



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Johnson Nduya Muthama Holdings Limited v Musomba & 5 others; National Environment and Management Authority (Interested Party) (Environment & Land Petition E012 of 2021) [2024] KEELC 5331 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5331 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND PETITION E012 OF 2021

A NYUKURI, J

JULY 10, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 3, 10, 22, 23, 27(1) (2), 40, 42, 48, 69, 70 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 4, 10, 11, 13, 19, 20, 23, 24 (1) OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF THE VIOLATION OF THE PETITIONER'S ENVIRONMENTAL RIGHTS AND QUIET & PEACEFUL ENJOYMENT OF PROPERTY

BETWEEN

JOHNSON NDUYA MUTHAMA HOLDINGS LIMITED PETITIONER

AND

FRANCIS MULWA KAVOI MUSOMBA 1ST RESPONDENT

JOSEPH NZYOKA MUSOMBA 2ND RESPONDENT

MUTHOKA MATAKA SOO 3RD RESPONDENT

ALBANUS MUASA KAVOI 4TH RESPONDENT

MBITHI NGULUKYO 5TH RESPONDENT

DANIEL MUTISO MATAKA 6TH RESPONDENT

AND



JUDGMENT

Introduction

1. Johnson Nduya Muthama Holdings Limited instituted this suit by way of a Constitutional Petition dated 29th July 2021 against the six respondents and the interested party herein, seeking the following orders;
 - a. A declaration does hereby issue that the petitioner has proprietary rights and or interest over known as Matungulu/Kyaume/2744 (measuring approximately 0.091 ha); Matungulu/Kyaume/2742 (measuring approximately 1.324 ha) and Matungulu/Kyaume/2743 (measuring approximately 0.783 ha); all located within Machakos County.
 - b. A declaration does hereby issue that the respondents, their agents, employees, servants or people acting under their instructions, action of dumping human waste around the suit properties breaches the petitioner's right to quiet and peaceful enjoyment of the property as provided for under Article 40 of *the Constitution* of Kenya 2010.
 - c. An order does hereby issue that the respondents, their agents, employees, servants or people acting under their instructions act, of dumping human waste around the suit properties disobey and frustrate orders issued by this Honourable Court and thus amounts to environmental pollution and are thus in contravention of Article 42 of *the Constitution* of Kenya 2010.
 - d. A declaration does hereby issue that the respondents, their agents, employees, servants or people acting under their instructions, act of dumping human waste around the suit properties amounts to flagrant abuse of court orders and total disregard to Articles 69 and 70 of *the Constitution*.
 - e. An order of Judicial Review of Prohibition does issue permanently restraining the respondents, their servants, and/or employees, from the continued and/or further interference and dumping of human feecal matter around the petitioner's property.
 - f. Costs of the petition be provided for, compensation for the violation of the rights of the petitioner and interests thereon be paid to the petitioner at court rate.
 - g. Any other relief that this court will grant in the circumstances.
2. The petition is supported by a supporting affidavit sworn by Wilson Mwaniki Ngumbi, the petitioner's General Manager dated 28th July 2021. The petitioner averred that they are the registered proprietor of all those parcels of land known as Matungulu/Kyaume/2744 (measuring about 0.091 hectares), Matungulu/Kyaume/2743 (measuring about 0.783 Hectares; and Matungulu/Kyaume/2742 measuring about 1.324 Hectares. They argued that the respondents and their agents, employees, servants and persons acting under their instructions disobeyed orders of the court and contravened the petitioner's right to property and rights under Articles 42, 60 and 70 of *the Constitution* of Kenya 2010.
3. It was the petitioner's contention that on 5th October 2016, one of the petitioner's agents found that the respondents had trespassed on the suit property and attempted to cut down the trees thereon. That



- these acts prompted the petitioner to move to court in Machakos ELC No. 39 of 2020 and obtained an order of injunction on 15th June 2020 restraining the respondents from trespassing or interfering with the suit property.
4. They further stated that the respondents had found unscrupulous ways to breach the petitioner's right to quiet and peaceful enjoyment of his property by bringing an exhauster and dumping raw human excrement around the petitioner's property without due regard to public health, safety and the environment. That horrid stench and noxious gases emanating from the human waste for months have had grievous effects on persons living and working on the suit property. Also that the raw human waste is slowly eating away the petitioner's fence, compromising its structural integrity and exposing the inhabitants of the land to security risks and attacks from wild animals and reptiles.
 5. They averred that the respondents' actions will expose the residents to deadly diseases and the environment to unimaginable hazards. They attached title deeds for the suit property; the court order of 15th June 2020 and photographs.
 6. The petition is opposed. Francis Mulwa Kavoi the 1st respondent filed replying affidavits dated 27th September 2021 and 6th June 2022, on his own behalf and on behalf of the 3rd, 4th, 5th and 6th respondents. He stated that none of the respondents has ever trespassed on the suit property and that the petitioner has not demonstrated the respondents' trespass thereon in any way. According to him, the petition is actuated by malice as this is not the first suit to be filed by the petitioner who is determined to harass and intimidate the respondents.
 7. He further deponed that the respondents are law abiding citizens and that to demonstrate the petitioner's malice and mischief, the 2nd respondent is deceased while the 3rd and 6th respondents reside in Masinga and are not residents of Tala. He stated that the petitioner's allegations were lies as the photographs produced did not show a single tree that had been cut and that there was no way a dead person could participate in cutting down trees.
 8. He deposed that the suit was a waste of court's time and engaged the respondents in unnecessary court battles as orders sought are similar to those in ELC No. 39 of 2020; and that this suit ought to be stayed pending hearing of the aforesaid suit. He stated that the 3rd, 5th and 6th respondents have never been served with the petition and only learnt of it from the 1st respondent as they moved to Masinga in the 1970's and have no interest in Tala or the suit property.
 9. It was his averment that it was not true that the respondents had dumped human waste in the suit property and no evidence had been presented as the photographs presented do not show any human waste. He took the view that the filing of this petition was meant to assist him obtain orders through the back door which he failed to obtain in ELC No. 39 of 2020.
 10. The 1st respondent averred that the petitioner's title deeds herein were obtained unscrupulously and that the matter is yet to be determined in court as the respondents' titles have not been revoked and that there is need to conduct a resurvey to ascertain the boundaries, which is a matter that cannot be resolved in this petition. He stated that the petitioner's director one Johnson Nduya Muthama is their neighbor and aware of the 2nd respondent's demise and hence filing suit against the deceased amounts to disrespect to the family of the respondents.
 11. He stated that the petitioner has filed several other cases against them, namely Kangundo ELC No. 35 of 2020, Kangundo Criminal Case No. 1244 of 2019, Kangundo Criminal Case No. 269 of 2020 and Machakos ELC No. 39 of 2020. That these cases are against the respondents' family members in respect of the same subject matter and therefore that this petition is an abuse of the court process. He



annexed pleadings in Machakos ELC No. 39 of 2020; copies of the respondents' title deeds; pleadings and charge sheet in other cases involving the parties herein.

12. He stated that the respondents have never acted in any manner that is destructive to the environment. He further stated that ownership of the suit property is subject of other proceedings before this court.
13. He insisted that none of their agents, employees, servants or anybody acting under their instructions interfered with the petitioner's quiet enjoyment of the suit property. He stated that the respondents have never disobeyed any court orders and that they have not violated the petitioner's rights to property under *the Constitution* or Statute. He maintained that the petition does not disclose any cause of action against the respondents and was based on falsehoods.
14. He took the position that if indeed the petitioner had obtained orders against the respondents then they ought to have filed contempt proceedings if the same were breached as alleged vide ELC No. 39 of 2020. He denied allegations that the respondent brought an exhaustor to the suit property and averred that an exhaustor is a big vehicle and could have been seen and a report made to the police. That the photographs annexed to the petition are inconsistent with the petitioner's allegations and that the petitioner's allegations have no evidentiary proof.
15. The petition was disposed by way of written submissions. On record are the petitioner's submissions dated 23rd November 2022 and the 1st, 3rd, 4th, 5th and 6th respondents' submissions dated 13th March 2023.

Petitioner's submissions

16. Counsel for the petitioner submitted that Article 23 of *the Constitution* empowers this court to grant appropriate relief including conservatory orders. On the test for grant of conservatory orders, counsel relied on the cases of Gatirau Peter Munya v. Dickson Mwenda Kithinji [2014] eKLR and Centre for Rights Education and Awareness (CREAW) v. Attorney General [2011] eKLR for the proposition that to obtain conservatory orders, the applicant must demonstrate a prima facie case and a real danger to suffer prejudice as a result of violation of *the Constitution*.
17. Counsel argued that from the pleadings, it was clear that fundamental rights and freedoms of persons inhabiting the suit property were at a risk of infectious diseases and death due to acts and omissions of the respondents. Counsel submitted that the only issue for determination was whether the petitioner had established a case of issuance of conservatory and prohibitory orders against the respondents.
18. It was submitted for the petitioner that as the respondents had dumped raw human excrement around the petitioner's property, the inhabitants thereof were exposed to many risks including diseases and death.
19. Reliance was placed on the case of Jacqueline Okuta & Another v. Attorney General & 2 Others [2017] eKLR, for the proposition that a court ought to adopt the interpretation that most favours the enjoyment of rights and freedoms in the fullest measure.

1st, 3rd to 6th respondent's submissions

20. Counsel for the 1st, 3rd to 6th respondents submitted that Sections 107, 108 and 109 of the *Evidence Act* places the burden of proof on the person alleging existence of any particular fact and that therefore the burden of proof in this case lies on the petitioner. In that regard, counsel argued that the petitioner had failed to prove his allegations and the petition was merely meant to frustrate the respondents.



21. Regarding the allegation of breach of court order, counsel submitted that no particulars of breach were pleaded and no evidence of breach was produced. Further, it was submitted that the allegations of trespass and attempt to cut all trees were not proved as no evidence on that issue was presented to court as no stump or activity on the suit property has been presented to court. Counsel argued that the photographs produced do not prove allegations made by the petitioner.
22. Counsel also contended that the averments that the 2nd respondent was deceased was not controverted and the fact that the 3rd to 6th respondents moved to Masinga was confirmed by the petitioner in their submissions. Counsel argued that there is no way a deceased person could have been seen dumping human waste at the suit property, and that therefore the petition was anchored on malice, and an abuse of the court process.
23. Counsel submitted that he who comes to equity must do so with clean hands, and that the petitioner's hands were soiled. Reliance was placed on the cases of Dalip Singh v. State of Up and Others, 2010 (2) cited in Secretary, County Service Board & Another v. Hulbhai Gedi Abdille [2016] eKLR and Losesia Group Ranch v. Kamanya Holdings Limited & 43 Others [2022] eKLR.
24. It was submitted for the respondents that since there were other matters between the parties herein touching on the suit property; namely Machakos ELC No. 39 of 2020 and Kangundo ELC No. 35 of 2020; Criminal Case Number 1244 of 2019 and Criminal Case Number 269 of 2020, it was clear that the petitioner was only intend on constantly harassing the respondents and therefore the petitioner has not demonstrated any justification for filing the petition herein.
25. On the issue of conservatory orders, counsel submitted that the petitioner had abandoned the prayers sought in the petition and was submitting on conservatory orders which the court had declined to grant. Counsel maintained that the matters raised in the petition touched on destruction of property, trespass and nuisance which could be handled under legislative provision and not by a Constitutional Petition. To buttress this position, counsel cited the case of John Harun Mwau v. Peter Gastrow & 3 Others [2014] eKLR and Uhuru Muigai Kenyatta v. Nairobi Star Publications Limited [2013] eKLR.

Analysis and determination

26. The court has carefully considered the petition, the affidavit in support thereto, the replying affidavits and the parties' rival submissions. From the foregoing, three issues arise for determination;
 - a. Whether the petition as framed, meets the threshold of a Constitutional petition.
 - b. Whether the petitioner's rights have been violated.
 - c. Whether the petitioner is entitled to the orders sought.
27. A Constitutional petition must raise a Constitutional question requiring Constitutional interpretation as opposed to statutory interpretation. In the case of Kiambu County Tenants Welfare Association v. Attorney General & Another [2017] eKLR, the court stated that a proper Constitutional petition ought to raise a Constitutional question whose resolution require Constitution interpretation rather than statutory interpretation.
28. In many court decisions, courts have held the view that a petitioner in a Constitutional petition is obligated to plead with precision regarding violated Constitutional provisions, and also how those provisions have been violated to their detriment (See the case of Anarita Karimi Njeru v. Attorney General [1979] KLR 154).



29. The Supreme Court of Kenya has stated this position in the case of Communication Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others [2014] eKLR, as follows;

Although Article 22 (1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic [1979] KLR 154; the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the Constitutional process of dispute settlement.....

30. In the instant case, the petitioner stated that the respondents dumped raw human excrement around his property thereby interfering with their quiet enjoyment thereof and exposing the inhabitants of the suit property to serious diseases and death. They also stated that the raw human excrement was a danger to the environment. They averred that their property rights and the right to a clean environment under Article 42 of *the Constitution* have been violated. Considering these pleadings; it is clear that the petitioner in their petition have shown the nexus between the petition, the Constitutional provisions allegedly violated and the alleged manifestation of the violations. For those reasons, I find and hold that this petition has pointed to alleged violations of Articles 40 and 42 of *the Constitution* and therefore the same meets the threshold of a Constitutional petition and therefore the same is a proper Constitutional petition.

31. Articles 40 and 42 of *the Constitution* protect the right to own and acquire property as well as the right to a clean and safe environment.

32. On whether the petitioners proved that their Constitutional rights to property and clean and safe environment contrary to Articles 40 and 42 of *the Constitution* were breached by the respondents, the allegations made are that the respondents trespassed on the suit property and dumped raw human excrement around the suit property. To prove these allegations, the petitioner produced title deeds and photographs of the suit property.

33. The fact that the suit property is registered in the petitioner's name is not in dispute. It is also clear from copies of pleadings in Machakos ELC No. 39 of 2020 that the ownership of the suit property is in contention which is yet to be determined. That notwithstanding, the issue of dumping raw human excrement transcends the question of property ownership as it touches on the environment.

34. Article 42 of *the Constitution* protects every persons right to a clean and safe environment as follows;

Every person has the right to a clean and healthy environment, which includes the right—

- a. to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
- b. to have obligations relating to the environment fulfilled under Article 70.

35. The issue that arise therefore is whether the petitioner proved that the respondents dumped raw human excrement around the suit property, and attempted to cut all the trees on the suit property. I have considered the evidence produced by the petitioner in support of that allegation which evidence is in form of photographs. I have considered the photographs produced by the petitioner, and there is



nothing therein to show that raw human excrement was dumped around the suit property or that the trees thereon were cut down.

36. The 1st, 3rd to 6th respondents denied trespassing on the suit property or dumping raw human excrement as alleged by the petitioner or at all. They stated that the 2nd respondent is deceased and there is no way a dead person would do what can only be done by the living. This position was not controverted by the petitioner. The petitioner also failed to show that the respondents were present on or around the suit property at the material time or at all. The totality of the above clearly demonstrate that the petitioner failed to prove their pleaded allegations that the respondents dumped raw human excrement on the suit property or cut trees thereon.
37. In the premises, I find and hold that the petitioner has failed to prove their case on the required standard and the same is hereby dismissed. As the petition raised Constitutional questions, I order that each party shall bear its own costs.
38. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10TH DAY OF JULY 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

No appearance for the petitioner

No appearance for the respondents

No appearance for the interested party

Court assistant – Josephine

