



**Ododa v District Land Registrar, Kericho & 3 others; Rop & another (Interested Parties) (Environment & Land Petition E002 of 2017) [2024] KEELC 5123 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5123 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND PETITION E002 OF 2017**

**MC OUNDO, J**

**JULY 4, 2024**

**IN THE MATTER OF ARTICLES 2, 10, 19, 20, 21, 22, 23, 24, 25, 27, 35, 40, 47, 48, 50, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT NO. 19 OF 2011**

**AND**

**IN THE MATTER OF THE LAND ACT NO. 6 OF 2012**

**AND**

**IN THE MATTER OF THE ENVIRONMENT AND COURT ACT NO. 19 OF 2011**

**BETWEEN**

**WILLIAM AUDI ODODA ..... PETITIONER**

**AND**

**THE DISTRICT LAND REGISTRAR, KERICHO ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**SIRERET FARMERS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**CHEMARTIN TEA CO LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**CHRISTOPHER KIPROP ROP ..... INTERESTED PARTY**



## JUDGMENT

1. Vide a Petition dated the 23<sup>rd</sup> May, 2023, which was supported by an Affidavit of equal date sworn by Moses Otieno Audi, the Donee of the Petitioner's Power of Attorney, the Petitioner sought for the following orders;
  - i. An order of Permanent injunction to issue against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, their servants, agents, shareholders, directors and proxies from dealing with, entering, occupying and possessing Kericho/Chilchila/Kunyak Block 2 (Kinda) 204.
  - ii. A declaration that the Petitioner was and is the indefeasible owner of Kericho/Chilchila/Kunyak Block 2 (Kinda) 204.
  - iii. An order of eviction to issue against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, their servants, agents, shareholders, directors and proxies from the Kericho/Chilchila/Kunyak Block 2 (Kinda) 204 and the Inspector General of Police to ensure compliance that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents do give vacant possession of the suit land to the Petitioner.
  - iv. A Declaration be and is hereby issued that the Petitioner's right to property as provided for under Article 40 of *the Constitution* was unlawfully truncated through the illegal sale of the Petitioner's land parcel No. Kericho/Chilchila/Kunyak Block 2 (Kinda) 204.
  - v. A Declaration be and is hereby issued that pursuant to the illegal sale, no good title passed to the 3<sup>rd</sup> nor the 4<sup>th</sup> Respondent and the title issued to them was null and void ab initio.
  - vi. A Declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do register fresh title in favour of the Petitioner.
  - vii. An Order of Restitution reinstating back the Petitioner to land parcel No. Kericho/Chilchila/Kunyak Block 2 (Kinda) 204
  - viii. A Declaration be and is hereby made that the 1<sup>st</sup> Respondent acted ultra-vires in cancelling/revoking and annulling the Petitioner's title deed to the suit land and vesting the same upon the 3<sup>rd</sup> Respondent.
  - ix. A Declaration do and is hereby made that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated the Petitioner's right to the suit land by aiding and abetting the illegal and fraudulent acquisition of the suit land by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
  - x. The 1<sup>st</sup> Respondent violated the Petitioner's Constitutional rights to own the suit land by illegally and fraudulently transferring the suit land to the 3<sup>rd</sup> and subsequently to the 4<sup>th</sup> Respondents.
  - xi. The Court be pleased to issue a mandatory injunction to order the 3<sup>rd</sup> and 4<sup>th</sup> Respondents either by themselves, agents, servants, directors, shareholder, proxies or whosoever otherwise to deliver vacant possession of the suit land within 14 days of the issuance of this order and that the Inspector General of Police be ordered to ensure compliance and also provide security personnel.



- xii. The Court do issue an order of Mandamus to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to rectify the register and re-register the Petitioner as the proprietor of Kericho/Chilchila/Kunyak Block 2 (Kinda) 204 and within 21 days be issued with a title deed.
  - xiii. The Court be pleased to issue an order that the 3<sup>rd</sup> Respondent is not an innocent purchaser of the suit land and thus did not pass good title to the 4<sup>th</sup> Respondent.
  - xiv. The Court be pleased to issue an order of Judicial Review in form of Certiorari to bring into court and quash the decision of the 1<sup>st</sup> Respondent to annul, cancel and/or revoke the Petitioner's title deed.
  - xv. The Court be pleased to issue an order of Judicial Review of Mandamus to bring into court and compel the 1<sup>st</sup> Respondent to register and issue the Petitioner with a title deed to the to the suit land.
  - xvi. Mesne Profits as against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents from the year 1999 to date.
  - xvii. Damages
    - a. Special damages Kshs. 3,682,022/=
    - b. General damages for deprivation of land, loss of use of land and income, violation of the Petitioner's rights to human dignity, malicious prosecution, emotional distress, brutal eviction without notice, loss of self-worth and right of access to information.
    - c. Exemplary damages
    - d. Aggravated damages.
  - xviii. The Cost of the Petition
  - xix. Any such consequential and appropriate relief, further or other orders/or reliefs as the court may deem fit, just and expedient to grant.
2. In response to the Petition, there were Grounds of Opposition dated 15<sup>th</sup> September 2023 filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which I have considered and wherein the Respondents had stressed on the importance of having an end to litigation to the effect that the matter had been concluded wherein the Petitioner had lawfully been evicted vide eviction order of 14<sup>th</sup> June, 1999. That it had taken the Petitioner 40 years since losing his case to the Respondent in H.C.C No. 66 of 1978 between John Yier v Fredrick Ododa Odundo to bring the instant Petition, seeking to review the said orders in a Constitutional Petition so as to avoid the law of Limitation of Actions.
  3. In response to the Grounds of Opposition, the Petitioner had argued that when the root of title was challenged, it was not sufficient to dangle the instrument of title as proof of ownership. That pursuant to the provisions of Section 7 of the *Environment and Land Court Act*, the court had power under Article 23 of *the Constitution* to make orders and reliefs including revocation, declarations among others if it found that the title being challenged had been acquired fraudulently.
  4. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents via their Replying Affidavit sworn on 14<sup>th</sup> September, 2023 by Pius Malakwen Barno, their Director, in response and opposition to the Petition had argued that they had bought the parcels of Land Reference No. 6030/2 (IR 67092) measuring 19.82 hectares, parcel Kericho/Chilchila/Kunyak Block 2 (Kinda) 201 measuring 201.8 hectares of land( which was subdivided resulting into Nos. Kericho/Chilchila/Kunyak Block 2 (Kinda) 203 and 204) all registered in the name of Fredrick Ododa Odundo through a public auction which had been pursuant to a court



order of 14<sup>th</sup> July, 1997 in Kisumu High Court Civil Case No. 66 of 1978. That subsequently the title had been transferred to the 3<sup>rd</sup> Respondent who then transferred the suit land to a sister company.

5. In retort, the Petitioner vide his Supplementary Affidavit sworn by Moses Otieno Audi dated 29<sup>th</sup> October, 2023 and filed on 30<sup>th</sup> November 2023 deponed that whereas the Daily Nation advertisement of the auction had indicated that the Auction would be conducted on Monday 10<sup>th</sup> August, 1998, the Notification of Sale by the Auctioneers had indicated that the auction would be conducted on 6<sup>th</sup> April, 1998 contrary to the auctioneer's rules. That further, on 4<sup>th</sup> July, 1998 when the intended auction had been advised in the Daily Nation Newspaper, Kericho/Chilchila/Kunyak Block 2 (Kinda) 201 which was auctioned had been non-existent as the same had been partitioned into Kericho/Chilchila/Kunyak Block 2 (Kinda) 203 and 204 registered in the names of Florida Aoko Ododa and the Petitioner respectively. Further, that Pius Malakwen Barno was neither a shareholder nor a director of the 3<sup>rd</sup> Respondent hence he had no locus to represent the 3<sup>rd</sup> Respondent. Lastly that the order that had been issued on 7<sup>th</sup> October, 1997 was incapable of being executed as the subject matter had already been registered in the names of the Petitioner and Florida Aoko Ododa and not Fredrick Idoda Odundo against whom the order had been issued.
6. That the process, procedures and protocols that had been employed and involved from application for execution by way of public auction up to the transfer of the suit land had been tainted with un-procedural, irregularity, unlawfulness, fraud, misrepresentations, impersonation, illegalities, conspiracies, abuse of power and judicial authority and corrupt schemes by the Respondents herein thus the Petitioner had properly been guided to institute the instant Petition notwithstanding the court orders that had been issued in H.C.C.Nos. 66 of 1978 and 90 of 1999.
7. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Party did not file any Response to the instant Petition and therefore I am minded not to consider their submissions herein filed as it had been held by the Supreme Court in Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR that:  

“A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1<sup>st</sup> Respondent on 17<sup>th</sup> August, 2018 are of no effect. ”
8. The Petition was disposed of through written submissions wherein the Petitioner summed up the brief facts of his Petition before framing his issues for determination as follows:
  - i. Whether the current Constitution 2010 applies to the instant Petition.
  - ii. Whether the Petitioner has locus to file the instant Petition.
  - iii. Whether Pius Malakwen Barno has locus/authority to depone the Replying Affidavit on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
  - iv. Whether the Petitioner had established/raised Constitutional issues.
  - v. Whether the Ho. Court had jurisdiction in H.C.C.C No. 66 of 1978 between John Yier v Fredrick Odundo to issue the orders of 14<sup>th</sup> July, 1997, 7<sup>th</sup> October, 1997, 28<sup>th</sup> May, 1998 and 27<sup>th</sup> October, 1998 and the orders of 1<sup>st</sup> December, 1998.
  - vi. Whether the instant Petition was Res-judicator.
  - vii. Whether the Petitioner's right to property was violated.
  - viii. Whether the Petition is time barred.



- ix. Whether the Petitioner deserves the orders sought.
9. On the first issue for determination, as to whether *the Constitution* of Kenya 2010 applied to the instant Petition, the Petitioner relied on the decision in the case of Janmohammed (Suing as the Executrix of the Estate of Daniel Toroitich arap Moi) & 2 others v Chelugui & another (Suing as the administrators of the Estate of the Late Noah Kipngeny Chelugui) & 6 others (Civil Appeal 159 & 254 of 2019 (Consolidated)) [2022] KECA 720 (KLR) (22 July 2022) (Judgment) and Arnacherry Limited v Attorney General [2014] eKLR to submit in the affirmative to the effect that the provisions of Section 75 of the Repealed Constitution and Article 40 of *the Constitution* of Kenya 2010 were both aimed at protecting property rights, allowing persons whose property rights had been violated a right of access to court and the need for prompt payment as just compensation for compulsory acquisition of land. That subsequently, the said rights had merely been transferred from the repealed constitution to *the Constitution* of Kenya 2010 hence they were not new rights that had not existed prior to the year 2010. Further reliance was placed on the provisions of Article 17 of the Universal Declaration of Human Rights, 1948.
10. On the second issue for determination as to whether he had locus standi to file the instant Petition, the Petitioner while submitting in the affirmative, placed reliance on the provisions of articles 22 and 258 of *the Constitution* as well as a combination of decisions in the case of Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission & 9 others [2016] eKLR and Attorney General & another v Rahimkhan Afzalkhan Rahimkhan & 4 others [2019] eKLR to submit that he had filed the instant Petition to challenge the cancellation of his title to the suit land herein and the transfer of the same in favour of the 3<sup>rd</sup> Respondent by the 1<sup>st</sup> Respondent which was a violation of his right to the suit land which he had acquired by virtue of being a beneficiary of the estate of Fredrick Ododa Odundo (deceased) vide High Court Succession Cause No. 321 of 1995.
11. That he had also filed the instant Petition to challenge the violation of his right to dignity, right to fair administrative action and right to fair hearing, inter-alia, by the acts and omission of the Respondents. That further, he had filed the instant Petition on behalf of his family members to challenge the violation of the children's right to dignity, right of elderly and rights of persons living with disability by the actions and omissions of the Respondents.
12. On the third issue for determination, the Petitioner's submission was in the negative to the effect that the Pius Malakwen Barno had not annexed any minutes, resolution or a letter authorizing him to swear an affidavit on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. That further, the CR2 of both the 3<sup>rd</sup> and 4<sup>th</sup> Respondents showed that he was neither a director nor a shareholder of the 3<sup>rd</sup> Respondent. He thus urged the court to strike out the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Replying Affidavit. Reliance was placed on the provisions of Order 9 Rule 2 (c) as well as a combination of decisions in the case of Steel Formers Limited v SGS (Kenya) Limited & another [2020] eKLR, Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR and Leo Investments Limited v Trident Insurance Company Limited [2014] eKLR where the court had referred to the holding of Hawett J. in *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd H.C.C.C No. 391 of 2000*.
13. On the fourth issue for determination as to whether he had established and/or raised Constitutional issues, the Petitioner submitted that the instant Petition had complied with the Mutunga Rules, 2013 as it had disclosed his name and address, the fact relied upon, the constitutional provisions violated, the nature of injury caused, related previous cases and the reliefs sought which the Respondents had replied to. Reliance was placed in the decided case of Benard Ambasa v Institute of Human Resource Management & 3 others; Lilian Ngala Anyango (Interested Party) [2021] eKLR.



14. That he had established a link between himself and his family (as aggrieved party) and the provisions of *the Constitution* that had been contravened. That he had also called upon the court to determine whether the 1<sup>st</sup> Respondent had acted ultra-vires and whether the Petitioner had legitimate expectation from the 1<sup>st</sup> Respondent. That further, the Petitioner had sought a determination as to whether the 1<sup>st</sup> Respondent had reviewed High Court Succession Cause No. 321 of 1995 in which he was a beneficiary of the estate of Fredrick O. Odundo (deceased) through which he had acquired the suit land by transmission. Lastly, that he had elucidated that Article 28 had been violated by the 3<sup>rd</sup> Respondent in the undignified manner in which the eviction without notice had been carried out.
15. On the fifth issue for determination, the Petitioner's submission was in the negative to the effect that the same was null and void ab initio since there had been no known legal representatives when the Application for the substitution of the deceased estate had been applied for in the year 1995 since a Grant of representation was issued on 16<sup>th</sup> May, 1996, 2 months after the hearing and determination of the said application. That further, the suit had abated one year after the demise of the Defendant for lack of substitution. That the order of 1<sup>st</sup> December, 1998 in H.C.C.C No. 66 of 1978 had also been null and void ab initio since Florida Ododa had died on 7<sup>th</sup> November, 1998 hence such orders could not issue against a deceased person. Reliance was placed in the decided case of Japhet Nzila Mwangi v Hamisi Juma Malee [2022] eKLR amongst others, and on the provisions of Section 2 and 37(1) of the *Civil Procedure Act* and Order 24 Rule 4(1) of the Civil Procedure Rule.
16. On the sixth issue for determination as to whether the instant Petition was res-judicator, the Petitioner placed reliance in the decided cases of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), amongst others to submit that whereas the Respondents had created an impression that the instant Petition could be res-judicator due to the cases involving the deceased herein, the Civil Appeal and Applications had emanated from H.C.C No. 66 of 1978 between Fredrick Ododa Odundo and John Yier in respect of land parcel No. Kericho/Chilchila/Kunyak Block 2 (Kinda) 201 and which had all been struck out for being incompetent. That there had not been conclusive judgments in the previous cases as the court lacked jurisdiction because the suit had abated. That the subject matter herein was land parcel No. Kericho/Chilchila/Kunyak Block 2 (Kinda) 204 while the subject matter in the previous cases had been land parcel No. Kericho/Chilchila/Kunyak Block 2 (Kinda) 201. That further, the instant Petition was seeking redress for violation of the Petitioner's right to property and the ultra-vires acts of the 1<sup>st</sup> Respondent which had not been the prayers in the previous case. He thus submitted that the instant Petition was not res-judicata and that the court had jurisdiction to hear and determine the same.
17. On the seventh issue for determination, the Petitioner submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were not bonafide purchasers for value without notice as they had been part of the fraud and illegalities that had been involved in the transfer of the suit land to themselves. He placed reliance in the definition of a bonafide purchaser from the Black's Law Dictionary 9<sup>th</sup> Edition and the decisions in the case of Dina Management Limited (supra), Katende v Heridar & Company Ltd [2008] E.A 173, Samuel Kamere v Lands Registrar, Kajiado [2015] eKLR and Munyu Maina v Hiram Gathiha Maina [2013] eKLR.
18. The Petitioner further submitted that the 3<sup>rd</sup> Respondent was not a bonafide purchaser for value since he had not produced evidence of payment of stamp duty prior to registration and transfer of the suit land to its name. That further, the suit land was not what had been ordered for sale by public auction and neither had it been what had been bought and paid for by the 3<sup>rd</sup> Respondent.
19. That the 3<sup>rd</sup> and 4<sup>th</sup> Respondents had failed to comply with the provisions of Rules 15, 16, 17 and 18 of the Auctioneers Rules, 1997 and Section 6 of the *Land Control Act*. That the Land Control Board



- consent ought to have been applied for and issued in the name of the Court's Deputy Registrar who had been the transferor.
20. On the eighth issue for determination as to whether the Petitioner's right to property had been violated, he had submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had not adduced any evidence nor sworn an Affidavit to rebut his assertion that their acts and omissions had violated his right despite the 1<sup>st</sup> Respondent being a government organ with institutional succession, memory and perpetuity and a custodian of the land records. Reliance was placed on a combination of the decisions in the case of Peter O. Nyakundi & 68 Others v Principal Secretary, State Department of Planning & Another [2016] eKLR, David Peterson Kiengo & 2 Others v Kariuki Thuo [2012] eKLR and Vekariya Investment Ltd v Kenya Airport Authority and 2 others [2014] eKLR as well as the Provisions of Article 260 of *the Constitution* and Sections 24 and 26 of the *Land Registration Act*.
  21. He also submitted that the 1<sup>st</sup> Respondent had no power to revoke the his title deed since the provisions of Section 79 of the *Land Registration Act* only gave the 1<sup>st</sup> and 2<sup>nd</sup> Respondents powers to rectify a land register in case of error/omissions that did not materially affect the interests of the proprietor. Reliance was placed on the decision in the case of Kuria Greens Ltd v Registrar of titles & Another [2011] eKLR, amongst others.
  22. On the ninth issue for determination as to whether the instant Petition was time barred, the Petitioner submitted that courts have heard and determined Constitutional Petitions filed more than 25 years after the cause of action had arisen and relied on the decision in the case of *Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019)* (Consolidated) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment). That further, deprivation of the suit land and subsequent eviction and displacement of members of his family had led to immense financial hardships hence he could not file the instant Petition immediately thereafter.
  23. His further submission was that he had unsuccessfully sought alternative means of redress from the Ministry of Lands and the then Kenya Anti-corruption Commission as well as lodging Appeals that been struck out.
  24. On the tenth issue for determination as to whether the 1<sup>st</sup> Respondent had violated his legitimate expectations and acted ultra vires, the Petitioner placed reliance in the decided cases of David Peterson Kiengo & 2 others v Kariuki Thuo [2012] eKLR and Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgment) to submit that the 2<sup>nd</sup> Respondent's Letter dated 18<sup>th</sup> November, 1998 addressed to the 1<sup>st</sup> Respondent had given him legitimate expectations that no transfer and issuance of the title to the 3<sup>rd</sup> Respondent would take place. That further, the Gazette Notice No. 7082 dated 18<sup>th</sup> December 1998 had violated the Petitioner's legitimate expectation since as at the said 18<sup>th</sup> December, 1998, his title had already been transferred to the 3<sup>rd</sup> Respondent.
  25. On the eleventh issue for determination, reliance was placed in the decided case of Musembi & 10 others (Suing on Their Own Behalf and on Behalf of 326 Persons Formerly Residing in City Cotton village and Upendo City Cotton Village and Their 90 School Going Children) & Margaret Kanini Keli & 2 others (Suing on their Own Behalf and on *Behalf of 15 Residents of Upendo City Cotton Village at South C Ward, Nairobi (Petitioners) v Moi Educational Centre Co. Ltd & 4 others (Respondents)* (Petition 2 of 2018) [2021] KESC 50 (KLR) (Civ) (16 July 2021) (Judgment) to submit in the affirmative to the effect that he together with members of his family including the elderly, persons living with disability and children had been ambushed without notice and forcefully evicted from the suit land in an undignified manner.



26. As to whether the court had been biased and partial against the Petitioner, he submitted in the affirmative to the effect that the court had proceeded ex-parte to hear and determine Applications giving rise to the orders that had led to the auction of the suit land against the rules of natural justice and fair hearing. He placed reliance in the decided case of *Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019)* [2021] KECA 144 (KLR) (19 November 2021) (Judgment) to submit that the said court orders had been issued by a biased and partial court thus exhibiting the use of judicial authority to manipulate the law in order to achieve an objective that would be favorable to the 3<sup>rd</sup> Respondent through deception and fraud.
27. The Petitioner then relied on the provisions of Article 23 (3) of *the Constitution* to submit that he deserved the orders sought herein.
28. That he also deserved mesne profit, as per a valuation report produced wherein as at the year 1999 the value of maize, cane, crop, coffee, beans was Kshs. 2,475,000/= excluding the store/office. He thus sought for payment of a total sum of Kshs. 61,875,000/= in mesne arising from loss of earnings on the above commodities for the past 25 years from the year 1999 to date.
29. In as far as general damages were concerned, that there had been violation of his right to property, dignity and other wrongs that had been occasioned by the Respondents' acts of omission and commission. He placed reliance in the case of *Attorney General v Zinj Limited (Petition 1 of 2020)* [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment) where the Supreme Court had affirmed an award of Kshs. 51, 129,600/= in general damages for violation of right to property measuring 51.129 hectares, to pray for an award of Kshs. 75,000,000/= as general damages for the violation of his rights to the suit land measuring 93.94 hectares. He also sought for an award of Kshs. 350,000/= for each of his family members listed in his annexure marked as "W.A.O-27" who had been victims of eviction for the violation of their dignity as a consequence of their forceful eviction.
30. The petitioner also sought an award of exemplary damages of Kshs. 15,000,000/= owing to the violation of his right to property that had been orchestrated by the Respondents for the benefit of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to his detriment. He thus prayed for an award of a sum
31. Lastly he sought that any sub-division that had been carried out and the transfer that had been effected subsequent to the transfers to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the titles that had issued thereto be cancelled and thereafter, the Director of Surveys amend the relevant Registry Index Map (RIM).
32. In conclusion, he submitted that the passage of time should not obscure the facts and deny the Petitioner and his family justice because of delay which had been explained to be as a result of lack of trust and confidence in the judiciary pre-2010 Constitution in addition to socio-economic hardships and effects of the post-election violence of the year 2007 and 2008. He thus submitted that courts should not provide succor to land grabbers who hide under the delay and latches in the face of violation of rights.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Submissions.**

33. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents framed their issues for determination as follows;
  - i. Whether the Petition was barred by Doctrine of Avoidance.
  - ii. Whether the court has jurisdiction to entertain the instant petition.
  - iii. Whether there was inordinate delay in bringing the Petition.



- iv. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted within the law in issuing the title to 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
34. On the first issue for determination as to whether the instant Petition was barred by the doctrine of avoidance, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted in the affirmative and reiterated that the instant matter had been litigated for years in the High Court as a civil suit before the promulgation of *the Constitution* of Kenya 2010 which created the Environment and Land Court. That further, the auction sale which the Petitioner was seeking to reverse had taken place on 10<sup>th</sup> August 1998, pursuant to a court order that had been issued on 14<sup>th</sup> July, 1997 in High Court Case No. 66 of 1978. That the Petitioner was challenging a title that had been issued on 2<sup>nd</sup> December, 1998 with the knowledge that had he approached this court with a normal suit as it ought to be, the same would have been thrown out by virtue of limitation of actions.
35. Their submission was hinged on the decided case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR on the definition of the doctrine of Constitutional-Avoidance, to submit that the same dealt with instances where a constitutional court would decline to deal with a matter because there existed another remedy provided in law which the aggrieved party was yet to utilize. That the same was also referred to as the doctrine of exhaustion. Further reliance was placed in the decided case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR to submit that the instant Petition had not met the constitutional threshold required for a Constitutional Petition having failed to set out with a degree of precision the Petitioner's complaint, provisions infringed and the manner in which they were alleged to be infringed.
36. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also submitted that the suit herein was civil in nature hence should not have been brought under the disguise of a Constitutional Petition and that where there was an alternative remedy in lieu of constitutional remedies, the Constitutional mandate of the court should not be revoked. Further reliance was placed in the decided case of *Godfrey Paul Okutoyi & others v Habil Olaka & Another* [2018] eKLR.
37. On the second issue for determination as to whether the court had jurisdiction to entertain the instant Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted in the negative to the effect that the parties herein had already exercised the right of appeal in Nairobi Civil Application No. 394 of 2001; *Paul Waore Ododa v John Yier* which matter had been fully heard and determined. That the Petitioner herein had made an application for leave to appeal out of time against the Public Auction which had taken place on 10<sup>th</sup> August 1998 wherein the court had vide its ruling dated 13<sup>th</sup> March, 2001 allowed the said Application ordering the Petitioner to file the Notice of Appeal within 7 days and Record of Appeal within 21 days which had been filed vide Civil Appeal No.89 of 2002 and which Appeal had been dismissed in the year 2004. That the Petitioner was now bringing the instant suit against the said Court of Appeal's Ruling disguised as a Constitutional Petition. Reliance was placed in the decided case of *Martha Wambui v Irene Wanjiru Mwangi & another* [2015] eKLR.
38. On the third issue for determination as to whether there had been inordinate delay in bringing the instant Petition, the Respondents placed reliance in the decided case of *Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others* [2014] eKLR on the definition of inordinate delay, to submit that the Petitioner was seeking to institute the instant Constitutional Petition more than 40 years after it was first heard and that even the previous judges in the instant suit had lamented on the way it had been dragging. That the Petitioner could not purport to sleep on his rights for more than 40 years and then seek a second chance to prosecute their case.



39. They placed reliance in a combination of decisions in the case of *Arga Wekesa Okumu v Dime College Limited & 2 Others* [2015] eKLR and *Wamahiu Kihoro Wambugu v Attorney General* [2016] eKLR to submit that there had been unexplained delay and laches by the Petitioner in approaching the court thus in the absence of a cogent explanation for the delay, it would be proper to conclude that the delay had been unreasonable hence the instant Petition ought to be dismissed.
40. On the fourth issue for determination, it was their submissions that the 1<sup>st</sup> Respondent had issued a title deed in favour of the 3<sup>rd</sup> Respondent pursuant to the orders of 1<sup>st</sup> December, 1998 in High Court Case No. 66 of 1978 which had been done after gazettelement of the public auction of the suit land, which auction had been conducted lawfully. That further, the Land Registrar had the mandate to cancel the title and issue the same in favour of the successful bidder.
41. In conclusion, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the instant Petition was an abuse of the court process and ought to be dismissed with costs to enable the successful parties to enjoy the fruits of their successful litigation.

### **Determination.**

42. Having considered the Petition, the responses thereto, the submissions, the authorities cited and the relevant law, I find that I need to determine in the first instance is whether the Court has jurisdiction to entertain the Petitioner's Petition as it is trite that jurisdiction is everything without which a court of law must down its tools and take no further steps.
43. The threshold of what constitutes a constitutional petition is established in the case of *Anarita Karimi Njeru vs The Republic* [1979] eKLR where the court had held that a Constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed.
44. This principle was later reaffirmed by the Court of Appeal in the case of *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR where the Court at paragraph 87(3) of the judgment had stated as follows:-

“It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the constitution* of Kenya and the *Ethics and Anti-corruption Commission Act, 2011*, accordingly the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case.”
45. Indeed in this matter what came out clearly in the Petition was not a pleading with specificity on matters related to or seeking redress with reference to *the Constitution* or an infringement of the Petitioner's Constitutional right but rather, it is clear that the Petitioner was challenging allocation and registration of ownership of land parcel identified as Kericho/Chilchila/Kunyak Block 2 (Kinda) 204 to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents which he maintained had been done and obtained through fraud.
46. I further understood and it came out clearly that the Petitioner was not only challenging the sale of the suit land through a public auction that had purportedly taken place on 10<sup>th</sup> August, 1998 to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents but was also challenging the jurisdiction of the court to have heard and determined, the issue on the sale by public auction of land parcel No. Kericho/Chilchila/Kunyak Block 2 (Kinda) 204 where its proprietor as he alleged, had since died and the suit had abated.



47. I find that the determination that the Petitioner seeks herein are orders whose resolution requires a full trial hearing and the interpretation of a statute rather than through a Constitutional Petition because a constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. The particular question to be decided herein so as to put this matter into the ambit of a Petition was whether the state was liable for acts committed by its agents while on duty. In this case, I find the answer in the negative as constitutional rights protect individuals from governmental injury and regulate the discretion of the government to inflict injury which evidence I find has not been adduced herein.
48. In the case of *Godfrey Paul Okutoyi & Others vs. Habil Olaka & Another* (2018) eKLR Chacha , J held that:-
- “It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional Petition. A party should only file a constitutional Petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”
49. In the case of *Bernard Murage -vs- Fine Serve Africa Ltd & others* (2015) eKLR the Court held that:-
- “Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.
50. Indeed the Court of Appeal in the case of *Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited* [2013] eKLR made the following observation:-
- “...it is an established practice that where a matter can be disposed of without recourse to *the constitution, the constitution* should not be involved at all.....the courts will not normally consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to the applicant under some other legislative provision, or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights....”
51. The issues raised by the Petition herein, in my opinion and in accordance to the case law herein above cited would best be dealt with in the appropriate forum in the manner allowed by the applicable statutory law and procedure like the Penal Code, The *Land Act*, The *Land Registration Act*, amongst others, but not through a Constitutional Petition.
52. The Supreme Court in *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* [2014] eKLR in defining the principle of constitutional avoidance had stated as follows:-
- “The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle



of avoidance in his minority Judgment as follows [at paragraph 59]:I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

53. From the facts before me, and the fact that that courts must at all times guard against improper transmission of normal disputes or ordinary issues of litigation being clothed as Constitutional Petitions, I find that this Petition does not raise constitutional issues. The Petitioner ought to have approached the appropriate court by way of an ordinary suit. Having found that the Petition herein does not raise any constitutional claims hence it offends the Principle of Constitutional Avoidance to which the same stands as dismissed with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 4<sup>TH</sup> DAY OF JULY 2024.

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**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

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