



**Simba v Mzungu & 4 others (Environment & Land Petition
22 of 2022) [2024] KEELC 6372 (KLR) (2 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6372 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 22 OF 2022
EK MAKORI, J
OCTOBER 2, 2024**

BETWEEN

BEATRICE KAHINDI SIMBA PETITIONER

AND

ELIAS CHARO MZUNGU 1ST RESPONDENT

ANTIOCHIA LIMITED 2ND RESPONDENT

OMNI MEGA LIMITED 3RD RESPONDENT

REGISTRAR OF TITLES KILIFI COUNTY 4TH RESPONDENT

HON ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. The petition, filed and dated 15th September 2022, seeks to address several critical issues, including:
 - a. The main objective of the Petition is to secure a declaration that the Petitioner’s rights to property as guaranteed in *the Constitution* have been infringed by the 4th Respondent’s action in fraudulently registering and issuing an illegal certificate of the title - Land Reference No. Kilifi/Jimba/376 to the 1st, 2nd and 3rd respondents;
 - b. The desired outcome of the petition is a declaration that the certificate of title Land Reference No. Kilifi/Jimba/376, issued to the 1st, 2nd, and 3rd respondents by the 4th respondent, is null and void ab initio;
 - c. A declaration that parcels of Land Reference No. Kilifi/Jimba/376 belong to the Petitioner
 - d. A prerogative order of certiorari quashing the certificate of title issued to the 1st, 2nd, and 3rd respondents over Land Reference No. Kilifi/Jimba/376



- e. A prerogative order of mandamus is issued directing the 4th Respondent to register and issue the Petitioner with a certificate of title for Land Reference No. Kilifi/Jimba/376.
 - f. The Petitioner finally seeks to have the costs of the petition provided.
2. The 1st, 4th, and 5th Respondents have lodged a strong opposition to the petition. They argue that the petition is incompetent and does not suffice as a constitutional petition as set out in *Anarita Karimi Njeru v The Republic (1976-1980) KLR1272*; the petition is time-barred inordinately late and offends the provisions of Sections 7 and 17 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya. It offends Article 159(2) of *the Constitution* of Kenya, lacks clarity and precision, and does not disclose any constitutional provisions violated or threatened to be violated by the 4th and 5th respondents or demonstrate any breach by the respondents above and that the orders sought are untenable. The petition is frivolous, bad in law, and abuses the Court process.
 3. The Court directed that the petition be disposed of through the filed affidavits and written submissions; the 1st respondent did file written submissions, but the Petitioner, 4th and 5th Respondents did not.
 4. The Petitioner, Beatrice Kahindi Simba, vide affidavit, deposed on 9th November 2022, and her statement dated 28th October 2022 supporting the petition states that she is in occupation of land reference Kilifi/Jimba/376. She is apprehensive that the 1st, 2nd, 3rd, and 4th respondents have unlawfully colluded and fraudulently registered, transferred, and issued the title to the suit property to the 1st, 2nd, and 3rd Respondents. The Respondents never followed the conveyancing protocols while processing and issuing the certificate of title; therefore, the same was fraudulently obtained. Even though the 1st Respondent was registered and issued with the title of the suit property, he was not on the adjudication list.
 5. The title held by the 1st Respondent was issued on 7th September 1998, while that of the Petitioner was issued on 18th December 2001. No stamp duty was paid. 1st, 2nd, and 3rd Respondents have never been in occupation or possession of the suit property.
 6. The 1st Respondent, Elias Charo Mzungu, in his replying affidavit deposed on 7th November 2023, avers that he is the original allottee of the suit property - Kilifi/Jimba/376; this is after a successful allocation process. The land was under the Settlement Fund Trustees (SFT) regime. He paid all the necessary fees as required by the scheme. A discharge of charge was issued to him on the 2nd of September 1998. The property was transferred to the 2nd Respondent on 14th February 2001 after the sale. He used to enjoy peaceful and quiet possession before the sale, and the alleged occupation of the Petitioner since time immemorial is false.
 7. The 1st Respondent further states that the documents relied on by the Petitioner are not legible and seem to have been manufactured for purposes of this matter. Moreover, the allegations of fraud have not been proven.
 8. From the materials placed before me, I frame the issues for this Court's determination: whether the petition meets the threshold of a constitutional petition as enunciated in *Anarita Karimi Njeru (supra)*, whether the reliefs sought are available, and who should bear the costs of the petition.
 9. The 1st Respondent submits that the reliefs sought in the petition can only be granted if fraud has been proven. The petition, which seeks prerogative orders and civil reliefs, is incompetent and does not comply with how the court should have been moved in a proper constitutional petition.



10. I agree that the current petition does not meet the threshold of bringing up a constitutional petition. The decision in *Anarita Karimi Njeru v Republic (No1)-[1979] KLR 154* is germane the Court stated as follows:

“... if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and how they are alleged to be infringed.”

11. As submitted by the 1st Respondent and the grounds in opposition raised by the 4th and 5th Respondents, this petition is an omnibus. It, therefore, lacks reasonable precision as it fails to demonstrate how the Respondents have infringed the Petitioner’s rights, and as such, it is incapable of proper adjudication. The petition only seeks the Court to address the validity of the title allegedly held by the Petitioner and the transfer from the 1st to the 2nd Respondent on allegations of fraud. This can appropriately be addressed in a civil suit to determine the root of the title dangled by the parties.

12. The seeking of prerogative orders should not have been mixed with the remedy of cancellation of title on allegations of fraud, which remedy is ordinarily available in a civil suit. In *Pyaralal Mhand Bheru Rajput v Barclays Bank and others Civil Case No. 38 of 2004*, the Court stated thus:

“There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long-established and different judicial principles which counsel needs to bring to the attention of, and the court needs to consider before granting the entire relief sought. This makes the plaintiff’s application incurably defective and a candidate for striking out.”

13. Further, the Court of Appeal reiterated this position in *Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR*, thus:

“...the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court... The procedure is also a handmaiden of just the determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing issues in constitutional petitions is an extension of this principle.”

14. The current petition is grounded on quicksand. It is a civil suit by nature. The evidence alluded to by the Petitioner needed to be subjected to a thorough hearing under cross-examination for the Court to deduce fraud. I need not discuss the question of limitation of actions here. The petition failed the primary test in the framing of constitutional petitions. The petition is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 2ND DAY OF OCTOBER 2024.

E. K. MAKORI

JUDGE



In the presence of:

Happy: Court Assistant

In the absence of:

