



**Ndirangu & 5 others (Suing on their own behalf and on behalf of Impala Garden Estate) v Jiweze Development Limited & another (Petition 18 of 2021) [2023] KEELC 525 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 525 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
PETITION 18 OF 2021  
LA OMOLLO, J  
FEBRUARY 2, 2023**

**BETWEEN**

**JANE NYAMBURA NDIRANGU ..... 1<sup>ST</sup> PETITIONER  
SUSAN VIRGINIAH WACHIRA ..... 2<sup>ND</sup> PETITIONER  
SUSAN MWIHAKI NDIRANGU ..... 3<sup>RD</sup> PETITIONER  
PETER MAINA WAIKIA ..... 4<sup>TH</sup> PETITIONER  
MAUREEN WANJIRU MWANIKI ..... 5<sup>TH</sup> PETITIONER  
ANN WAMBUI KARUGU ..... 6<sup>TH</sup> PETITIONER  
SUING ON THEIR OWN BEHALF AND ON BEHALF OF IMPALA GARDEN  
ESTATE**

**AND**

**JIWEZE DEVELOPMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT  
THE DISTRICT LAND REGISTRAR, NAKURU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This judgement is in respect to the petitioners' Petition dated November 30, 2021. The petitioners seek the following prayers:
  - a. A declaration that the petitioners are the rightful and lawful allottees of all that parcel of land known as un-alienated public utility on Kiambogo/Kiambogo Block2/23549 and Kiambogo/Kiambogo Block2/2355.



- b. A declaration that the petitioners' rights guaranteed and protected under section 75 of the repealed constitution and articles 27, 28, 29, 40, 47, 48 and 50 of the Constitution, 2010 have been violated by the respondents.
- c. A declaration that the issuance of the title deeds for parcels Kiambogo/Kiambogo Block2/23549 and Kiambogo/Kiambogo Block2/23558 by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent was null and void *ab initio* and ineffectual to confer any right/ interest or title upon the 1st respondent in the first instance.
- d. An order for rectification on the land register by cancellation of the title deed held by the 1st respondent (Jiweze Development Limited) in respect of all or any of those parcels of land known as Kiambogo/Kiambogo Block 2/23549 Kiambogo/Kiambogo Block2/23558 so as to restore the maid parcels of land public land to be utilized by the petitioners.
- e. An order compelling the respondents to deliver vacant possession of all those as Kiambogo/Kiambogo Block 2/23549 properties known Kiambogo/Kiambogo Block2/23558.
- f. An order prohibiting the respondents either by themselves, their agents, or assigns from re-entering, taking possession of, alienating or in any other way whatsoever interfering with the petitioners quiet possession of all those as public land and fraudulently registered as Kiambogo/Kiambogo Block2/23549 and Kiambogo/Kiambogo Block2/23558.
- g. In the alternative an order compelling the 1 respondent either by themselves, their agents, servants, employees or otherwise howsoever to give the petitioners either by themselves and or their agents or employees full unfettered physical access to all those parcels of land known as public utility land and fraudulently registered as Kiambogo/Kiambogo Block2/23549 and Kiambogo/Kiambogo Block2/23558.
- h. Costs of this petition.
- i. Such other and/or alternative appropriate reliefs or remedies as the honourable court shall deem just and expedient to grant in the circumstances.

### **Factual Background.**

2. This suit was commenced by way of Petition dated November 30, 2021 and filed on December 2, 2021. In summary, the petitioners are seeking among other orders: a declaration that they are the rightful and lawful allottees of all that parcel of land known as Kiambogo/Kiambogo Block 2/23549 and Kiambogo/Kiambogo Block 2/23558 the suit properties herein, a declaration that the issuance of the title deeds to the suit properties by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent is null and void, an order for rectification of the land register by cancellation of the title deed held by the 1<sup>st</sup> respondent in respect of the suit properties, an order compelling the respondents to deliver vacant possession of the suit properties, an order prohibiting the respondents from re- entering or taking possession of the suit properties and in the alternative an order compelling the 1<sup>st</sup> respondent to give the petitioners full unfettered physical access to the suit properties.
3. The 1<sup>st</sup> respondent filed their response to the petition on May 24, 2022 while the 2<sup>nd</sup> respondent filed their response on June 17, 2022.
4. Subsequently, the petitioner filed a further affidavit on July 19, 2022.



### **Petitioners' contention.**

5. The petitioners contend that they are bona fide purchasers of various plots of land from the 1<sup>st</sup> respondent. It is their further contention that they have all constructed permanent residential homes on the said plots and have named them Impala Garden Estate.
6. It is their contention that they were issued with their respective title deeds and that they have all settled on their respective homes leaving Kiambogo/Kiambogo Block 2/23549 and Kiambogo/Kiambogo Block 2/23558 as public utility for the estate members and a way leave for power lines.
7. The petitioners further contend that the 1<sup>st</sup> respondent is in the process of constructing a perimeter fence on the public utility land and despite raising concerns, it has fallen on deaf ears.
8. They also contend that the 1<sup>st</sup> respondent has since obtained title deeds for Kiambogo/Kiambogo Block 2/23549 and Kiambogo/Kiambogo Block 2/23558. It is their further contention that the title deeds are not genuine.
9. The petitioners contend that their rights have since been violated, they have incurred and continue to incur legal costs and that their security has been greatly prejudiced and compromised.
10. They further contend that the acts arising therefrom negate the petitioners' constitutional rights and values as enshrined under chapter 4 of the Constitution.

### **1<sup>st</sup> Respondent's response.**

11. In opposition to the application, the 1<sup>st</sup> respondent filed a replying affidavit on May 24, 2022. It is sworn by one Elizabeth Wagechi Ng'ang'a a director of the 1<sup>st</sup> respondent company. She deposes that the Petition is misconceived without merit and an abuse of the court process.
12. It is her deposition that the Petition raises no cause of action against the 1<sup>st</sup> respondent as the petitioners have not demonstrated which constitutional rights have been infringed.
13. She further deposes that the dispute is one of purported illegal allocation of land and the petitioners therefore ought to have approached the court via a plaint and not a petition. That the aforementioned Impala Gardens Estate is a non-existent group as the petitioners have not attached any authority by the purported members authorizing the instant suit.
14. She deposes that the 1<sup>st</sup> respondent did its due diligence before purchasing the land and the searches carried out did not show any inhibitions. The 1<sup>st</sup> respondent avers that it took steps to amalgamate the land and thereafter subdivided it so as to build residential houses which were then sold to the petitioners save for the 5<sup>th</sup> petitioner.
15. She further deposes that copies of the green card ascertain that the suit parcels are owned by the 1<sup>st</sup> respondent.
16. It is the 1<sup>st</sup> respondent's deposition that the suit parcels and the parcels owned by the petitioners and other purchasers are as a result of the subdivision of Kiambogo/Kiambogo Block 2/22944 (Mwariki) and Kiambogo/Kiambogo Block 2/17265 (Mwariki) and are not resultant of acquisition of public land.
17. The 1<sup>st</sup> respondent deposes that there is no evidence that the procedure for the creation of a right of way has ever been initiated by the petitioners. She further deposes that the petitioners have failed to



provide any evidence in support of their claim that the suit parcels were fraudulently registered in the 1<sup>st</sup> respondents name.

18. She finally deposes that the petitioners claim and orders are inconsistent. On one hand, the petitioners claim that the suit land is public land illegally alienated to the 1<sup>st</sup> respondent and on the other hand, they state that they are private individuals and pray that the court declares them as the rightful owners of the land.

#### **The 2<sup>nd</sup> Respondent's response.**

19. The 2<sup>nd</sup> respondent filed its replying affidavit dated June 14, 2022. It is sworn by one R G Kubai a land registrar. He deposes that the Petition is frivolous and an abuse of the court process. He further deposes that the Petition does not meet the threshold in [\*Annarita Karimi Vs Attorney General & Others\*](#) case.
20. He further deposes that L R Nakuru Kiambogo/Kiambogo Block 2/23549 and 23558 (the suit properties) are as a result of the subdivision on Kiambogo/Kiambogo Block 2/22944.
21. It is his further deposition that the said parcels were legally registered in the name of the 1<sup>st</sup> respondent and that its office was never involved in any fraudulent transactions relating to the suit parcels.
22. In conclusion, he deposes that if there is any compulsory acquisition of public land, then the same has been done without their involvement and if proved, compensation should be borne by the 1<sup>st</sup> respondent.

#### **Issues for determination.**

23. The petitioners' filed their submissions on September 15, 2022 while the 1<sup>st</sup> and 2<sup>nd</sup> respondent filed their submissions on October 6, 2022 and October 12, 2022 respectively.
24. The petitioners' identified the following issues for determination:
  - a. Whether the petitioners have satisfied the pre-conditions for grant of prayers sought in the petition.
  - b. Whether the petitioners lack *locus standi*.
  - c. Whether the subject suit parcels of land are public land or private land.
25. On the first issue, the petitioners relied on article 22(1) of the [\*Constitution\*](#) and submit that they have a fundamental right to enjoy the use of property without any interference unless authorized by law. On the second issue, they submit that they bring the petition in their own interest and that of the public and thus they are properly before this court. They cite the judicial decision in [\*Attorney General Vs Isaiab Muturi Mucee\*](#) [2019] eKLR. They further submit that their right to use of public utility land is under threat and they therefore have the locus standi to bring this petition.
26. On the final issue, they rely on section 26(1) of the [\*Land Registration Act\*](#) and submit that the suit parcels were reserved for public utility. They further submit that they have exhibited that suit parcels were set aside for public utility by the residents of Impala Gardens Estate.
27. The petitioners submit that there is a public right of wayleave on the suit properties which the 1<sup>st</sup> respondent has a duty to safeguard. They add that said right can only be defeated by operation of the law which in the instant case is by creation of public right of wayleave under section 143(1) of the [\*Land Act\*](#). The petitioners cited the judicial decision in [\*Kenya Power & Lighting Co Ltd Vs Kipevu Island Container EPZ Ltd\*](#) [2018] eKLR.



28. The 1<sup>st</sup> respondent on the other hand identifies the following questions for determination:
- a. Whether the petitioner's Petition meets the threshold for granting of the orders sought by the petitioners
  - b. Whether Kiambogo/Kiambogo Block 2/23549 and Kiambogo/Kiambogo Block 2/23558 are public land and whether there is a way leave or communal right of way over both parcels.
  - c. Who should bear the costs.
29. On the first issue, the 1<sup>st</sup> respondent relies on the Judicial decision in of *Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR and submits that the petitioner joined the 1<sup>st</sup> respondent to this case but the petitioner failed to specifically plead any allegation of contravention of the Constitution. It further submits that although the petitioner quoted provisions of article 27, 28, 40 47 and 29(d) of the *Constitution*, there are no particulars of allegations of contravention of the said provisions against the 1<sup>st</sup> respondent. It also submits that the petitioners have failed to demonstrate and prove to any degree that the 1<sup>st</sup> respondent's titles to the suit properties were fraudulently or illegally obtained.
30. On the second issue, the 1<sup>st</sup> respondent relied on article 62(1)(2) and (3) of the *Constitution* and submits that the suit properties are not public land and that no evidence has been adduced to the contrary. It submits that Kenya Power and Lighting Company Limited is licensed to generate, produce, transit and supply within the country and therefore in a better position to guide the court as to the existence of a wayleave. It further submits that the orders sought cannot be granted since a wayleave or communal right of way runs along a determined corridor ascertained by the parties involved in its creation. It adds that the Petitioners have made a presumption that the wayleave covers the whole area of the suit properties which could not be the case unless the same were compulsorily acquired.
31. They relied on sections 145 and 146 of the *Land Act* and submit that no evidence was adduced to prove that there exists a right of way or communal right of way for the Petitioners to be granted the orders sought. They submit that for their right to property to be defeated by operation of the law, the said law must have been complied with in the acquisition, conversion and creation of the alleged right of way on the subject property.
32. On the final issue, they rely on the decision in *Jospeh Oduor Anode Vs Kenya Red Cross Society* [2012] eKLR and urge the court to award them costs.
33. The 2<sup>nd</sup> respondent identified the following issues:
- a. Whether the petitioners are the rightful allottees of the suit properties.
  - b. Whether the petitioners constitutional rights have been violated by the respondents.
  - c. Whether the title held by the 1<sup>st</sup> respondent be cancelled and the suit land be declared public land.
34. On the first issue, the 2<sup>nd</sup> respondent relied on the case of *R G Patel Vs Lalji Makani* which cited the case of *Gladys Wanjiru Ngacha Vs Theresa Chesast & 4 Others* (2013) eKLR and submit that the 1<sup>st</sup> respondent is and should be taken so to be the legal proprietor of the of the suit land unless otherwise proven by facts and evidence as required by law.
35. On the second issue, it submits that the petitioners failed to prove ownership or any proprietorship on the suit land. Regarding the third issue, the 2<sup>nd</sup> respondent relied on section 28 of the *Land Registration*



Act and submits that the court cannot take away the rights and property legally protected and acquired in law. They urge the court that costs be in the cause.

### **Analysis and determination.**

36. Upon perusal of the Petition, Supporting Affidavit, Replying Affidavit, Annexures and submissions filed in respect of this Petition, my considered view is that the following three questions arise for determination:

- a. Whether the jurisdiction of this court was properly invoked.
- b. Whether the petitioners' rights have been infringed.
- c. Whether they are entitled to the orders sought.

37. The threshold for grant of orders in a constitutional petition was set out in the case of Anarita Karimi Njeru v Republic [1979] eKLR where the court held as follows;

“We would, however, again stress that 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 the manner in which they are alleged to be infringed.”

38. This court agrees with the petitioners that under article 22 of the Constitution of Kenya 2010, they have the right to bring these proceedings. Article 22(1) of the Constitution entitles the petitioners to come to court for the protection of the said rights.

39. The petitioners contend that they have the right to use public utility land which is under threat of alienation and/or possession by the respondents.

40. Further the petitioners allege fraud and collusion between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and pray for cancellation of the title deed held by the 1<sup>st</sup> respondent.

41. In the case of Isaac Makokba Okere Vs Mumias Outgrowers Sacco Society Limited & 9 others [2021] eKLR. The court held as follows:

“The petitioner’s allegations of fraud and collusion as well as prayers for cancellation of the titles and removal of structures on the land are matters that can be addressed in an ordinary suit under section 26 of the Land Registration Act which makes provisions on the requirements for nullification of a certificate of title. (emphasis is mine). Under the said provision, a title document can be nullified on grounds of fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Additionally, it must be remembered that a constitutional petition is usually heard through affidavit evidence and written submissions, a procedure which is not appropriate to deal with allegations of fraud.(emphasis is mine). Procedural law is clear that fraud is a serious and contentious issue which must be pleaded, particularized and strictly proven.”



42. In the judicial decision of *Petro Oil Kenya Limited Vs Kenya Urban Roads Authority* [2018] eKLR the court held as follows:

“A constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called like in this case...(emphasis is mine). Whether or not the suit property was hived from a road truncation is not an issue which I can determine on the affidavit evidence before me. If it is true that the suit property was hived from a road truncation, the title held by the Petitioner would not be valid since the property was not available for allocation to wangs from whom the Petitioner purchased the suit property. Article 40 (6) of the *Constitution* provides that the protection accorded to property does not extend to the property which has been acquired unlawfully. Whether or not the Petitioner acquired the suit property lawfully is an issue that can only be determined in a civil suit and not in a constitutional petition. The courts have said over and over again that the mere fact that constitutional rights are alleged to have been violated or are threatened does not make the dispute a constitutional one calling for the filing of a petition under Article 22 of the *Constitution*. The court can still uphold constitutional rights in a normal civil suit.”(emphasis is mine).

43. In the instant case, it is worth noting that both the petitioners and the 1<sup>st</sup> respondent have annexed copies of title to the suit properties. The title is in the name of the 1<sup>st</sup> respondent. The petitioners allege that the titles were acquired fraudulently while the 1<sup>st</sup> respondent states that it is the legal and registered owner of the suit properties.
44. It is therefore this court’s view that due to the nature of the dispute i.e who between the two parties is the legal owner of the suit parcels and whether fraud was committed resulting to the registration of the suit parcels in the name of the 1<sup>st</sup> respondent a constitutional petition is not appropriate. Fraud must be pleaded, particularized and strictly proven, the ideal procedure is to file a normal civil suit, take oral evidence, admit documents in evidence and scrutinize them before making a determination.
45. The petitioners have a right to invoke the jurisdiction of the court under article 22(1) of the *Constitution*, however, the said jurisdiction is not ideal for the resolution of the issues in dispute.
46. On the second question, it is this court’s view that it can never be enough to merely enumerate various constitutional provisions alleged to have been violated in the heading of the Petition. It is necessary that the pleadings set out the particulars of the alleged violations and relate them to the constitutional provisions said to have been violated.
47. In the case of *David Gathu Thuo Vs Attorney General & Another* (2021) eKLR Muchemi J held as follows: -

“The articles of the *Constitution* which entitles rights to the petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings”. (Emphasis is mine)

48. This petition falls short of the requirements pertaining to constitutional petitions as was set out in the decision in *Anarita Karimi Njeru (supra)* i.e that a constitutional petition should set out with a reasonable degree of precision that which is complained of, the provisions alleged to be infringed and the manner in which they are alleged to be infringed.



49. From the instant petition, I am not able to determine which rights and fundamental freedoms of the petitioners have been infringed or threatened or determine the manner in which they have been infringed.
50. In answer to the third question, I take cue from my finding in the second question and in the result find that the petitioners have failed to satisfy this honourable court that the orders sought should be granted.
51. In *Beekey Supplies Limited & another v Attorney General & another* [2017] eKLR, The learned judge observed as follows;

The court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in constitutional petitions.

**Disposition.**

52. In the result, I find that the Petition before me does not meet the threshold of a constitutional petition and the same is dismissed.
53. Each party shall bear own costs.
54. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023.**

**L A OMOLLO**

**JUDGE**

**In the presence of: -**

**Miss Karuga for the petitioner.**

**Mr Maina for the 1<sup>st</sup> respondent.**

**No appearance for the 2<sup>nd</sup> respondent.**

**Court assistant; Ms Monica Wanjohi.**

