



**Ratanya v Land Adjudication and Settlement Tigania West &  
5 others; M'mukiri & another (Interested Parties) (Petition  
E018 of 2021) [2023] KEELC 587 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 587 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
PETITION E018 OF 2021**

**CK NZILI, J**

**FEBRUARY 8, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLE 40, 47, 258 OF THE CONSTITUTION OF KENYA  
IN THE MATTER OF ARTICLES 22, 23 AND 165 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 15, 16-20, 21, 23, 24 AND 27 OF  
THE LAND CONSOLIDATION ACT CAP 283 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 80, 26(A) (B) OF THE LAND REGISTRATION ACT**

**AND**

**IN THE MATTER OF SECTION 7 OF THE LAND ACT NO. 6 OF 2012**

**AND**

**IN THE ENVIRONMENT AND LAND ACT 2011**

**BETWEEN**

**DOMIZIANO M'CHOKERA RATANYA ..... PETITIONER**

**AND**

**THE LAND ADJUDICATION AND SETTLEMENT TIGANIA  
WEST ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND ADJUDICATION AND SETTLEMENT OFFICER URINGU 1  
ADJUDICATION SECTION ..... 2<sup>ND</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR – TIGANIA WEST ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF SURVEY ..... 4<sup>TH</sup> RESPONDENT**



**CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**ERESTUTO M'MUKIRI ..... INTERESTED PARTY**

**ALEXANDER BAARIU ..... INTERESTED PARTY**

### **JUDGMENT**

1. By a petition dated 8.6.2021 the petitioner describing himself as a gatherer, occupant, and developer of land known as Parcel No Nyambene/Uringu/1/98 in his possession for the over 60 years, sued the respondents for alleging that they jointly colluded with the interested parties, subdivided his land and created new parcels of land namely Parcel No.'s Nyambene/Uringu/1/3420 and 3421 in favour of the interested parties without following due process and in contravention of his constitutional fundamental rights and freedoms. He prayed for: - declaration that the purported subdivisions, the hiving off of his land and the registration in favor of the interested parties, was in violation of his constitutional rights and freedoms; for the cancellation, revocation and or reversion of the resultant titles to his original parcel number and lastly, for the invalidation of the registration of his land in favor of the interested parties. The petition was supported by two affidavits by Domiziano M'Chokera Ratanya sworn on 8.6.2021 and 30.9.2021 respectively.
2. The petitioner's testimony as contained in said affidavits was that he gathered the said land in 1956 prior to the demarcation process in the area and that in accordance with the record of existing rights, he was issued with an allotment letter dated 7.12.1994 marked as annexure DMR "1". That after all the disputes in the adjudication committee stage were concluded, the petitioner stated that he put up a permanent house on the land in 1994 and has since made extensive developments thereon as per photographs marked as annexure DMR "2".
3. That in 2014, the interested parties alongside the respondents allegedly interfered with the original maps and the adjudication records whereof he protested to the District Land Adjudication and Settlement Officer (DLASO) in charge of the area, but despite this, in April 2020 he discovered that the respondents had allegedly altered the adjudication register and the demarcation map to illegally create Parcels No's 3420 and 3421, which the interested parties immediately transferred to their relatives and were now threatening to evict him as per the demand letters dated 19.3.2021 marked as DMR "3".
4. The petitioner averred that he sought and obtained a demarcation map which indicated his permanent house and that of his son were part of the new Parcel No's. 3420 and 3421 created out of imaginary boundaries, yet the interested parties have never been on his land. He attached a copy of the map, photographs and his gathering book as annexure marked DMR 4, 5 and 6 respectively.
5. The 1<sup>st</sup> – 3<sup>rd</sup> respondents filed a replying affidavit sworn by Diana Mbugu, a Land Adjudication and Settlement Officer Tigania West Sub County on 21.9. 2022.They confirmed that the record of existing rights indicated that the petitioner as the recorded owner of Parcel No. 80 gathered under folio No. 197 measuring 18.22 acres as per the attached. Record of Existing Rights as annexure marked DM "1". It was averred that the account was added with 5.0 acres from Folio No. 485 and 1690 following objections to the (RER) numbers 1474 and 3754 and later with two more acres through Objection No's 3869 and 498, making a total acreage of 20.51 acres. Further it was averred that 10.41 acres were hived off and transferred to Parcel No. 1935 pursuant to the decision of lower court Case No. 1 of



- 1994 with the resulting No's 3420 and 3421 issued to M'Anjiru M'Ibui and M'Itome M'Ibai for 3.0 and 2.0 acres respectively causing the remaining acreage to reduce to 5.10 acres.
6. The respondents averred that the petitioner has failed to disclose to this court that he filed Judicial Review Meru Misc. Application No. 23 of 2008 seeking to quash the land adjudication officer's decision in Objection No's 19, 960, 620, 37 and 976 with Objection No's 19, 960 and 967 relating to Parcel No. 98 and in which he was a party to the objection case.
  7. Further, the respondents averred that the petition was unmerited since it was only through an ordinary suit and not in a petition, evidence could be called and tested, given that the court was being called to unravel processes dating back to 2007; without the petitioner having exhausted the internal mechanisms under the Land Consolidating Act. Additionally, it was averred that the petitioner had not demonstrated how his fundamental rights have been violated, had failed to attach a published map, wished to make the court to usurp powers it did not process under Section 18 of the Land Registration Act and had failed to demonstrate what steps he had taken before the map was generated under Section 26 of the Land Consolidation Act.
  8. The interested parties filed an answer to petition dated 28.5.2021, a replying affidavit sworn by Erestuto M'Mukiri on 25.8.2021 and 27.10.2021, a witness statement and a list of documents dated 25.2.2022. The interested parties averred that they acquired a share of their grandfather's M'Mbui M'Thangaku (deceased) estate after filing an A/R objection No. 3726 whose outcome was not appealed against hence were lawfully owners of the suit premises which the petitioner has allegedly attempted to encroach into. They therefore denied the alleged infringement of the petitioner's rights.
  9. In the affidavit dated 21.8.2021, the interested parties averred that the suit land was left to the three sons among them the petitioner's father who was requested to hold the land during gathering on behalf of his two brothers, as the only educated member of the family. It was further averred that after the publication of the register, the interested parties' parents sought for their respective shares which the petitioner adamantly refused to surrender, making the lodging of the A/R objection No.3726 inevitable.
  10. The interested parties averred that the said objection was heard and determined by the 2<sup>nd</sup> respondent whose outcome was that the petitioner acquired 5.10 acres and the 1<sup>st</sup> & 2<sup>nd</sup> interested party's fathers acquired 3.00 acres and 2.00 acres respectively. Subsequently the implementation of the decision on the ground occurred. The interested parties averred that the decision by the 2<sup>nd</sup> respondent was legal, rational and logical and that it was never appealed against by the petitioner until he was awakened by a demand notice dated 18.3.2021.
  11. The interested parties averred that it was the petitioner who has trespassed into their parcels of land which they have been tilling since the 1960's. Additionally, the interested parties averred that the suit land was also a subject matter in *Meru JR No. 23 of 2008* which was dismissed and in which the petitioner appealed as *Nyeri Civil Appeal No. 190 of 2019* as evidenced by annexure marked EM 2 (a) & (b). Additionally, the interested parties averred that the suit parcels have already been distributed to their respective beneficiaries pursuant to a confirmed certificate of grant produced as annexure marked EM 3 (a) and (b) respectively.
  12. In a supplementary affidavit sworn on 30.9.2021, the petitioner maintained that he was the one who gathered the suit land and not his late grandfather who died in 1920 long before the adjudication process begun. The petitioner denied holding the land in trust for anybody since it was as a result of consolidation of various fragments from other areas he had gathered and that the adjudication committee cases were finalized by 1968 hence the alleged Objection No. 3726 of 1994 was illegal since under the Land Consolidation Act, only an arbitration board under Sections 12, 13, & 14 thereof as



- opposed to a land adjudication committee. He relied on a DLASO's letter dated 17.7.1997 indicating the particulars of the subject section.
13. Further, the petitioner averred that Objection No. 3726 of 1994 was eventually nullified by the Provincial Land Adjudication and Settlement Officer by a letter dated 30.5.1999 and 21.6.1996 annexed as DMR "3" and "4" respectively, following his complaint. As regards the 2<sup>nd</sup> interested party, the petitioner averred that he did not prefer any appeal as indicated in the letter by DLASO dated 17.1.2012. He produced the two letters as annexure marked DM "5" & "6".
  14. Moreover, the petitioner averred that since the interested parties never appealed to the arbitration board and given the nullification of the said decision at the provincial level, his R.E.R remained valid. He produced the proceedings and decisions in A/R Objection No. 37 which led to the filing of the Judicial Review as annexure marked DMR "7". The petitioner averred that the interested parties misdirected the land adjudication officers to implement an already annulled decision hence his warning letter dated 16.1.2015 marked as annexure DMR "8 (a) and (b)" respectively.
  15. It was the petitioner's contention that since the decision was nullified, the resultant parcels of land could not form a basis for distribution in a succession cause. Lastly the petitioner refuted the photographs produced by the interested parties as taken elsewhere and the alleged imaginary boundaries to land parcels illegally recorded in the names of the interested parties.
  16. In a further replying affidavit sworn on 27.10.2021, the 1<sup>st</sup> interested party averred that the Provincial Land Adjudication Officer had no right to interfere with the DLASO's decision by dint of Section 19 of the Land Consolidation Act. Similarly, the 1<sup>st</sup> interested party averred that his late father filed A/R Objection No. 37 which was determined in his favour triggering the Judicial Review case hence the petitioner's petition was premature until the appeal in the Court of Appeal was conclusively heard and determined.
  17. With leave of court, parties agreed to canvass the petition through written submissions dated 27.10.2022 and 24.11.2022 for the petitioner and the interested parties.
  18. The petitioner has submitted that the petition is hinged on Articles 22 (1), 23, 165 (3) (b), 258 (1) of the Constitution and Section 7 of the Land Act 2012, Section 26(1) of the Land Registrations Act, and Sections 20 & 27 of the Land Consolidation Act.
  19. It was averred that since there was no objection within 6 months by the interested parties, the petitioner's RER was entered and notice of completion of RER given together with a certificate to that effect which under Sections 20 and 27 of the Land Consolidation Act was final. Therefore, the petitioner submitted that any alteration to the register thereafter was fraudulent, illegal and in breach of his constitutional rights to land. Reliance was placed on Titus Barasa Makhanu v Police Constable Simon Kinuthia Gitau & 3 others (2016) eKLR.
  20. The petitioner further submitted that his right to fair administrative action was violated by the respondents in altering the adjudication register, subdividing, allocating and registering the interested parties as land owners without a notice or considering the history of the adjudication process and the record of existing rights. Reliance was placed on Kuria Greens Ltd v Registrar of Titles and another (2011) eKLR.
  21. The petitioner submitted that the acts of the respondents also infringed on the national values and principles including his right to human dignity, for not following the law and altering the adjudication register contrary to the principles of good governance, integrity and accountability by state officers. Reliance was placed on Ahmed Isack Hassan v Auditor General (2015) eKLR.



22. The interested parties submitted that the petition was *res-judicata* and *res sub-judice* in view of the pending appeal at the Court of Appeal Nyeri and was contrary to Section 7 of the [Civil Procedure Act](#) as read together with Section 28 of the [Environment and Land Court Act](#).
23. Reliance was placed on [Pangae Holdings Ltd and another v Hacienda Development Ltd and 2 others](#) (2020) eKLR, [Benedict Obat & 2 others v Pius Onyango Obat](#) (2021) eKLR, [Richard Makwen Sang and 3 others v Principal Secretary Ministry of Housing & Urban Development and 9 others](#) (2021) eKLR.
24. Concerning the alleged violation of rights, the interested parties submitted that the subdivisions were legally done leading the petitioner seeking by way of judicial review to quash the decisions and since the petitioner had his day in court and was still before the court of appeal his rights were never violated.
25. The issues for determination are:
  - i. If the petition has met the constitutional threshold and if it discloses a constitutional question.
  - ii. If the petitioner exhausted the internal mechanism before moving to court.
  - iii. If the petitioner has proved any breach of constitutional rights and freedoms so as to be entitled to the prayers sought.
  - iv. What is the order as to costs?
26. A party moving the court for an alleged breach of constitutional rights and freedoms is required to comply with the procedural requirements set out under Articles 22, 23 (1), (2) & (3), 258 of the [Constitution](#) as read together with the [Constitution of Kenya \(Fundamental Rights & Freedoms\) Practice and Procedure Rules 2013](#), by disclosing his capacity, particulars and nature of rights or freedoms breached, particulars of injuries or damage made, pending or concluded cases over the dispute and the reliefs sought.
27. Prior to the promulgation of the 2010 Constitution, the court in [Anarita Karimi Njeru v Republic](#) (1979) eKLR and [Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others](#) (2013) eKLR had made findings that a constitutional petition must be pleaded with precision, specificity and that it was not enough for a party to merely cite the constitutional provisions alleged to have been breached. The court said that there must be details and particulars on how, when, where and through which processes the right or freedom is alleged to have been threatened, breached or infringed. Similarly, courts have held that a party must bring tangible evidence in the body of petitions showing the manner he breaches occurred. See. [Daniel Kibet Mutai & 9 others v Attorney General](#) (2019) eKLR.
28. In this petition, the petitioner has cited Articles 40, 47 and 258 of the [Constitution](#). The petition at paragraph A, B, C & D sets out the description of the parties, locus of the petitioner, particulars of breach, grounds thereof and the reliefs sought. Further, the petition is supported by several affidavits and annexures. In my considered view therefore, the petition meets the basis minimums under the Constitution which has enabled the respondents together with the interested parties to understand and respond to the petition. See [Bernard Murage v Fine Serve Africa Ltd](#) (2015) eKLR.
29. A petition must also disclose a constitutional question or controversy. This essentially means one whose answers and or reliefs flow from the constitution but not a statute.
30. It must fall within the four corners of the [constitution](#) so that the court can grant the reliefs particularized under articles 23 (3) of the [constitution](#). It is not every infringement of a legal right which must get its answers from the constitutional court.



31. A constitutional court must also not be trivialized to handle all manner of breaches of legal rights and freedoms. See *Patrick Mbau Karanja v Kenyatta University* (2012) eKLR. That is the reason why Chapter V of the [Constitution](#) provides for fundamental rights and freedoms. The jurisdictions of a constitutional court as set out under Article 22 and 23 of the [Constitution](#) is limited in the sense that Article 21 thereof places a duty on the state and every state organ to observe, respect, protect, promote and fulfill the rights and freedoms in the bill of rights.
32. Therefore, it goes without saying that not every infraction of a right or freedom in the bill of rights should entitle a party to rush to the constitutional court since the [Constitution](#) under Article 159 thereof sets out other courts, tribunals and alternative dispute mechanisms where one can seek justice. See [Board of Management Visa Oshwal Primary School v Shree Visa Trustees and 4 others; National Land Commission \(interested party\)](#) Application 32 (E043 of 2020) (2022) KESC 4 (KLB) (17<sup>th</sup> February 2022) (Ruling).
33. In *Godfrey Paul Okutoyi and 2 others v Habil Olaka and another* (2018) eKLR, Chacha J held that rights conferred by statute were not fundamental rights under the Bill of Rights and a breach of them should be redressed through a court of law in the manner allowed by that particular statute or in the ordinary suit. Further the court held that not every failure to act in accordance with a statute should give rise to a constitutional petition.
34. In *Bernard Murage v Fine Serve Africa Ltd & 2 others* (2015) eKLR, the court held that not each and every violation of law must be raised before the constitutional court as a constitutional issue especially where there exists an alternative remedy. Lenaola J as he then was, echoed the same word in *Patrick Mbau Karanja v Kenya University supra* and held that the constitution is an instrument of governance and that simple matters between individuals which are of purely civil or criminal nature should follow the route of Article 165 (3) (a) of the [Constitution](#) otherwise to invoke the Bill of Right would dilute its sanctity.
35. Further the court in [Republic v Paul Kihara Kariuki AG & 2 others exparte Law Society of Kenya](#) (2020) eKLR the court held that constitutional issues include the constitutionality of a statute, the interpretation of a statute and its application. Coming to the doctrine of exhaustion in *Boniface Akusala & another v LSK & 12 others* (2021) eKLR the court held that the doctrine originates from Article 159(2)(c) of the [Constitution](#), while in *William Odhiambo Ramogi & 3 others v AG and another* (2020) eKLR, the court held the doctrine serves the purpose of ensuring a party first of all is diligent in the protection of his own interests within the mechanism in place for resolution outside court.
36. Similarly, the court cited with approval [Speaker of National Assembly v Karume](#) (1992) KLR 21 where it was held that a procedure set by the Constitution or Statute outside court must be strictly adhered to since there were good reasons for such special procedures. Likewise in [Geoffrey Muthinja Kibiru and 2 others v Samuel Munga Henry and 1756 others](#) (2015) eKLR, the court said that courts ought to be fora of the last resort and not the first port of call the moment a storm brews unless the issues raised related to a constitutional interpretation or where an important constitutional value was at stake; or where the suitability of the internal mechanism under the statute was inadequate or if there had been a clear abuse of discretion by the alternative dispute mechanism including arbitrariness, capriciousness and the disrespect of the rules of natural justice. See *Royal Media Services Ltd v AG & others* (2015) eKLR, [Fleur Investments Ltd v Commissioner of Domestic Taxes & another](#) (2018) eKLR.
37. On the issue of *sub-judice* and *res-judicata*, the respondents and the interested parties took the view that the petition was an abuse of the court process based on the same subject matter that the petitioner has appealed against to the Court of Appeal after this court dismissed a judicial review seeking to quash the award by the respondents which forms part of the petition herein. In response, the petitioner while



- admitting the pendency of the appeal, he took the view that the court dismissed the judicial review on technicalities and therefore the matter was not determined on merits to fall within Section 7 of the [Civil Procedure Act](#).
38. Rule 3 (8) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#) provides that nothing in the Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the court.
39. In [Margaret Migwi v Barclays Bank of Kenya Ltd](#) (2016) eKLR, the court held that the filing of a fresh notice of motion where there was pending in court another undetermined notice of motion was an abuse of the court process. In [Kenya Planters Cooperative Union Ltd v Kenya Cooperatives Coffee Millers Ltd and another](#) (2016) eKLR the court cited with approval [Choklolo v AG Trinidad and Tobago](#) (1981) ULR 108 and [Maharaj v AG Trinidad and Tobago](#) (1970) A.C 385, where the court held that a collateral attack of a judgment through an appeal and another one through a constitutional reference would be subversive of the rule of law. The court in [Kenya Planters Cooperative Union](#) case (*supra*) took the view that the petitioners conduct in filing the petition at the pendency of an appeal over the same issues was an abuse of court which and that the later petition should be struck out for there to be good order in litigation and for the proper use of judicial time and resources.
40. The court cited with approval the [King v the General Commissioner for the purpose of Tax Kensington exparte Princess Edmund of Plignal](#) (1917) KB 486 at page 495, where it was held that there was an inherent jurisdiction by every court to prevent an abuse of court by stopping such proceedings. Similarly, the court went on to find that the petition *sub-judice* as defined under Section 6 of the [Civil Procedure Act](#).
41. Applying the foregoing principles and caselaw to the instant case the bone of contention by the petitioner is that the respondents in utter breach of statute and the [Constitution](#) proceeded to sub divide his Parcel No. 98 into two Parcels No's .3420 and 3421 in favour of the interested parties without his notice and outside the timelines set out by the [Land Consolidation Act](#). He averred that the said acts infringed on his rights under Articles 10, 40, 47 and 258 of the [Constitution](#) as read with the [Land Registration Act](#), [Land Act](#), [Environment and Land Act](#) and the [Land Consolidation Act](#).
42. The petitioner filed a supplementary affidavit sworn on 30.9.2021 following a response by the interested parties that the initial land was ancestral land belonging to three sons of the late M'Ibui M'Thanyaka which were demarcated in the petitioners name in trust for them, he adamantly refused to surrender them triggering A/R Objection No. 3726 of 1994 leading to allocation of 5.10 acres in his favour and 3.00 acres and 2.00 acres in favour of the interested parties, which decisions were not appealed against within the internal mechanisms set under the Land Consolidation Act; that the petitioner filed *JR No. 23/2008* which is still pending as *Nyeri Civil Appeal No. 190 of 2019*.
43. The petitioner averred that Objection No. 3726 of 1994 was illegal since committee cases had closed and that the [Land Consolidation Act](#) did not have a provision for a land committee appeal save for arbitration board under Sections 12, 13 & 14 thereof. The petitioner averred that he protested to the provincial land adjudication and settlement officer who nullified the decision *vide* a letter dated 30.5.1995 where after the land adjudication officer notified the committee about the decision and a reminder dated 21.6.1996 was sent to the DLASO by the Provincial Land and Adjudication and settlement officer copied to the Director of Land Adjudication but strangely the interested parties misdirected the Land Adjudication Officer to implement an already nullified award or decision. Further, the petitioner averred that the 1<sup>st</sup> interested party filed an A/R Objection No. 37 whose decision led to the filing of the judicial review.



44. In the replying affidavit by the respondents through the affidavit sworn by Diana Mbugu, it was stated at paragraph 9 thereof that the common thread in Objections No's 19, 37, 960 and 967 forming part of the judicial review and the pending appeal was parcels No. 98, the subject of this petition.
45. Looking at the previous litigation alluded above, it is quite evident that the 1<sup>st</sup> and 2<sup>nd</sup> interested parties in this petition were also parties to the appeal in Nyeri alongside the 1<sup>st</sup> respondent herein.
46. The interested parties in a further replying affidavit take the view that the provincial Land Adjudication and Settlement Officers letters dated 30.5.1995 and 21.6.1996 have no legal basis to nullify an award since the [Land Consolidation Act](#) has no such a provision for an intervention by the provincial land adjudication and settlement officer.
47. The respondents take the view that the creation of Parcel No's 3420 & 3421 was lawfully zone through the Land Committee *Case No. 1 of 1994* whose outcome the petition failed to challenge through an objection to the register before the map was generated under Section 26 of the [Land Consolidation Act](#).
48. It is the respondents view that the petitioner was indolent in so far as his statutory rights were concerned and that he failed to exhaust the internal mechanism on time or at all leading to conclusively and finality under the Act hence he cannot be heard to allege any breach of his constitutional rights and freedoms under Articles 10, 40, 47 and 258 of the [Constitution](#) as read together with the [Land Consolidation Act](#), [Land Registration Act](#) and the [Land Act](#).
49. From the respective pleadings herein, what is coming out clearly is that there is a pending appeal by the petitioner touching on the entire Parcel No. 98 and its subdivisions.
50. The basis for the application for certiorari related to Objection No's 19, 976, 960 & 37 said to have been heard and determined in the absence of the petitioner on 14.12.2007, 17.12.2007 and 29.11.2007.
51. In the judicial review case, the court struck out the proceedings on 8.4.2019 for failure to annex both the proceedings and awards in the objection's proceedings before the 2<sup>nd</sup> respondent. The petitioner thereafter filed *Nyeri Civil Appeal No. 190 Of 2019*.
52. The respondents and the interested parties have raised objections that in view of the pending appeal. This petition is an abuse of the court process and that that the petitioner should have awaited the outcome of his appeal. The petitioner has been silent to this objection.
53. In [Peter Kimandiu v Land adjudication officer Tigania West District & 4 others](#) (2016) eKLR the court was dealing with the interpretation of the dispute resolution mechanism regarding a completed adjudication register (A/R) and whether the Land Adjudication Officer could sit alone under Cap 283.
54. The court took the view that unlike in the [Land Adjudication Act](#) the committee was very central under the [Land Consolidation Act](#) to sit with the land adjudication officer at all the stages starting from Section 9, the arbitration board, Section 11, the preparation of record of existing rights, under Section 15, on the issuance of notice for objects, under Section 16, on the filing of objections, under Section 17 on demarcation of the land, under Section 23, on the preparation of the adjudication register and, thereafter the hearing of an objection to the adjudication register under Section 26 (1) of the Act. Under Section 26 (3) thereof, the law provides that no appeal shall lie against any decisions by the adjudication officer to dismiss objection or order for rectification or to award compensation.
55. In this petition, what is clear is that the petition in the judicial review case was acting in furtherance of the internal mechanism as set under the [Land Consolidation Act](#) in so far to questioning the process of the hearing of the objections brought against Parcel No. 98 in with compliance with the law. This court struck out the notice to motion for non-compliance with Order 53 Rule 7 of the [Civil Procedure](#)



- Rules. Being aggrieved by the decision of this court made on 8.4.2019, the petitioner exercised his right of appeal to the Court of Appeal, whose outcome has not been disclosed to this court.
56. The question for this court to answer is whether the petitioner can come back to the court for a decision over the same parcel number, between almost the same parties, over the same issues and while seeking almost similar reliefs, albeit this time round a constitutional petition.
  57. The petitioner at paragraph 14 of his supplementary affidavit to the petitioner sworn on 30.9.2021 has made an admission that he holds the record of existing rights under Section 15 Cap 283 and attached as annexure DMR “7” the copy of the proceedings and decision in A/R Objection No. 37 that he says led to the filing of the judicial review proceedings. At Paragraph 15 thereof he averred that the interested parties misdirected the land adjudication officer to irregularly and illegally implement the annulled *Case No. 1 of 1994*.
  58. Therefore, this clearly shows that what the petitioner is complaining about at paragraph 12 – 13 of the petition and has sought as constitutional reliefs are the same reliefs as to what was before this court then by way of a judicial review and now pending before the Court of Appeal.
  59. In other words, the petitioner has worn new clothes and approached this court basing his claim on alleged breach of constitutional rights in the manner the respondents heard and determined the interested party’s objection albeit late.
  60. Article 159 2(c) of the Constitution is couched in mandatory terms that by this court exercising its judicial authority, it shall be guided by the principle that alternative dispute resolutions shall be promoted.
  61. The petitioner chose in furtherance of the law to follow the path of judicial review to quash *inter alia* the decisions by the 2<sup>nd</sup> respondent in objections Nos. 19, 960, 967 and 37 on the manner Parcel No. 98 was reduced to 5.11 acres from the initial 10.10 acres in favour of the interested parties who happen to be his cousins.
  62. The petitioner at the time, he filed this petition knew his appeal was still pending. In his petition, supporting affidavit and the supplementary affidavit, the petitioner deliberately failed to disclose the pendency of the judicial review and the appeal at the appellate court which have a direct bearing to this petition as required of him under Rule 10 (2)e of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013.
  63. Even after the issue was raised by the respondents and the interested parties, the petitioner gave it a lip service and failed to disclose at the very least, its relevance and the status of his pending appeal.
  64. Clearly, the petitioner in so far, he failed to make material disclosure in the first instance and has continued to prosecute this petition as if the appeal in Nyeri Court of Appeal has no relevance or bearing to this petition, that by itself amounts to an abuse of the court process. The petitioner cannot have it both ways, pursue an appeal over the same subject matter and also prosecute his petition against the same issues, parties and the subject matter.
  65. Borrowing from the words of Mutungi J in *Bernard Mulakwen Sang (supra)* and Boaz Olao J in KPCU (supra) the petition herein has all the hallmarks of the pending appeal. Until the appeal is heard and determined the petitioner would be abusing the court process and the court would be acting against its inherent powers to tolerate the use of its judicial time and resources to sustain an abuse.
  66. Judicial review has been widened under Article (8) and 47 of the Constitution as read together with the Fair Administrative Actions Act 2016. Therefore, a party need not resort to a constitutional petition



especially when he or she has chosen the path of filing a judicial review application. It was therefore unnecessary for the petitioner herein to mount a parallel process through a constitutional petition and drag the respondents and the interested parties to this court. In so doing, the petitioner has made the parties on the opposite side incur costs and expenses. Consequently, I find the petition incompetent and an abuse of the court process. The same is dismissed with costs to the interested parties.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2023**

In presence of:

C/A: Kananu

Sandi for petitioner

1<sup>st</sup> Interested party

**HON. C.K. NZILI**

**ELC JUDGE**

