



**Mberia & another v County Government of Meru (Petition
01 of 2020) [2023] KEELC 18766 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION 01 OF 2020**

**CK YANO, J
JULY 12, 2023**

BETWEEN

JOSEPH BUNDI MBERIA 1ST PETITIONER

JULIUS MUTI M'THIRIBI 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF MERU RESPONDENT

JUDGMENT

1. By a petition dated 21st January, 2020, the petitioners are seeking the following orders:-
 - a) A declaration that the Respondent has breached the petitioners' right to property under Article 40 of *the Constitution* by causing the petitioners Kianjai Market stall Plot No. A 17 & Plot No (B) to be changed on the map and taken illegally.
 - b) General damages for breach of petitioner's right to property.
 - c) Costs of this suit and interests on (b) above.

The Petitioner's Case

2. The petition was supported by a verifying affidavit sworn by Joseph Bundi Mberia and Julius Muti M'Thiribi on 21st January 2020 and the annexures thereto. The Petitioners stated that they are businessmen and operate their businesses at Kianjai Market and have been paying and renewing out business licences from the year 1999 to date. That they are registered owners of Market Stall Kianjai Market plot No.A 17 issued vide Minute No.TP & M.16/05 A(a)17 and plot No.B 49 vide Minute No.20/92 (C) (B) 49. Copies of the licenses and minutes are annexed.
3. The Petitioners stated that they were given the said plots in the year 1992 by the defunct Nyambene County Council as per the map attached marked "JBM3".That a former Councillor, Mr. Francis



Muchiri who was incharge of Kianjai Market was involved in the allocation process and is aware of what transpired together with the former area chief called Daniel Limbere.

4. It is the petitioners' contention that the Respondent has unlawfully changed the map of Kianjai Market stall in contravention of their ownership rights and that the Respondent has issued threats to evict them from their plots and has instructed them to look for alternative premises. The petitioners contend further that the Respondent has also illegally brought on the petitioners' plots new occupants and put them on the map and yet the petitioners are the people who are on the ground and in occupation of the said plots.
5. The Petitioner further stated that the Respondent has made decisions that are infringing on their right to ownership of their properties without giving them an opportunity to give their views and have them participate in the process of the said decision making.
6. The Petitioners are seeking for compensation if they are to be disposed of their properties because they have no other source of income and livelihood apart from the earnings they get from the Market stalls and arguing that their families depend on the same.
7. The Petitioners stated that in the alternative the Respondent should leave them to occupy and use their properties without any interference.
8. The Petitioners stated that the court has the jurisdiction to hear and determine the matter under the Law and cited Article 165 of *the Constitution* of Kenya, 2010.
9. The petitioners averred that they stand to suffer immense loss if the Respondent is allowed to evict them from their properties.
10. The petitioners stated that Article 10 of *the Constitution* lists public participation as one of the national values and principles of governance that binds all state organs, state and public officers, and all persons in Kenya whenever any of them applies or interprets *the Constitution*, enacts, applies or interprets any laws ,or make or implements public policy decisions
11. The petitioners further stated that the petition is premised on their right to property enshrined in the Bill of Rights under Article 40 of *the Constitution*.

Respondent's Case

12. The Respondent filed a replying affidavit dated 26th May 2021 sworn by Jefferson Musyoka wherein he has noted that the petitioners have not exhibited any ownership documents for market stall Nos.17 &49 respectively at Kianjai Market. The deponent stated that he confirmed that the defunct Nyambene County Council never allocated any market stalls to the petitioners'. He tated further that he has noted that the petitioners do not have any certificate of allocation from the defunct Nyambene County Council or from the Respondent.
13. The deponent averred that he had noted that the applicants were to be allocated market stalls subject to availability of space in the markets and that there is no single documents from the petitioners to show that space subsequently became available and that they were actually allocated such stalls.
14. The deponent stated that he further believed that under the Physical Planning Act, Kianjai Market is fully planned and all the available plots have been allocated to their rightful proprietors and therefore insisted that the petitioners do not own any property at Kianjai Market that needs protection under article 40 of *the Constitution* of Kenya.



15. The deponent averred that even if the petitioners were operating kiosks or stalls, those are temporary permits that are capable of being revoked at the Respondent's pleasure for purposes of proper planning and development of the market.
16. The deponent contended that there is no mention of the alleged persons allocated the spaces previously held by the petitioners and argued that the petition by the petitioners herein does not meet the threshold of a Constitutional petition and that there are no constitutional issues that have been set out by the petitioners.
17. The deponent further contended that the petitioners have not exhausted alternative dispute resolution Mechanism under the provisions of the *Physical and Land use planning Act* No. 13 of 2019 and urged the court to dismiss the petition with costs.
18. The respondent also file a notice of preliminary objection dated 21st June 2021 on the following grounds:-
 - a) That this Honourable court lacks jurisdiction to entertain the present suit.
 - b) That the suit herein and the application dated 16th November, 2020 is manifestly and materially defective as it does not comply with the provisions of the Physical Planning Act Cap 286 Laws of Kenya particularly section 10 (2) (a) which requires the complaints by the petitioner be determined by the Liasion committee.
 - c) That the petitioner/applicant herein has failed and or neglected to exhaust the alternative means of dispute resolution as provided by statute.
 - d) That the instant suit is therefore premature, frivolous and an abuse of the court process as this Honorable court's jurisdiction has been limited by statute.
 - e) The suit and the application herein should be struck out with costs to the respondent.

Submissions

19. The petition was canvassed by way of written submissions. In their submissions dated 22nd March 2022, M/s Kevin Nyenyire & Co. advocates for the petitioners submitted that the petitioners allegations have not been controverted fully by the respondent. That it is trite that under Article 40 of *the constitution*, which was cited, the petitioners have the right to property which includes the use of the suit property and submitted that the petitioners have proved their petition to the required standard and that therefore the court ought to uphold their rights.
20. The firm of M/s Mwirigi Kaburu & Co. advocates filed the respondent's submissions dated 3rd April, 2023. It is submitted that the petitioners have not exhibited any ownership documents for market stall Nos.17 & 49 at Kianjai Market neither did they have any certificate of allocation from the defunct Nyambene County Council or from the Respondent It is the respondent's submission that the documents attached to the petition are illegible minutes albeit not certified generically to state a plot in Kianjai Market. That there is no letter of allotment neither PDP Map for the said plot that was attached.
21. It is the respondent's contention that documents of ownership especially on land matters must have precision if they are authentic which is not the case herein. The respondent relied on cases of Nelson Kazungu Chai & 9 others vs Pwani University College (2014)eKLR and Sara Leitich v Joshua Rutto & 2 others (2021) eKLR which restated the powers of allocation of government land.



22. The respondent urged the court to be persuaded that the defunct Nyambene County council never allocated any market stalls to the petitioners. That as per paragraph 6 of the Replying Affidavit dated 26th May 2021, the petitioners were to be allocated market stalls subject to availability of space in the Markets. It is the respondent's contention that there was no single documents from the petitioners to show that space subsequently became available and that they were actually allocated such stalls.
23. The respondent submitted that the petitioners do not own any property at Kianjai Market that needs protection under Article 40 of *the Constitution* because even if the petitioners were operating kiosks or stalls, these are temporary permits that are capable of being revoked at the respondent's pleasure for purposes of proper planning and development of the market.
24. The respondent further submitted that the petition does not meet the threshold of a constitutional petition and should be struck out as there are no constitutional issues that have been set by the petitioners.
25. It is the respondent's contention that the petition raises issues which are disputes on re allocation of two plots and falls squarely within the realm of private law civil claim. The respondent submitted that the issues raised touches on matters of ownership and can only be adequately addressed and/or redressed by way of civil suit. The respondent placed reliance in the case of Gabriel Mutava & 2 Others vs Managing Director, Kenya ports Authority [2016] eKLR.
26. The respondent contended that the petitioner ought to have filed a normal civil suit and prayed that the petition be struck out with costs to the respondent.

Analysis And Determination

27. I have perused the petition, the response and the submissions and authorities filed in regard to the petition. The issues that I can deduce form the petition are-:
 - i. Whether the petition meets the threshold of a Constitutional petition.
 - ii. Whether the petitioners are the owners of Market Stall Kianjai Market Plot No. A17 and plot No. (B) 49.
 - iii. Whether the Respondents interfered with the petitioner's rights to the suit property.
 - iv. Whether the petitioners are entitled to the reliefs sought.
 - v. Who bears the cost of the petition?

Whether the petition meets the threshold of a Constitutional petition.

28. In Javan Oscar Bulemi (suing as Secretary General Tiriki Union (E.A) v Permanent Secretary, Ministry of Internal Security and Principal Administration & 2 others [2015] eKLR the court observed:

“The manner in which constitutional petitions are to be drafted has also severally been dealt with by our courts. In the late 1970's the High Court dealt with this issue in the case of Anarita Karimi Njeru vs The Republic [1976-1980] KLR 72 and came up with the following precise principle in dealing with constitutional petitions. It is now required of a petitioner to:

- I. Specifically set out the provisions in *the constitution* that have been allegedly violated



II. Provide the particulars of the alleged violations

III. Provide particulars in which the respondents have purportedly infringed their rights.”

29. Further in the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 Others* [2013] eKLR the Court of Appeal observed that:

“We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and save the court from the embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new constitution is whether a Petition as stated raised issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare”

30. In the instant case, the Petitioners have raised the issue that the respondent made decisions that are infringing on their right to ownership of their plots without giving them an opportunity to give their views and have them participate in the process of the said decision making. The petitioners further allege that the respondent has allocated their stalls to other people.

31. I am of the view that the petitioners have not raised a constitutional issue. In the case of *Benard Murage v Fine Serve Africa Ltd & 3 others* [2015] eKLR, the Supreme Court held that:-

“Not each and every violation of the law must be raised before the High court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

32. In this case, the issue raised in the petition are disputes on reallocation or ownership of stalls which fall squarely within the realms of private law. Even if the petitioners were operating stalls, these are temporary permits that are capable of being revoked by the respondent for purposes of proper planning. The petitioners have also not demonstrated ownership of the property that requires protection by the court.

Whether the petitioners are the owners of Market Stall Kianjai Market Plot No.A17 and plot No. (B) 49.

33. The Petitioners have alleged that they are the registered owners of market stall Kianjai Market plot No.A 17 issued vide minute No TP & M 16/05 A (a) and plot No.(B) 49 vide Minute No. 20/92 (C). They have also alleged that the Respondent unlawfully changed the map of Kianjai Market stall in contravention of the ownership rights of the petitioners. It is trite law that for a person claiming ownership of a property the same must be proved by evidence. One cannot merely claim ownership without proof.



34. The petitioners have attached minutes of extracts dated 16th May 2005 and minutes extract dated 26th October 1993 wherein it is captured that the committee had considered their applications for market spaces and the same were subject to availability of space in the market. One wonders at what point the petitioners became the registered owner of the market stalls.
35. Moreover there is an elaborate procedure on acquisition of allocation of market space and I am not convinced that the petitioners are registered owners by virtue of paying for the permits. There is no evidence of ownership as the same was on a temporary basis. Consequently, the impugned action by the Respondent did not violate the Petitioner's aforesaid constitutional rights.
36. Article 40 of *the Constitution* provides that:
- 40.(1) Subject to article 65, every person has the right either individually or in association with others, to acquire and own property-
- (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall enact a law that permits the state or any person –
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over any property of any description; or
 - (b) to limit or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) The State shall not deprive a person of property of any description, unless the deprivation –
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land in accordance with Chapter five; or
 - (b) is for a public purpose or in the public interest and carried out in accordance with this constitution and any act of Parliament that-
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired in good faith of land acquired under clause (3) who may not hold title to land.
37. I am certain that the petitioners have not proved that they are the registered owners for them to invoke article 40.
- Whether the Respondents interfered with the petitioner's rights to the suit property.
38. The petitioners raised the issue that the respondent made decisions that are infringing on the petitioners right to ownership of their plot without giving them an opportunity to give their views and have them participate in the process of the said decision making and had issued threats to evict the petitioners from their plots and had brought on new occupants.
39. The petitioners further stated that article 10 of *the Constitution* lists public participation as one of the values and principles of governance.



40. On the other hand the respondent submitted that the petitioners do not own any property at Kianjai Market that needs protection under Article 40 of *the Constitution* because the petitioners were operating kiosks or stalls which are temporary permits that are capable of being revoked at the respondent's pleasure for purposes of proper planning and development of the market.
41. In the case of John Mining Temoi & another v Governor of Bungoma County & 17 others Mabeya J, opined:
'.....as a basic minimum, the petitioners are required to show not only the provisions of *the constitution* which have been violated but also the manner in which they have been violated with regard to them in demonstrating the manner in which there has been a violation of their rights or of *the constitution*, the petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation.'
42. Similarly Hon. Lenaola J, (as he then was) in the case of Stephen Nyarangi Onsoma & Another vs George Magota & 7 others [2014] eKLR in revisiting the principles in Anarita Karimi's case stated as follows:
'....this court has in the past expressed its concern about the manner in which parties coming before the court and alleging a violation of constitutional rights have prescribed their cases. As a basic minimum a petitioner is required to cite the provisions of *the constitution* which have allegedly been violated and the remedy which he seeks for the violation. In demonstration the manner in which they have been violated, a petitioner should present before the court evidence of the actual basis upon which the court can make a determination whether or not there has been a violation.'
43. It is apparent that the petitioners are not the registered owners of Kianjai Market plot No. A 17 and plot (B) 49 and as such they have nothing in form of evidence to demonstrate that their rights were violated.
44. Having carefully considered the petition before me and the submissions, I find that the petition does not raise any constitutional issues at all. Secondly, the petitioners have failed to prove the alleged infringement of constitutional right to the required standard.
45. I find that the petition has no merit and I dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 12TH DAY OF JULY 2023

IN THE PRESENCE OF:

Court Assistant - V. Kiragu

No appearance for petitioner, but petitioners present in court

Mwirigi Kaburu for respondent

C. K. YANO,

JUDGE.

