



Mutiri alias Remus Banu Mutiri alias Remus Banu Muthuuri v Itirikia (Petition 15 of 2013) [2023] KEELC 19866 (KLR) (20 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19866 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION 15 OF 2013

CK YANO, J

SEPTEMBER 20, 2023

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS UNDER ARTICLE 40 AND ENFORCMENT OF SAID RIGHTS, UNDER ARTICLE 22,23, 159 AND 165 OF THE CONSTITUTION OF KENYA

BETWEEN

REMUS CYPRIAN BANU SAIMON MUTIRI ALIAS REMUS BANU MUTIRI ALIAS REMUS BANU MUTHUURIPETITIONER

VERSUS

STEPHEN NTURIBI ITIRIKIARESPONDENT

BETWEEN

REMUS CYPRIAN BANU SAIMON MUTIRI ALIAS REMUS BANU MUTIRI ALIAS REMUS BANU MUTHUURI PETITIONER

AND

STEPHEN NTURIBI ITIRIKIA RESPONDENT

JUDGMENT

Introduction

1. By a petition dated 12th August 2013, which was amended on 26th July, 2018 and further amended on 16th December, 2022 the petitioner is seeking the following orders-;
 - a) A declaration that the petitioner is the sole and exclusive owner of all that parcel of land to wit title number Tigania West/Akithi III/1388 measuring about 0.1425 Ha situate in Muili village, in the former Akithi III adjudication section within Meru county and the respondent's blockage of the road of access and encroachment into a portion thereof measuring about 0.009 Ha is unjustified, illegal *ab initio* and a flagrant derogation of the petitioner's constitutional



right to acquire, own and enjoy property under Article 40 (1) and (2) of the *Constitution of Kenya*.

- b) An order compelling the respondent to demolish and remove his stone house and pit latrine from the petitioner's land title no. TIGANIA WEST/AKITHI/III/1388 situate in Muili village in the former Akithi III adjudication Section within Meru County and the road of access into the said land.
 - c) An Injunction, permanently restraining the respondent, his family members, representatives, employees, servants agents and anybody else acting or claiming for through or on his behalf or at his behest direction or instruction, from entering into trespassing onto, encroaching into and or whatsoever interfering with the petitioner's quiet, peaceful, undisturbed and uninterrupted actual and exclusive possession, cultivation, occupation, development, user and enjoyment of all that land Title NO. TIGANIA WEST/AKITHI III/1388, measuring about 0.1425 Ha, situate in the former Muili village, Akithi III adjudication section within Meru county.
 - d) Costs of the petition and interest thereon at court's rates.
2. The petition was supported by facts set out in the petition and the affidavits of Remus Cyprian Banu Saimon Muthiri alias Remus Banu Muturi, the petitioner sworn on 12th August 2013, 26th July 2018 and 16th December, 2022.
 3. In response to the petition, the respondent filed what he christens "Answer to petition" dated 4th January, 2014 and filed in court on 11th February, 2014.

The Petitioner's Case

4. The petitioner's case in a nutshell is that he is the registered proprietor of land title No. TIGANIA WEST AKITHI III/1388 measuring about 0.1425 Ha. (hereinafter "the suit property") adjacent to Muili market in Muli area within Meru County. That the respondent is the owner of plot No. 30 measuring about 40 by 80 feet adjacent to the petitioner's aforementioned parcel of land.
5. It is the petitioner's case that the respondent's commercial stone house in his plot No. 30 extends and completely blocks the road of access and encroaches on the petitioner's land. That the area encroached is 0.009 Ha. The petitioner states that on or about 16th November, 2011 he complained to the now defunct County Council of Nyambene seeking assistance for clearance of the said road of access and vacant possession of the area encroached by the respondent, but sometime in July 2013, the respondent in a flagrant abuse of his official powers as the then County Assembly representative for Akithi ward and despite the petitioner's protestations, damaged some of the petitioner's barbed wire delineating the extent and boundaries of the suit property and unlawfully established a pit latrine on a portion of the petitioner's land.
6. The petitioner averred that Geoland surveys went to the ground where they took measurements of both the petitioner's parcel No. 1388 and the respondent's plot No. 30 and vide a report dated 24th October, 2012 ascertained the encroachment complained of and recommended inter alia, demolition and removal of the respondent's house, but the respondent declined to do so. The petitioner also averred that a survey report dated 9th May 2022 done upon a scene visit by the Deputy Registrar of this court, the land Registrar and surveyor also confirms the said blockage and encroachment into the petitioner's land.



7. The petitioner contended that the aforesaid actions of the respondent are illegal, an epitome of impunity and a conspicuous and blatant contravention of his inherent and inviolable constitutional right to acquire, own, develop and enjoy property as provided for under Article 40 (1) and (2) of the [Constitution of Kenya](#). The petitioner listed particulars of violation of his constitutional rights by the respondent as depriving the petitioner user and enjoyment of his land, utilizing the said portion of the petitioner's land to the petitioner's detriment and denying the petitioner the right to use the road of access to the petitioner's land.

Response By The Respondent

8. The respondent denied the contents of paragraphs 3, 4 5,6,7,8, 10, 11 12 and 13 of the petition. The respondent admitted that he is the registered proprietor of plot No.30 which he stated has several structures standing thereon, but denied that the same borders the petitioner's plot No. 1388. He therefore denied encroaching into the petitioner's land, and urged the court to dismiss the petition with costs.
9. The petition was canvassed by way of written submissions but only the petitioner filed his submissions dated 6th July, 2023 through the firm of Carl Peters Mbaabu & Co. Advocates. The respondent did not file any submissions despite being duly served with the court's directions.

The Petitioner's Submissions

10. In their submissions learned counsel for the petitioner gave a background of the petition and submitted that the further amended petition meets the threshold as held in the case of [Anarita Karimi Njeru Vs Republic](#) (1979) eKLR and [Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 others](#) [2013] eKLR.
11. Regarding the merit of the further amended petition learned counsel for the petitioner submitted that the further amended petition is principally anchored on breach of Article 40 (1) & (2) of the [Constitution](#), which stipulates thus 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 not enact a law that permits the state or any person-;
 - (a) to arbitrarily deprive a person of 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 specific or contemplated in Article 27 (4).
12. The petitioner pointed out that the above constitutional stipulation is pleaded at paragraph 9(i) to (iii) of the further amended petition. The petitioner submitted that the documents in his bundle confirms the petitioner's ownership of his Land parcel No. 1388 and the respondent's ownership of adjacent plot No.30 Muili market and submitted that the respondent's illegal acts of constructing his house and blocking the access road and encroachment into the petitioner's land parcel No. 1388 has been proved by the evidential facts in the petitioner's affidavits and the report of Geoland survey as well as the report by the Deputy Registrar.



13. It is the petitioner's submission that the respondent did not file any document or a counter report to challenge the two reports both of which confirm the blockage of the access road and encroachment of the petitioner's parcel No. 1388 by the respondent's house.
14. The petitioner's advocate urged the court to find and hold that the respondent contravened the petitioner's constitutional right to property under Article 40 (1) & (2) of the *Constitution of Kenya* by constructing his permanent house on a portion of the petitioner's land parcel No. 1388. While relying on the case of *Simon Natal Ntoitha Vs Sub County Land Adjudication and Settlement Officer, Igembe North & 2 others* (2022) eKLR the petitioner urged the court to allow the petition in terms of prayer (a) (b) and (c) of the further amended petition
15. The petitioner further submitted that the "answer to petition" filed by the respondent is an alien document in constitutional petitions and that it flagrantly offends and flies in the face of Rule 15(2) (a) & (b) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and procedure rules* which obligate the respondent to oppose the petition either through a replying affidavit or a statement. That the "answer to petition" ought to be struck out and the petition herein deemed unopposed.

Analysis And Determination

17. Having analyzed the pleadings and the submissions filed, I find that the following issues are for determination.
 - i. Whether the petition raises any constitutional issue.
 - ii. Whether the petitioner is entitled to the reliefs sought
18. In the case of *Kennedy Onyango vs Idime Enterprises and another* [2021]eKLR, this court stated as follows

"In order for the petitioner to succeed in any constitutional petition, the law requires that the petitioner must demonstrate that the constitutional rights subject matter of the petition have actually been denied or violated or are threatened with denial or violation."
19. In the case of *Benard Murage Vs Fine Seve 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"
20. In order to appreciate the issues raised in the further amended petition, one has to go through all the paragraphs therein. What I can deduce from the pleadings is the issue of trespass or encroachment. The petitioner alleges that the respondent has encroached onto his parcel of land by putting up a permanent structure thereon and blocking an access road. Indeed, the petitioner is seeking for declaration that the disputed portion is his, order of demolition and injunction.
21. In view of the foregoing, I have no doubt in my mind that the petition is premised on the alleged trespass or encroachment. I do not think that the dispute qualifies to be a constitutional issue. In my view, this is an issue that falls squarely in the realm of private law. There are a host of authorities that elucidate the principles that private law claims should not form the basis of constitutional petitions and should be resolved by using the usual process of litigation.



22. In the case of *Godfrey Paul Okutoyi & others – vs-Habil Olaka & another* (2018) eKLR E.C MWITA J. on the issue of there being an alternative remedy *in lieu* of constitutional remedies at paragraph 65 stated-;

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental right 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 in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a Statutory Provisions 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 procedure.”

23. In the case of *Patrick Mbau Karanja Vs Kenyatta University* (2012) eKLR Lenaola, J (as he then was) expressed himself as follows in regard to when the constitutional interpretative mandate of the court may be invoked-;

“I should only say this as I conclude, in Francis Waithaka Vs Kenyatta University Petition No. 633 of 2011, this court was categorical that it is imperative that the bill of rights and the constitutional interpretative mandate of this court should not be invoked where other remedies lie.

Further the court also cited with approval, the decision in *Teitinnang Vs Ariong* (1987) LRC const. 517 where it was held as follows-;

“dealing now with the question, can a private individual maintain in action for declaration against another private individual or individuals for breach of fundamental rights provisions of the law? The rights and duties of individuals and between individuals, are regulated by private law. the Constitution, on the other hand, is an instrument of Government. It contains rules about the government of the day, to the governed. I am of the opinion that an individual or group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution no action for a declaration that there has been a breach of duty under that provisions can lie or be maintained in the case before me, and I so hold.”

24. After citing the above case Lenaola J went onto observed as follows

“I maintain this position and it is important that simple matters between individuals which are of a purely civil or criminal nature should follow the route of Article 165 (3)(1) and be determined as such. To invoke the bill of rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights.”

25. I fully associate myself with the sentiments expressed by Mwita J. and Lenaola J (as he then was) in the above referenced cases and I agree that matters that do not call for the court’s constitutional interpretative mandate under the bill of rights provisions of the Constitution should not be disguised



as constitutional petitions seeking enforcement of the bill of rights. There ought to be a clear delineation of constitutional matters and the ordinary civil suits. In the present matter the petitioner is seeking for ownership of the disputed portion of land that has no constitutional underpinning at all. It is a matter that ought to have been filed as an ordinary civil suit.

26. In the same breadth in case of *Kenya Agricultural and Livestock Research Organization (KALRO) - vs Edison Sonje Taura & 3 others* [2021] eKLR, it was held that-;

“There is no escaping that what the petitioner is seeking has no constitutional underpin at all. This is an apparently simple case of trespass and permanent injunction. It appears to me a clear civil dispute alleging the tort of trespass. It should have been commenced through a plaint and not a constitutional petition. It has been said time without number that the constitutional procedure/process should not be subjected to abuse, where persons file all sorts of mundane civil disputes under the constitutional procedure process.”

27. Similarly, in the case of *Gabriel Mutava & 2 others Vs Managing Director, Kenya Ports Authority* 2016, eKLR the Court of Appeal stated as follows-;

“Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

28. From the material on record, I am not satisfied that the petitioner has made out a case to show that his Constitutional Rights as envisaged in the Articles cited in the petition have been violated or threatened to be violated. A constitutional petition is meant to deal with clear Constitutional matters and it is to be applied in clear cases where facts can be ascertained not in a case like the present one which discloses a simple case of trespass and permanent injunction.

29. It is therefore my finding that the petition has no merit and I dismiss it. Considering that the respondent did not participate at the hearing. I order that each party bears their own costs.

30. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF SEPTEMBER, 2023.

C.K YANO

JUDGE

In Presence Of

Court Assistant – V Kiragu / Lenah M.

Ms Mugo holding brief for Carlpeters for petitioners

No appearance for Mbogo & Muriuki for respondent

