



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO. 10 OF 2019

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40
OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF ARTICLES 22 AND 23 AND 165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 26 A, 27 AND 28 OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 24, 25 AND 26 OF THE LAND REGISTRATION ACT

AND

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

AND

IN THE MATTER OF ENVIRONMENT AND LAND ACT 2011

BETWEEN

MIKE MAKARENA.....PETITIONER

VERSUS

THE DISTRICT LAND ADJUDICATION AND

SETTLEMENT OFFICER

TIGANIA EAST DISTRICT.....1ST RESPONDENT

PERMANENT SECRETARY

MINISTRY OF LANDS..... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL..... 3RD RESPONDENT

COUNTY GOVERNMENT OF MERU..... 4TH RESPONDENT

JUDGMENT

A. PETITION

1. Before the court is the petition dated 5.5.2019 where the petitioner alleges he brings the case as a representative of Persons Living With Disabilities, (PLWD), being a resident of Tigania East District. He brings the case on behalf of residents of Tigania East District who are genuine residents and owners of land in **Ngaremara/Gambella Section**, a trust land.
2. He avers the 1st respondent in collusion with other individuals were fraudulently demarcating their land and dishing out the parcels to their conspirators and land grabbers to the detriment of the residents who are now at the risk of being rendered landless.
3. As a result, the petitioner avers their customary rights to own land which they have been occupying for decades risks being forcefully taken away contrary to law and the constitution.
4. Further, he pleads the illegal actions of the 1st respondent have caused a lot of tension, hostility, imminent destruction, suspicions, anxiety in the area and was likely to cause breach of peace and anarchy.
5. He avers that the demarcation process should involve the residents, devoid of fraud, conspiracy and secrecy and unless the court intervenes, the petitioner's constitutional rights will be violated.
6. The petitioner pray for declaration that the acts of the 1st respondent are unconstitutional, arbitrary, wrongful, null and void and should be stopped; permanent injunction restraining the respondents from continuing with the said adjudication process until they respect the rights of the petitioner and conservatory orders stopping the continuation of the adjudication process.
7. The petition is supported by an affidavit of Mike Makarena which more or less regurgitates the contents of the petition save to annex a demand letter dated 11.3.2019 addressed to the 1st respondent and a list of members marked **MM "1" – MM "2"** respectively.
8. Together with the petition, the petitioner brought a notice of motion dated 6.5.2019 seeking for interim orders.
9. The application and the petition was served upon the respondents and a return of service filed on 20.5.2019.

B. RESPONSE

10. The 1st and 2nd respondents filed a replying affidavit sworn by Eliab Kamaru on 11.11.2019 in opposition to both the petition and the notice of motion. He stated Ngaremara Gambella adjudication section was declared an adjudication section on 11.3.2016 and a notice issued to the locals under **Section 5 Cap 284** following which the ascertainment and the recording of rights and interests begun on July 2017, after the adjudication committee team was appointed; and that the work was ongoing; that there were procedures of ascertaining and recording of interest on land as per **Section 14 and 15 and under Section 13**, it is stipulated on how claims are to be lodged and processed.
11. That the petitioner had not appeared before the adjudication committee to lay claim of his interest and his name did not appear in **annexture MM"2"** which list was misleading, full of dishonesty and untruthful since 66 of the persons in the list and alleged to be petitioners have had their parcels recorded as itemized as per paragraph (9) of his affidavit hence the claim of disenfranchisement of land and right to registration was not true.
12. Further, he stated in line with the law as at the filing of the affidavit, over 40,000 parcels had been demarcated and surveyed, close to 1300 disputes had been registered out of which over 1200 cases had been heard and determined with no claim or objection recorded by any of the petitioners more so over the alleged foreigners, and that it was only in the settlement schemes that land was allocated to the beneficiaries hence the petitioner was not candid and truthful since he had also failed to follow laid down procedures to have his claim if meritorious lodged and or processed.
13. The 4th respondent entered appearance on 22.5.2019 and put in a replying affidavit sworn by Jackson Makarina Muriungi on 22.8.2019 opposing both the petition and the motion on the basis that the adjudication process was above board and was following the law; parties with issues were filing objections or claims within the internal mechanisms; the land committee had been properly constituted; there was no violation of any rights and freedoms; and the **annexture MM "1"** was before the wrong forum and that there had been no conspirators as alleged or at all.
14. In a ruling delivered on 16.1.2020, the court declined to issue any interim orders based on its decision in **Meru ELC Petition No. 7 of 2017**, ruling of 24.5.2019 in **Meru ELC Petition No. 5 of 2019** and **Meru Petition 5 of 2019**.

C. WRITTEN SUBMISSIONS

15. With leave of court, parties opted to put in written submissions to dispose the petition by 17.2.2022.
16. The parties filed their submissions dated 12.11.2021 and the 4th respondent dated 17.1.2022 respectively.
17. The petitioner submits the 1st respondent has appointed under **Section 4** has clear powers under **Sections 9, 10 and 11 of Cap 284** but opted to exercise his powers under **Section 5** without the involvement of the petitioner(s) hence there was no transparency, notification of parties and their participation was lacking contrary to **Articles 10, 61 of the Constitution** given that the 1st and 2nd respondents had failed to attach any notices issued in line with **Section 5 of the Land Adjudication Act** to their replying affidavit.
18. The petitioner submits despite the names attached and paragraph 9 of the replying affidavit by Eliab Kamaru, the rightful owners with

immense development in the area were not allocated land. Reliance is placed on *County Government of Kiambu & 3 Others –vs- Robert N. Gakuru & Others [2017] eKLR* on the role of public participation.

19. It is submitted further that the 1st respondent as a public officer was bound by the Constitution, Land Laws and in particular **Articles 20 (3) (b) 20 (4)** hence the petitioner(s) were entitled to the prayers sought under **Order 40 Civil Procedure Rules, Article 40, 22, 23 and 165 of the Constitution of Kenya**. Reliance is placed on *Law Society of Kenya –vs- Office of Attorney General & Another: Judicial Service Commission (Interested Party) [2020] eKLR, Centre for Rights Education and Awareness (CREAW) & Another – vs- Speaker of the National Assembly & 2 Others [2017] eKLR, Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR, Olympic Sports House Ltd -vs- School Equipment Centre Ltd [2012] eKLR, County Government of Meru & Another –vs- District Land Adjudication & Settlement Officer Tigania East Sub-County & 18 Others [2018] eKLR*.

20. The 4th respondent submits the petition is incompetent as the issue at hand was over adjudication which should have come as a judicial review and not a constitutional petition as held in *Anarita Karimi Njeru –vs- Republic [1979] eKLR, County Government of Meru & Another –vs- District Land Adjudication & Settlement Officer Tigania East Sub-County & 18 Others [2018] eKLR*.

21. Secondly, it is submitted that the adjudication process was still ongoing according to the law with people settled on the ground and on the contrary, no evidence had been adduced by the petitioners to back their claim.

22. Instead of the petition, the petitioner(s) were at liberty to lodge their claims or objections if any to the relevant adjudication bodies in line with the **Land Consolidation Act** and the **Land Adjudication Act** and failure to the exhaust internal mechanisms, should by itself bar them from filing the petition. Reliance is placed on *Speaker of the National Assembly –vs- Karume [1992] eKLR, Lepore Ole Maito –vs- Letwat Kortom & 2 Others [2016] eKLR, Stanley Lezen Mliwa –vs- Leonard Kapala Makangalu & 2 Others [2007] Eklr*.

23. Further, the 4th respondent submits what is not allowed is forbidden and that the petitioners having failed to start and or exhaust the internal remedies alluded above they were estopped from pursuing any perceived interest in the suit land through this petition which must fail.

24. Still, the 4th respondent submits that a demarcation process and its procedure have to be observed since it was a genesis of planning which process does not deprive any land owner rights to lodge or ascertain interest in land and that the petition was based on mere allegations falling short of **Section 107 of the Evidence Act** since no committee members have sworn affidavits to say that they were not consulted or involved; that the list of grabbers and conspirators has not been disclosed meaning the petitioners lack evidence to support the petition.

25. The 4th respondents also take the view an adjudication process was participatory in nature, the petitioners opted not to participate in it but want to stall it which should not be allowed out of the wider public benefit and interest; that there was no basis for any conservatory orders; that the court should not intervene at the stage when the process was at its initial stages which will bring confusion especially bearing in mind **Section 30 of Land Adjudication Act**. Reliance is placed on *Dickson Mukwe Lukeine –vs- Attorney General & 4 Others [2012] eKLR*.

D. ISSUES FOR DETERMINATION

26. The issues commenting themselves for determination are:-

i. If the petition meets the constitutional threshold.

ii. If the petitioner(s) have pleaded and proved any constitutional rights and freedoms breached or infringed on by the respondents.

iii. If the petitioners are entitled to any of the prayers sought.

iv. What is the order as to costs.

E. THE REGULATORY FRAMEWORK OF CONSTITUTIONAL PETITION

27. The law and procedure to make a constitution petition for the enforcement of rights and freedoms alleged to have been breached, infringed or threatened is governed by **Articles 20, 21, 22, 23, 159, 165 (2) (d) and 258 of the Constitution** as read together with **Constitution of Kenya, Rights and Freedoms (Protection Practice and Procedure Rules 2013)**.

28. The rules require that a constitutional petition may be presented by a person, a group or a class of people for and on behalf of a group or a class of people whom he or she belongs to.

29. The petition must disclose the parties, nature of rights and freedoms infringed, particulars of loss or injury caused or likely to be occasioned and lastly any cases criminal or civil pending or determined involving the parties.

30. **Article 22 (4) of the Constitution** as well as the **Rules** have a caveat that the right of any person to commence court proceedings and to

have the matter heard and determined by the court shall not be limited by the absence of rules.

31. Similarly, **Article 159** clearly states justice shall not be delayed and shall be administered without undue regard to procedural technicalities.

32. Having looked at the form and procedure, what then is the threshold of a constitutional petition and what is not a constitution petition?

33. Starting with *Anarita Karimi Njeru –vs- Attorney General [1979] eKLR and Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR* what is coming out clearly from our courts is that a petitioner must plead the specific constitutional questions, or controversies and give specific details and evidence of the right(s) and or freedom(s) allegedly breached, threatened or infringed. The issues of when, where, why and how come into play.

34. In this petitioner describes himself as a representative of persons living with disabilities and one making the petition on behalf of the residents of Tigania East District as well as genuine land owners of Ngaremara/Gambella adjudication section.

35. Whereas the Constitution grants any person the right to come to court on his own behalf and on behalf of a group of persons or organization in which he belongs to bring a petition, the petitioner has not attached a copy of any document to show he is a registered member of persons living with disability under the relevant law.

36. There is no authority to swear, plead and or act on behalf of and as a representative of the group he claims to represent including the alleged residents of Tigania East in general and land owners in Ngaremara Gambella adjudication section in particular.

37. Annexures marked **MM “1” and MM “2”** do not confer any authority to the petitioner to represent the listed members them nor have they authorized the petitioner to lodge the petition on their behalf, through minutes.

38. In my view therefore, the petitioner cannot possibly purport to claim for and on behalf of persons or residents who have not authorized him to present their concerns, complaints and or issues. He can only therefore represent his own private interests in this petition given that even annexure marked **MM “1”**, is not authored by the petitioner, nor has he described his relationship with the author of the annexed letter.

39. Similarly, the annexure MM “1” is not written by the author in the name of a group of persons or residents claiming to be aggrieved of any breach or infringement of their constitutional rights and freedoms. Needless to say, the author seems to be advancing a private claim/interest as opposed to a public interest. *See Communications Workers Union & Another –vs- Communication Authorities of Kenya [2015] eKLR, James Nduji & 4 Others –vs- Jamleck Waithaka Kinyua & 7 Others [2021] eKLR.*

40. So in absence of any demonstration of personal right(s) or group right(s) and by extension capacity to be affected directly or remotely by the impugned action(s), decision(s) by the respondents, my finding is that the petitioner has failed to plead any specific right(s) or freedom(s) both in his personal capacity and as a member of group(s) or community which have been infringed or are likely to be breached or threatened by the respondents.

41. The petitioner has also not pleaded any specific injury he has suffered or is likely to suffer by the alleged acts, decision(s) and or activities of the respondents regarding land in the Ngaremara/Gambella adjudication section.

42. Paragraph 6 of the petition does not specifically state where the petitioner specifically lives or resides. In paragraph 10, 11, 12, 13, 14 and 15 of the petition, the petitioner purports to speak in general terms for and on behalf of the petitioners.

43. In absence of a definition of his specific rights and or injury and authority to speak on behalf of the residents, my finding is that he has failed to specifically plead and prove his capacity to bring the petition in a representative manner or in public interest. *See Law Society of Kenya –vs- Commissioner of Lands & 2 Others Nakuru CC No. 464 of 2000.*

44. Even if for arguments sake the court were to remotely find that the petitioner has any grievance as a member of public without capacity to sue and plead on behalf of the members of Ngaremara/Gambella adjudication section, he can only do so after having shown how he has personally as a member or resident of the area been aggrieved by the action(s) or decision(s) of the respondents. This can only be through attaching a complaint letter to the respondents and in disclosing his specific grievance and breach of his constitutional rights and freedoms.

45. To attach a letter marked **MM “2”** containing a list of persons who have not authorized him to speak on their behalf and purport to say they have been denied their rights as to ascertainment of interests and rights over land is in my view infringement of the rights and freedoms of others without their consent or approval.

46. Further, there is nowhere the petitioner has said the people he claims to represent are so incapacitated that they could not give him authority to plead, swear and act on their behalf or that they could not approach the court by reasons of helplessness, disability or socio economic consequences. *See Javan Oscar Buleemi –vs- Permanent Secretary, Ministry of Internal Security & Provincial Administration & Others [2015] eKLR. See also Mwangaza L.P.O. Self Help Group –vs- Attorney General & 3 Others [2020] eKLR, Alfred Njau & Others –vs- City Council of Nairobi [1982] KAR 229, Charles Ratemo Nyambati –vs- Jackton Ocharo & 4 Others [2016] 3KLR.*

47. Turning to the issue of the nature of the alleged infringements, even though the court has made its finding, the claim is generalized, still the question is whether the petitioner has tried to prove the same to the required standard.

48. In *Sostenah Ogero Taracha –vs- Ethics & Anti-Corruption Commission & Attorney General [2017] eKLR*, the court held that the

alleged violation must be proved, and that the burden of proof is on he who alleges.

49. In this petition, the petitioner alleges there was no notification and public participation regarding the gazettement and the commencement of the adjudication process in the subject area. On the other hand, the respondents say the gazettement was done on 11.3.2016 and adjudication and demarcation was team lawfully established.

50. The petitioner submits the in absence of attached notice and material, the respondents have failed to prove there was full compliance with **Section 5 of Land Adjudication Act and Article 10 of the Constitution**.

51. **Section 107 of the Evidence Act Cap 80 Laws of Kenya** places the burden on he who alleges. The burden was on the petitioner to prove there was no-compliance with constitutional provisions with regard to his rights and freedoms leading to injury, loss and damage.

52. Courts have held a breach of a statute, regulations or policies does not necessarily amount to a constitutional claim, otherwise, we will be overburdening the constitution. The burden of proof never shifted in this instance to the respondents.

53. To say the least, the claim if any, by the petitioner in absence of precision on what constitutional rights and freedoms have been violated seems to fall under the private domain and which is governed by the adjudicatory laws with internal disputes mechanisms for anybody aggrieved by the adjudication process and or decision(s).

54. In ***Francis Oyagi & Samuel Motari Mangare & 2 Others [2018] eKLR***, the court observed it must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in constitutional petition, especially where there are alternative avenues of resolving the issues. See ***Sisilia Nyakoe & Another –vs- Attorney General & 4 Others [2021] eKLR***.

55. In ***Isaiah Mbaabu & 2 Others –vs- Land Adjudication & Settlement Officer Igembe South district & 4 Others [2022] eKLR***, this court took the view it is in the public interest that the process of land adjudication process be undertaken in strict compliance with the law. The petitioner has not shown that he subjected himself to the land adjudication process.

56. On the other hand respondents have demonstrated that some of the names alleges included in the petitioner's **annexture MM "2"** have had their parcels numbers issued yet the petitioner wants this court to believe his allegations more so, when his name was not among the persons who had invoked **Sections 3 and 15 of the Land Adjudication Act**. He has not attached any complaint indicating he has been denied a chance to participate in the adjudication process or that part of his land has been issued to a land grabber or a foreigner.

57. The easier thing by the petitioner would have been to demonstrate the land which he occupies had been allocated to so and so before he could purport to speak for and on behalf of a group.

58. Contrary to the petitioner's allegations, the respondents have brought a confirmation list showing 64 names of those who participated in the adjudication process and have been recorded as such. This evidence has not been contested by the petitioner.

59. My finding therefore is the petition herein is incompetent, lacks merit and is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 2ND DAY OF MARCH, 2022

In presence of:

Miss Gitonga for petitioners – present

Kieti for 1st to 3rd respondents –present

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE