



**Kimosop v County Government of Baringo (Environment & Land
Petition 8 of 2018) [2022] KEELC 2664 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2664 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND PETITION 8 OF 2018**

EO OBAGA, J

JULY 7, 2022

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE
10, 20, 22, 23, 40, 47, 64, 67 OF THE CONSTITUTION OF KENYA**

BETWEEN

CHEPCHIENG ARAP KIMOSOP PETITIONER

AND

COUNTY GOVERNMENT OF BARINGO RESPONDENT

JUDGMENT

1. The Petitioner filed this Constitutional Petition in which he sought the following reliefs:-
 - a. The declaration order that the entire suit land being Baringo/Kiboino 'B'/1349 as per the existing map, mutation form dated 29/3/2013 and title deed dated 6/1/2015 belongs to the Petitioner and that the Respondent's actions to invade and construct therein with a view of taking over 0.5 Acres or thereabouts or any part thereof of the said parcel of land Baringo/Kiboino 'B'/1349 measuring 1.30 Ha or thereabouts is null and void ab initio.
 - b. An order for permanent injunction as against the Respondent and/or agent(s) and/or department and/or any one person and/or agent(s) and or anybody acting under instructions and/or authority of the Respondent from accessing any part of the subject land parcel number Baringo/Kiboino 'B'/1349 measuring 1.30 Ha or thereabouts as per the existing map, mutation form dated 29/3/2013 and title deed dated 6/1/2015.
 - c. Costs of the petition.
 - d. Any other relief that this Honourable court may deem fit to grant.



2. The Petitioner contends that he is the registered owner of LR. No. Baringo/Kiboino ‘B’/1349 (suit property) which measures 1.30 hectares. The Petitioner states that in or around April, 2017, the Respondent through its Department of Industrialization, Trade and Tourism and Enterprise Development trespassed on to a portion of the suit property measuring 0.5 acres and started constructing a shade among other structures.
3. Despite the Petitioner protesting the actions of the Respondent, the Respondent has been adamant forcing the Petitioner to file the present petition. The Petitioner argues that as a result of the Respondent’s action, his Constitutional rights have been violated.
4. The Respondent opposed the Petitioner’s petition based on grounds of opposition filed on 8th November, 2021 in which the Respondent contends that the Petitioner’s petition is incompetent, frivolous, scandalous and is devoid of substance; that the issues raised in the petition revolve around ownership and boundaries of the suit property hence outside the purview of Constitutional Petition; that the Respondent has not breached any Constitutional or statutory provisions as no evidence has been placed before court to buttress the alleged encroachment, public interest to protect utilities override the Petitioner’s personal interests and that Cheploch Gorge remains public property which is part of Cheploch River.
5. The parties were directed to file written submissions in respect of the petition. The Petitioner filed his submissions on 10th May, 2022. The Respondent filed its submissions on 12th January, 2022. I have carefully gone through the petition as well as the opposition to the same by the Respondent. I have also gone through the submissions by the parties herein. The only issues for determination in this petition are firstly whether, the Petitioner has demonstrated that his Constitutional rights under Article 40 and 47 of *the Constitution* have been violated. Secondly, whether the Petitioner is entitled to the reliefs sought and thirdly, which order should be made on costs.
6. There is need for a Petitioner to be precise as to which of his Constitutional right has been breached and the manner in which the said right has been breached. This was underscored in the case of *Anarita Karimi Njeru – Vs- Attorney General* (1979) KLR 154 where the court held:-

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*. It is important (if only to ensure justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed”.
7. In the instant case, the Petitioner has singled out Article 40 and 47 of *the Constitution* as the ones which were violated. Article 40(1) (2) and (3) of *the Constitution* provides as follows:-
 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 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, or of any interest in, or right over, 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 is carried out in accordance with this Constitution and any Act of Parliament that— Constitution of Kenya, 2010 (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.”

8. The Petitioner alleges that the Respondent has trespassed on to 0.5 acres of the suit property and have constructed a shade thereon including other structures. Whereas the Petitioner in the supporting affidavit to the petition claims that he has annexed photographs to confirm the building of the structures, there are no such photographs annexed.
9. The Petitioner has also not annexed any survey report to show that the Respondent has trespassed on to a portion of the suit property measuring 0.5 acres. This being the case, there is no basis upon which this court can make a finding that any of the Petitioner’s constitutional rights under Article 40 of the Constitution have been violated.
10. Article 47 of the Constitution provides as follows:-
 1. “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.”
11. The Petitioner has not given any particulars of any administrative act done by the Respondent which infringed his right under Article 47 of the Constitution. This being the case, there is no basis upon which this court can make a finding that the Petitioner’s Constitutional rights under article 47 have been violated.
12. The Petitioner’s contention revolves around trespass and ownership of the suit property. This is a dispute which ought to have been solved in an ordinary civil suit and not through a constitutional petition. In the case of Sanghani Investment Limited –Vs- Officer in-charge Nairobi Remand and Allocation Prison (2007) eKLR the Court held as follows:-

“Be that as it may, I do agree with the Respondents that the underlying dispute herein is ownership of land. Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the Applicant; whether the title is genuine or not. In the case of *Rep –V-s- Exparte Karia* Misc Application 534/03, Justice Nyamu, Justice Ibrahim and Justice Makhandia held that in cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land, namely occupation, and disposition, there would be need to allow viva voce evidence and cross examination of witnesses which is not available in Judicial Review Proceedings. Even if the Respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced....so that in this case, even though this application were properly before this court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the



issue over the ownership of the land still stands. It will still require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil courts.”

13. In trying to justify the position that there is nothing wrong in bringing a suit through a wrong procedure, the Petitioner has relied on the cases of *Cecilia Njoki Njenga & 3 others –Vs- James Mburu Ndua & another* (2010) eKLR and *Jane Wangari Waiti –vs- Chief Land Registrar & another* (2021) eKLR. These two cases laid emphasis on procedure. Though the latter case involved a Constitutional Petition, the Judge was however alive to the fact that the dispute at the end of the day would have required calling of viva voce evidence. It is therefore clear that cases which ought to be resolved conveniently through ordinary suits ought not to be filed as Constitutional petitions.
14. The Petitioner also relied on the case of *Trusted Society of Human Rights Alliance –Vs- Attorney General & 2 others* (2013) eKLR where it was stated as follows:-

“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 ad save the court from the embarrassment of adjudicating on issues that are 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 issues 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.”

15. In the *Trusted Society of Human Rights Alliance* (Supra), the Court of Appeal emphasized the need for constitutional petitions to be 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. In the instant case, I have already said hereinabove that the Petitioner did not give the particulars of the alleged encroachment. There is no way the Respondent herein would have known what the Petitioner had in mind so that they could prepare adequately. It is therefore clear that the Petitioner’s petition has failed to reach the test of a constitutional; petition. This petition is devoid of merit. The same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 7TH DAY OF JULY, 2022.

E. OBAGA

JUDGE

In the presence of;

Ms. Kibet for Mr. Kibii for Respondent.

Mr. Kiboi for Petitioner.

Court Assistant -Albert

E. OBAGA

JUDGE



7TH JULY, 2022

