



**Onyambu & 3 others v Nyamongo & another (Environment & Land Petition
02 of 2021) [2022] KEELC 14759 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14759 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND PETITION 02 OF 2021**

JM KAMAU, J

NOVEMBER 3, 2022

BETWEEN

**JAMES ONYAMBU 1ST PETITIONER
MONGARE ONYAMBU 2ND PETITIONER
GRACE OKERIO 3RD PETITIONER
TUTI TAI 4TH PETITIONER**

AND

**LILIAN KERUBO NYAMONGO 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT**

JUDGMENT

1. This is a constitutional petition brought under articles 22, 23 and 50 of the [Constitution](#) of Kenya, 2010. The suit was commenced by way of a petition dated December 6, 2016 seeking for the following orders: -
 - a. An order of injunction restraining the respondents through their agents, servants, employees or any other person claiming through them from trespassing, interfering with, revoking the petitioners' titles West Mugirango/ Bomanono/1702, 1703, 1704 & 1705 respectively.
 - b. An order of certiorari do issue, quashing any decision made by the 2nd respondent over revocation, the ownership and registration of petitioners' title in West Mugirango/ Bomanono/1702, 1703, 1704 & 1705.
 - c. Costs of the petition.
2. The grounds upon which the petitioners seek the above prayers are that the petitioners claim to be the beneficiaries of the estate of the late Onyancha Ombachi who was allegedly the registered proprietor of



West Mugirango/Bomanono/1540 in 1976 through a first registration. Following Ombachi's death, the estate was administered by James Onyambu and was later sub-divided and distributed among its rightful beneficiaries who are the petitioners herein. It was sub-divided and registered as West Mugirango/Bomanono/1702, 1703, 1704 and 1705 respectively in 1986 who together with other unnamed beneficiaries have occupied the suit premises quietly since 1974 when the adjudication process was completed. In April 2016, the 1st respondent lodged a claim before the 2nd respondent imploring that the suit premises belonged to her late father, Ombachi Mauga as a result of which the 2nd respondent ordered the surrender of title deeds held by the petitioners and a restriction was registered against the suit lands and, according to the petitioners, unlawfully and illegally. The petitioners therefore pray for the orders of injunction, prohibition and *certiorari* quashing the decisions made by the 2nd respondent. The facts relied upon are contained in a supporting affidavit sworn on December 6, 2016 by the first petitioner, James Onyambu with authority from his co-petitioners which affidavit expounds on the grounds in the petition.

3. On February 6, 2017, the 1st respondent swore and filed a replying affidavit as well in response to the petition in which she deponed that upon adjudication, West Mugirango/Bomanono/1540 belonged to the late Ombachi Mauga who was her grandfather through his eldest son Wycliff Oroko Ombachi (who is also deceased). The land was given by Ombachi Mauga to Oroko Ombachi but that the latter had moved to Tanzania to look for a job and eke out a living. It is when the late Oroko Ombachi was working in Tanzania that the petitioners falsified documents and alleged that the land belonged to their late father. If the same was ever registered in the name of their father, then it was done so fraudulently. She further claims that the petitioners have never been in occupation of the suit land. Lilian continues to depon that the petitioners repeatedly or deliberately failed to turn up at the National Lands Commission and the County Registrar, Nyamira offices for the resolution of this matter. She asks the court to dismiss with costs the entire petition and even claims that the same is *res judicata*. The matter was contemporarily filed with a notice of motion seeking conservatory orders which were first granted *ex parte* on December 7, 2016.
4. On September 19, 2017, this court gave directions as follows: -
 1. That this court will dispense with the hearing of interlocutory applications in favour of hearing this petition on its merits.
 2. That the conservatory order issued by the court on December 7, 2016 will remain in force until the petition is heard and determined.
 3. That the petitioners are granted limited leave to harvest the trees growing on the portions they occupy and are in possession of.
 4. That each of the petitioners may harvest a minimum of 3 grownup trees.
 5. That the petition shall be heard *viva voce*.
 6. That the parties are directed to exchange their bundle of documents and witness statements within the next 60 days from today.
5. I must point out from the outset that this petition invokes 2 jurisdictions of this court, the prerogative jurisdiction of injunction and the 2nd jurisdiction a petition for orders of *certiorari* and prohibition under article 23 of the [Constitution](#) of Kenya, 2010 which provides for judicial review as a relief.
6. The petitioner seeks an order of injunction restraining the respondents for trespassing, interfering with or revoking titles Nos West Mugirango/Bomanono/1702, 1703, 1704 and 1705 respectively and an order of *certiorari* quashing "any decision" made by the 2nd respondent, the National



Land Commission over revocation, the ownership and registration of the petitioner's title in West Mugirango/ Bomanono/1702, 1703, 1704 and 1705. Since the second prayer i.e the prayer for judicial review of *certiorari* is brought under article 23 of the Constitution of Kenya, 2010 and not under the Law Reform Commission Act, the requirement for leave has in various cases been held not to be mandatory. I will address the issue of *certiorari* first before coming to the prayer of injunction. The parties agreed that they would want to be heard by way of *viva voce* evidence. The particulars necessitating *certiorari* are said to be as follows: -

- i. Purporting to lodge a claim on behalf of a deceased person.
 - ii. Addressing the claim outside her mandate.
 - iii. Claiming a land purportedly under the colonial land injustice notwithstanding the fact that this was a first registration.
 - iv. Summoning the petitioners to surrender their original title deeds for cancellation before any decision or verdict could be reached.
 - v. Registering a restriction on the suit properties without any due process of the law.
7. These are the issues that were raised as particulars of unlawfulness to warrant the prayer for *certiorari*.
8. In law, *certiorari* is a court process seeking judicial review for the quashing of a decision of a lower court or a public body. *Certiorari* comes from the name of an English prerogative writ, issued by a superior court to direct that the record of the lower court or tribunal or a quasi-judicial body be sent to the superior court for review. The term is latin for "to be made certain", and comes from the opening line of such writs, which traditionally began with the latin words "*certiorari volumus...*" ("we wish to be made certain..."). It is also known as a "quashing order". With the expansion of administrative law in Kenya within the last few decades, the order of *certiorari* has gained broader use to review the decisions of administrative bodies as well as lower courts. In English common law, *certiorari* was a supervisory writ, serving to keep "all inferior jurisdictions within the bounds of their authority, protecting the liberty of the subject, by speedy and summary interposition". The court was tasked with the duty of supervising all lower courts, and had power to issue all writs necessary for the discharge of that duty. *Certiorari* is used to bring into the High Court the decision of inferior tribunals or authority in order that it may be investigated. If the decision does not pass the test, it is quashed, it is declared completely invalid, so that no one need respect it. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. This is the concern of the order, for the sake of orderly administration of justice. *Certiorari* can only be used to correct jurisdictional errors, i.e when a court makes a decision that is out of its power to make or makes procedural improprieties such as denying a party a fair hearing or at all; it cannot be used to correct legal errors, i.e where a court makes a decision it is allowed to make, but decides incorrectly. The latter type of error can only be challenged through an appeal. With the promulgation of the 2010 Constitution, in addition to the power to issue *certiorari* for the protection of other legal rights, superior courts have power to issue *certiorari* to protect fundamental rights.
9. An order of prohibition on the other hand restrains a body exercising public power from exceeding its powers or usurping jurisdiction which it does not have. That is, it prohibits the decision maker and those relying on the decision from doing something which they are about to do, or from continuing a course of action already commenced, such as taking any further steps in the proceedings. The basis upon which the order is commonly issued is want, or excess, of jurisdiction or breach of natural justice.
10. The court will quash a decision already made if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with.



11. In *Municipal Council of Mombasa v Republic Umoja Consultants Ltd*, Nairobi civil appeal No 185 of 2007(2002) eKLR, the Court of Appeal held that: -

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e. the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review”.

12. Further circumstances under which orders of judicial review can be issued were elaborated by Justice Kasule in the Uganda case of *Pastoli v Kabale District Local Government Canal & others* (2008) 2EA 300 at pages 300-304.

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----.

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidswi v Secretary of State for the Housing Department* (1990) AC 876”.

13. It is the petitioners’ contention that the 2nd respondent acted *ultra vires* the provisions of the *Constitution* and those of the *National Land Commission Act* when it purported to revoke the titles West Mugirango/Bomanono/1540, 1702, 1703, 1704 & 1705 respectively in accordance with section 80 of the *Land Registration Act*, thereby granting itself powers that it did not have.

14. Article 47(1) of the *Constitution* of Kenya, 2010 provides that:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”



15. In *Kipsyenan Farmers Company v National Land Commission & another* [2019] eKLR Nakuru ELC Petition No 8 of 2018 Justice Munyao Sila held:

“I am at a loss as to where the National Land Commission got the idea that they have a mandate to investigate and make decisions in relation to privately owned land. When it comes to disputes over private land that is not the mandate of the National Land Commission. For example, if people holding land under private tenure, have a dispute as to whether such land has been subdivided properly, or who between two private individuals should have title to the land, or whether an individual’s title to private land should be cancelled, that is a dispute that needs to go to the courts and not to the National Land Commission.....It has been held in countless decisions that the National Land Commission needs to stick to its lane, which is dealing with public land.The 1st respondent entered into an arena in which it had no jurisdiction, and that being the position, this petition must succeed.”

16. From the above, the 2nd respondent has no business wading into disputes over private land. The 2nd respondent exceeded its jurisdiction and usurped the role of the Environment and Land Court. It is true that the Environment and Land Court is the only organ with constitutional and statutory power to handle the dispute herein.
17. Jurisdiction is everything and as long as the body has no jurisdiction, it doesn’t matter how well the judgment was reasoned. It is a nullity. On that account only, the prayer on judicial review for *certiorari* and prohibition would ordinarily succeed and the court would order that the decision of the chairman of the National Land Commission revoking the ownership and registration of the petitioners’ titles in West Mugirango/ Bomanono/1702, 1703, 1704 & 1705 communicated in a letter dated October 27, 2016 be quashed and further order that there be a prohibition restraining the National Land Commission from investigating the said titles.
18. However, what is before this court is only a letter dated October 27, 2016 referring to a decision made by the 2nd respondent. The petitioners have referred to the said communication from the 2nd respondent to the Chief Land Registrar which they seek this court to quash. This is just a transmittal letter and the petitioners never bothered to attach the decision that was made, a copy of which they were/are entitled to. They ought to have asked for a decision or verdict. In the absence of this decision or verdict, then there is nothing before this court to be quashed and the order of *certiorari* on this ground therefore fails. The court cannot be asked to quash what is not before it. It was incumbent upon the petitioners to place before me what they wish to challenge. Courts don’t act on hearsays. It could as well be that the said decision does not even exist at all.
19. In the absence of the decision and proceedings to be quashed, the court would not be able to interrogate the other processes that culminated to the 2nd respondent’s decision such as whether the parties were given audience, proper notice, whether there was bias or any member of the 2nd respondent was conflicted.
20. Having dealt with the relief of judicial review, the parties have already submitted themselves to the jurisdiction of this court which has the mandate to deal with the matter. The petitioners asked the court to interrogate this matter and determine it by ordering that an order of injunction do issue against the 1st respondent.



21. The Environment and Land Court is in a position to determine the rival interests of the petitioners and the 1st respondent as well as the legality of the title. On September 19, 2017, this court gave directions as follows: -

1. That this court will dispense with the hearing of interlocutory applications in favour of hearing this petition on its merits.
2.
3.
4.
5.
6. That the parties are directed to exchange their bundle of documents and witness statements within the next 60 days from today.

22. The hearing of the case kicked off on October 13, 2020 before Lady Justice J.M Onyango. James Onyambu was the first to take the witness stand. He described his co-petitioners as his brother, aunt and uncle respectively. He said that his father was the late Onyambu Ombachi who was the registered proprietor of LR No West Mugirango/ Bomanono/1540 issued on July 17, 1976. The same was later sub-divided into LR Nos West Mugirango/Bomanono/1702, 1703, 1704 and 1705 in 1986. He said that after their father's death, they applied for a grant but could not produce it since the same got burned in his house. He further said that they (I believe the petitioners) have been staying in the suit properties where they have carried out extensive developments. He denied that they engaged in fraud to obtain the title deeds and that by the time the 1st respondent complained to the 2nd respondent in 2015, West Mugirango/Bomanono/1540 was not in existence and the finding of the National Land Commission that they obtained the land by fraud was not supported by any evidence. To support his case, the 1st petitioner produced the following documents: -

1. Certified copy of the green card in respect to title No West Mugirango/Bomanono/1540.
2. Certificated of official searches in respect of West Mugiragno/ Bomanono/1702, 1703, 1704 and 1705 respectively.
3. Copies of title deeds for West Mugirango/Bomanono/1702 and 1704 respectively.
4. Receipts from the adjudication office.
5. Photos of the developments carried on the suit properties.
6. Copy of the recommendations/decision of the National Land Commission.
7. Copy of father's (Onyambu Ombachi) death certificate.

23. He summed up his evidence in chief by adopting his witness statement, supporting affidavit and annexures.

24. On cross-examination by Mr Omwoyo for the 1st Repondent, Mr Onyambu said that his father's name was Onyambu Ombachi. He died in 1972 and was the first registered proprietor of West Mugirango/ Bomanono/1540. That he has 2 brothers; 2nd and 4th petitioners and that they obtained the grant at Nyamira Court in a year that he cannot remember. He said that his father inherited the land from his grandfather and that he acquired it during the adjudication process. He also said that they stay on another land that was purchased by their father (which number was not stated) nor where it is situate



but that they use the suit land for farming. He also claimed that the 1st respondent is his cousin and also lives about a kilometer from his home and that her father was called Oroko. He said in cross-examination that he had produced a receipt in court dated March 11, 1985 showing that he had applied for probate. On re-examination, the witness said that before adjudication, his grandfather did not have a title deed. He said that the suit property was ancestral and that Oroko, the 1st respondent's father, has his own land and that his father was not supposed to give any land to Oroko. PW2, Tuti Tai, the 4th petitioner adopted the written statement of the 1st respondent (to whom he had given authority to file the suit) dated December 6, 2016 as his evidence in chief. On cross-examination by Ms Nyabuti for the 1st respondent, he said that his portion of land is LR No West Mugirango/Bomanono/1703 registered in his name. He testified that they commenced the process of succession in respect to their father's estate in 1982 which was concluded in 1992. He too could not remember the succession cause number. He also claimed that he didn't have the documents for the succession cause since his house similarly burned down and the documents were all destroyed. His son Tom lives on the land West Mugirango/ Bomanono/1703 where the witness has planted trees and that the 1st respondent entered on the suit land in 2000. He said that he did not appeal against the decision of the National Lands Commission but decided to file this suit.

25. After the close of the petitioners' case the 1st respondent commenced her evidence by first adopting her witness statement filed in court on February 6, 2017. She testified that her father, the late Wycliff Oroko Ombachi had got the land from his (the latter's) father, the late John Ombachi Muga. Her father lived with his family in Tanzania where he was working and that when they returned to Kenya, they found that their land had been encroached onto but that the 2nd respondent heard the matter and gave a verdict in her favour. In her written statement, the 1st respondent said that the petitioners' assertions were all falsehoods and distinguishable from the factuality of records maintained at the Lands office, Nyamira. She said that after adjudication, the land belonged to Ombachi Muga (now deceased) who was her grandfather and who before his death had given the suit land West Mugirango/ Bomanono/1540 to his son, Wycliffe Oroko Omachi, the 1st respondent's father but that when the latter were in Tanzania, the petitioners falsified documents and transferred the land to themselves. She further stated that the petitioners have never occupied the suit land nor owned it thus lacking legal entitlement of the same. She testified through her written statement that the alleged transmission is fallacious and that the petitioners' claim smacks of mischief and abuse of the process of the court. To back up her case, the 1st respondent produced the following documents:
1. Chief's letter dated March 18, 2016.
 2. Chief's letter dated October 13, 2016.
 3. Pleadings Kisii HCCC No 52/1986.
 4. Pleadings Kisii SRMCC 467/1984.
 5. Death certificate of Wycliffe Oroko Ombachi.
 6. National Land Commission letter dated July 14, 2016,
 7. Land Registrar letter dated March 22, 2016.
 8. Map sheet No 2.
 9. National Land Commission letter dated May 18, 2016.
26. On cross-examination by Mr Nyambati, Ms Nyamongo admitted that registration of West Mugirango/Bomanono/1540 to the 1st petitioner's father was a first registration in 1976 and that all



- the happenings preceding the registration of the land were done behind her father's back and without his family's knowledge when they were all in Tanzania. On re-examination by Ms Nyabuti, Lilian said that the National Land Commission's decision is contained in their letter dated October 27, 2016 indicating that the suit land belonged to her late father. Her late father had left her grandmother, Prisca Moraa Ombachi and her aunt to take care of the land while he was in Tanzania.
27. DW3- Jeremiah Matoke Nyarandi adopted his statement filed in court on January 11, 2019 as his evidence where he testified that he is a retired chief of West Mugirango location since 1984 to 2003 and a member of the Land Control Board, Nyamaiya Division between 2015 and 2016. He testified that in 2016, the D.O Nyamaiya had told the petitioners to stop cutting down trees on the suit property since the land belonged to the 1st respondent's father.
 28. On cross-examination by Mr Okemwa he said that he never met Wycliffe Orok Ombachi but that he knows where his family lived including his wife who still lives on the suit land, in his neighbourhood to date. The petitioners also live in the neighbourhood. He said that he came to know the 1st respondent from the time she was in primary school who he said is married and is a primary school teacher. He wound up his answer to cross-examination by saying that he never knew the 2nd & 4th petitioners' father but that the 1st respondent's mother was a member of *Maendeleo ya Wanawake*. On re-examination he said that he didn't know the 1st and 2nd petitioners' parents, that he lives about 5 kilometers from the suit land and that nobody ever came to see him for a letter of recommendation in respect to the petitioners' father's succession cause. He finally said that he has never known the petitioners to live on the suit land.
 29. The last witness was Mr Martin Manwari Osano, the Land Registrar, Nyamira who came to testify following summons from the court. He did produce in court copies of green cards in respect of West Mugirango/ Bomanono/1540 as well as the resultant West Mugirango/Bomanono/1702,1703,1704 and 1705 respectively.
 30. He testified that after every succession cause the lands office normally indicates the succession cause number in the register following or during the transfer of land by way of transmission but that in the case of the closing of LR No West Mugirango/ Bomanono /1540 to pave way for the registration of West Mugirango/ Bomanono/1702, 1703,1704 and 1705 this was not adhered to. He concluded his evidence by stating that his office received a copy of a letter dated October 27, 2016 from the National Land Commission copied to the Chief Land Registrar recommending the revocation of the title deeds issued to the petitioners herein.
 31. On cross-examination by Mr Okemwa, Mr Osano testified that the registration of the parcels of land above to the 4 petitioners ought to have been done in accordance with the certificate of confirmation of grant. He also testified that the adjudication officer normally gives the lands office documents for registration but that Onyancha Ombachi was the first registered proprietor of LR No West Mugirango/Bomanono /1540 but the documents from the adjudication officer can also not be traced.
 32. On re-examination by Ms Nyabuti, the Land Registrar held that in the case of transfer by transmission, the green card always reflects the succession cause number.
 33. After the Land Registrar Mr Osano testified, the 1st respondent's counsel Ms Nyabuti was unable to procure a witness from the National Lands Office and opted to close her case after which I invited parties to file their written submissions and the petitioners and the 1st respondent duly complied. I have considered all the evidence tendered, the documents produced and both submissions and I wish to render my decision on the issue of Injunction.



34. As I retired to write this second part of my decision in this matter, I was alive to the fact that there is no counter- petition. Having heard evidence adduced in court from both parties each claiming ownership of the suit property, how the petitioners had the suit property registered in their names, and the 1st respondent claiming that it should have been registered in her father’s name, should I then leave the ownership of the suit property in abeyance? What do I do with the evidence adduced in court? Do I throw away the baby with the bath water? I am persuaded by the words of Justices Dinesh Maheshwari and Krishna Murari in the recent Supreme Court of India case of [Akella Lalita v Sri Konda Hanumantha Rao](#) | 2022 LiveLaw (SC) 638:

.....it is a fact that absolutely no relief was ever sought by them for the change of surname of the child to that of first husband/ son of respondents. It is settled law that relief not found on pleadings should not be granted. If a court considers or grants a relief for which no prayer or pleading was made depriving the respondent of an opportunity to oppose or resist such relief, it would lead to miscarriage of justice.....” (emphasis mine).

35. This recent Indian case was decided on July 29, 2022. It gives the following conditions for not granting a relief:

- i. where there is no prayer or pleading.
- ii. if the adverse party has been deprived of the opportunity to oppose the granting of the Relief.

36. If the above conditions are lacking, then it would lead to miscarriage of justice to go ahead and grant the relief. On the first condition, where then there is no prayer but the pleadings disclose the relief, the court, in my view, would safely go ahead and consider granting the relief.

37. If I leave the instant matter without declaring the ownership of West Mugirango/ Bomanono /1540 and West Mugirango/ Bomanono /1702, 1703,1704 and 1705 the parties will be left in more confusion than they were in before they decided to seek for justice. I must therefore decide who between the petitioners on the one hand and the first respondent on the other owns the suit land.

38. Evidence has come out clearly as to the ownership of the suit property. Although there is no prayer for the finding that the suit land herein belongs to either the petitioners or the 1st respondent, the pleadings by both parties are awash this claim. There is overwhelming cry in the respective evidence of either party to have the suit land declared his. The written submissions also dwell on nothing less.

39. Had the petitioners not pleaded the 1st prayer, that of injunction I would have had no business going into the substance of the matter. This is because the prayers of *certiorari* and prohibition only involve the legality and the process of a lower court, tribunal or a quasi-judicial authority and/or the process followed to determine the issues, but now the petitioners have asked me to find that there should be a prerogative order of injunction issued against the respondents barring them from trespassing, interfering with and/or revoking the petitioners’ titles viz West Mugirango/ Bomanono/ 1702, 1703,1704 and 1705 respectively.

40. To do so or otherwise, this calls for the examination of the evidence adduced in court. The 1st petitioner had the suit land registered in his name on May 6, 1986 on transfer in his capacity “as the personal representative in the estate of the deceased” 3 days later, on May 8, 1986, that entry was cancelled and the land was registered in the name of James Onyambu (the 1st petitioner) in his personal capacity and the title was closed on August 12, 1986 when new title numbers 1702,1703,1704 and 1705 respectively were created. When testifying, the 1st petitioner adduced evidence to the effect that he had applied for grant of letters of administration in respect to the estate of his father Onyambu Ombachi but that the



documents of the succession cause got burned in his house without telling when his house burned. He could not tell the succession cause number although he said that the cause had been filed in Nyamira Chief Magistrate's Court. Had he given the court the cause number, it would have been very easy to find out the details from the court registry which is only about 10 metres away from the courtroom. Even without the cause number, we could have ascertained the information from the register had he indicated the year the succession cause was filed. Having said that the documents burned in his house he did not produce a copy of police Abstract to give credence to his claim. But of more interest is that the death certificate did not burn nor other documents attached to the petition such as the letter dated October 27, 2016 from the 2nd respondent. He did not tell us where the said house was located nor when it burned down and why he could not get copies from either his advocates or other members of the family. Since the documents were used to transfer the suit land at the land's office, why couldn't the 1st petitioner get copies of these documents or even the cause number from the land's office file. How come there are no traces anywhere? One other thing that Mr Onyambu could not explain is how the land was registered in the name of his father during the process of land adjudication in 1974. If the land could be registered in the name of a deceased person since his father had died in 1972, then it should have been registered in the name of his grandfather and not his father, the land having been ancestral and having belonged to his grandfather. Who were the other beneficiaries in the succession cause? He also stated that the 1st respondent was his cousin but that the latter's father, Oroko had his own land and was not supposed to get any other land.

41. Tuti Tati, the 4th petitioner tried to bridge the gap in the first petitioner's evidence that the process of succession in respect to their father's estate commenced in 1982 and was concluded in 1992. He also could not remember the succession cause number and coincidentally he said that his house also burned down and his documents were destroyed therein. To counter this issue of destroyed or burned documents, the Land Registrar, Mr Osamo produced in court green cards in respect of West Mugirango/ Bomanono/ 1540, 1702,1703,1704 and 1705 respectively. He clarified that during every transfer by transmission after a successful succession cause the lands office normally indicates the cause number but this case had an irregularity. In this case, the entry did not disclose the cause number nor did the parcel file contain any succession cause documents such as the grant and/or the certificate of confirmation of grant. He was of the view which I agree with that for the parcel of land West Mugirango/Bomanono/1540 to have been registered in the name of the 1st petitioner there must have been fraud. The evidence of the petitioners on how the suit land came into their possession is highly questionable since in the absence of the proper process of transmission, the same must have been punctuated by fraud. If for sure there was probate, then there should be evidence in the lands office that the transmission was carried out in the strength of the succession papers. If the succession papers disappeared or were destroyed during the coincidental burning of the 2 different houses belonging to the 1st and 4th defendants respectively, then there would not have been any transfer by transmission for want of the probate documents and if the destruction of the documents took place after they had been presented for registration at the lands office, then they could have been traced in the registry parcel file. The disappearance of the documents in all the places cannot be a coincidence. In short, there were no transmission documents nor was there any succession cause in respect of Onyambu Ombachi. In fact, entry No 1 of the copy of the green card produced in court by the petitioners relating to the parcel of land LR No West Mugirango/ Bomanono/1540 is so obfuscated so that it is not clear what the entry is all about.
42. On the other hand, the 1st respondent's evidence seems quite credible. When her father relocated to Tanzania, her cousins had the suit land transferred to the 1st petitioner and then sub-divided between him and his co-petitioners in whose names sub-divisions were respectively registered. Her evidence is supported by the various letters written by the local administration including the CLMC. The court



does not see any good reason to doubt the evidence of the retired chief, Jeremiah Matoke Nyarandi who said that although he never met Wycliff Orok Ombachi, the 1st respondent's late father, he knew that the deceased's family has all along lived on the suit property and still lives there to date.

Article 40 must be read as a whole so that protections afforded by article 40 which protect the right to property must be read to exclude property found to be unlawfully acquired under article 40(6). This requirement is an extension of the fact that the Constitution protects higher values which are to be found in the preamble to the Constitution and article 10. Values such as human rights and social justice cannot countenance a situation where the Constitution is used to rubberstamp what is in effect unlawful..."

43. Section 26 of the Land Registration Act provides that:

26(1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b) Where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme.

44. In the end all the petitioners have urged me to find a violation of the constitutional rights and freedoms as made out in their petition and urged me to take a broader view in determining the appropriate reliefs to grant them and that the order of injunction is an adequate remedy.

45. I believe the dispute in this matter revolves around the issue of ownership and whether the petitioners are indeed entitled to the suit land and whether that relief will violate any of the 1st respondent's rights. and whatever the case, I must determine the appropriate reliefs this court can grant in the circumstances.

46. I accordingly find that the petitioners are not entitled to the relief of injunction under article 23 alleging a violation of their rights by the 1st respondent because the same will violate the ownership rights of the 1st respondent in respect of the parcel of land LR No West Mugirango/ Bomanono/1540. The court can only properly grant an appropriate relief as envisaged by article 23 of the Constitution to the aggrieved party.

47. Having found a violation of the 1st respondent's right, I must now address my mind to the appropriate relief to grant to the 1st respondent.

48. Under article 23 of the Constitution, this court has power to grant various reliefs to parties coming before it, including declarations of rights, injunctions, conservatory orders, and compensation. In considering the appropriate relief in this case in Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; petition No 3 of 2018 the Supreme Court of Kenya held that the court is at liberty to fashion appropriate reliefs. The court held: -

article 23(3) of the Constitution gives the courts wide powers to fashion appropriate remedies on a case by case basis.....article 23(3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to



redress the violation of a fundamental right..... However, given the fact that the learned judge, was interpreting and giving life to the bill of rights, specifically the rights to dignity, property, and housing under the constitution, she could have been in order to refer to the guidelines as an aid in fashioning appropriate reliefs during the eviction of the appellants”.

What appropriate reliefs should the court fashion in order to determine the ownership of the suit property?

49. As I have already explained above, I am not persuaded to issue an injunction in favour of the petitioners as pleaded in the petition dated December 6, 2016 since on a balance of probabilities the land parcel number West Mugirango/Bomanono/1540 ought to have been registered in the name of the late Wycliff Oroko Ombachi, now deceased and the resultant sub-divisions West Mugirango/Bomanono/1702,1703,1704 and 1705 respectively ought not to have been created. All the registrations herein were so done fraudulently as explained above and I invoke the powers of this court under section 80 of the *Land Registration Act* No 3 of 2012 to have all the entries in title No West Mugirango/Bomanono /1540 dated March 11, 1985, May 6, 1986, August 12, 1986 and any subsequent entries cancelled and West Mugirango/ Bomanono/1702, 1703,1704 and 1705 cancelled and the same revert to LR No West Mugirango/Bomanono/1540 to be registered in the name of the 1st respondent herein to hold the same as a legal representative for and in trust for the estate of the late Wycliffe Oroko Ombachi until the distribution of the estate of the late Wycliffe Oroko Ombachi. I also award the costs of the entire petition to the respondents against the petitioners jointly and severally.

DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 3RD DAY OF NOVEMBER 2022.

MUGO KAMAU

JUDGE

