



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 27 OF 2019

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & 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

AND

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

AND

IN THE MATTER OF SECTION 24, 25 AND 78 OF THE LAND REGISTRATION ACT

AND IN THE MATTER OF THE LAND REGISTRATION ACT AND THE LAND ACT

AND IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULE 2013, SECTION 4

BETWEEN

MATHIU M'THURAIINE.....PETITIONER

VERSUS

THE ADJUDICATION OFFICER,

RUIRI/RWARERA ADJUDICATION SECTION1ST RESPONDENT

THE LAND REGISTRAR

MERU CENTRAL DISTRICT2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

FRANCIS MWITI M'MUGA1ST INTERESTED PARTY

ELIZABETH KANUGU MUGAMBI2ND INTERESTED PARTY

MARTIN MUTWIRI MURITHANIA..... 3RD INTERESTED PARTY

JUDGMENT

1. Before the court is a petition dated 23rd October 2019 seeking for declaratory orders: that the petitioner is the absolute owner of **Parcels**

No. Ruiri/Rwarera Adjudication Section No's 892, 5256, 2246 and 2150; that the petitioner's rights to property under **Article 40** have been breached by recording the same in the name of the interested parties; an order of mandamus to compel the 1st and 2nd respondents to amend the adjudication register and record the petitioner's Land Parcel in his names; certiorari to quash the registration of the aforesaid parcels in the names of the interested parties; mandamus compelling the Land Registrar to register the petitioner as the proprietor of the aforesaid parcels and lastly an order for permanent injunction restraining the respondents and the interested parties from interfering with the petitioner's peaceful and lawful possession and occupation of the suit parcels of land.

2. It is pleaded the petitioner is the absolute proprietor since acquiring the lands in 1970, has made extensive developments thereof by putting up a permanent dwelling house, and has lived therein alongside his family undertaking horticulture and indigenous tree planting.

3. Further the petitioner alleges while he has all along been assured by the 1st respondent his land was intact and okay, he recently established his original land had been fraudulently subdivided into **Parcels No's Ruiri/Rwarera Adjudication Section 892, 5256, 2246 and 2150** in favour of the interested parties. He was advised by the 2nd respondent to seek redress as the 60 days to raise an objection had lapsed.

4. It is the petitioner's contention the acts of the respondents have been arbitrary, amount to breach of his constitutional rights to ownership of property, amount to land grabbing by the interested parties and that he had never experienced any conflict with anyone before least of all the interested parties.

5. The petitioner avers he has through writing sought the respondents to rectify the record all in vain. He was however issued with a consent issued on 6.9.2019 to seek for injunctive orders against the interested parties. Lastly, the petitioner takes the view the respondents' actions or omissions relating to the land are unconstitutional arbitrary, wrongful, null and void and therefore seeks they be quashed or corrected.

6. The petition was accompanied by a certificate of urgency and a notice of motion wherein the court ordered it served for interpartes hearing on **30.10.2019**. Mr. Kiongo litigation counsel came on record for the 1st – 3rd respondents, sought for 30 days to reply by 30.11.2020. The court granted prayer No. 3 of the said motion and directed the petition be heard by way of written submissions. None of the respondents and or the interested parties responded to the petition.

7. In compliance the petitioner filed written submissions dated 16.6.2020 relying on ***Giella –vs- Casman Brown[1973] EA 358 and Kibutuk Arap Too –vs- Peris Shanyasi Allulya & 4 Others [2017] eKLR***.

8. In ***Hon. Kanini –vs- Okoa Kenya Movement & 6 Others [2014] eKLR*** the court held a petition must be hinged on a claim that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened. In that case the court found that the petitioner had not pointed out with reasonable exactitude the rights and fundamental freedoms in the bill of rights violated or threatened.

9. In ***Anarita Karimi Njeru –vs- Republic [1979] eKLR*** the court held thus:

“We would however ... again 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 that justice is done to his case) that he should set out with a 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.”

10. The question before this court is whether this petition has met the above threshold. Whereas paragraph 6 of the petition states the petitioner is the absolute proprietor of **Parcels No's Ruiri/Rwarera Adjudication Section/892, 5256, 2246 and 2150 since 1970**, it does not state how the said parcels were acquired. Secondly the petitioner does not state whether he was ever recorded as the owner after the area was declared an adjudications section.

11. Looking at paragraphs 6, 8, 9 and 10 of the petition, they appear to be contradicting each other. The petitioner says he discovered his original parcel was subdivided into **Parcels No's Ruiri/Rwarera Adjudication Section/892, 5256, 2246 and 2150**, he claims to have been the absolute owner. It is common knowledge that subdivision to **Parcel No's 892, 5256, 2246 and 2150** could only arise from an original number. The petitioner has not specified that original number. He has not given any record to show that at the recording stage, he was allocated any registration number, the acreage and lastly the particulars of the Sub-location, Ward, Sub-County and County.

12. Further the petitioner has not attached any official copies from a land adjudication officer to show that his name was ever recorded in any parcel of land so as to make a claim that the said number was subsequently, illegally and or arbitrary subdivided and allocated to the interested parties. Again the petitioner makes serious allegations that there was interference with the adjudication record by the 1st and 2nd respondents in favour of the interested parties. It is common knowledge that the petitioner, as a Kenyan is entitled to access information held by the state. There is no disclosure or particulars on exactly when the petitioner checked the adjudication records and found out there was alteration of the record in favour of the interested parties.

13. Further at paragraph 10 of the petition, the petitioner has not given the particulars of exactly when he discovered the fraud and or the illegalities. **Order 2 Rule 4 Civil Procedure Rules** requires any person making a claim based on fraud, illegality and forgery to give particulars of the same. Additionally the petitioner claims to have raised the issue of illegalities, fraud and complicity. He does not give any specific ways in which he raised his concern with the respondents.

14. Other than the consent issued to sue for injunction dated 6.8.2019, the petitioner has not attached any other document to demonstrate he has been involved in the adjudication process since inception. The reason why the above particulars are crucial in a constitutional petition is

that the whole aspect and adjudication process is governed by both the **Land Adjudication Act Cap 284 and Consolidation Act Cap 283 Laws of Kenya** which have clear timelines and stages through which any party aggrieved by each of the process can have the complaint undertaken through the Internal Dispute Resolution Mechanism thereon.

15. A party therefore making a claim that he has been denied his constitutional rights as to the ascertainment and recording of land rights must make full disclosure on his involvement with the process right from inception and in the event there is no-compliance with the laid down processes, a party who is aggrieved must give reasons as to why he was not able to lodge his claim by way of an appeal or objection within the set timelines.

16. In the instant petition, the petitioner has not stated when he was initially recorded as the land owner and at what stage of the adjudication process the interested parties were allocated his land. The petitioner ought to have sought and attached copies of adjudication register and records so as to enable the court establish the veracity of his allegations.

17. A party cannot merely make spurious allegations without substantiating them. There is no record that the petitioner lodged any complaint with the DCI Land Fraud Unit regarding the allegations on alteration of an adjudication register or record so as to confer his land rights to the interested parties.

18. In *Mumo Matemu –vs- Trusted Society of Human Rights alliance & 5 Others [2013] eKLR* the court of Appeal held in absence of evidence to support the allegations of violation of constitutional provision a petition cannot be held to have met the threshold in *Anarita Karimi Njeru* case.

19. Coming to issue of the doctrine of exhaustion, **Section 29** of the **Land Adjudication Act Cap 284 Laws of Kenya** provides for an appellate system to the Minister before resorting to court. The consent given clearly shows the process was still at adjudication state and hence governed by the **Land Adjudication Act Cap 284**. This means there are no title deeds and hence any orders sought against the 2nd respondent and his involvement in these proceedings is not only premature but amounts to misjoinder of parties for no claim at this stage can be made or sustained until the land adjudication record and the register have been certified as complete under **Cap 284** and submitted to the Director, Land Adjudication and Chief Land Registrar to which the **Land Registration Act 2012** comes into play.

20. **Order 53 rule 2** of the **Civil Procedure Rules** provides any person seeking to quash any decision must file proceedings within 6 months of the making of that decision. It is not clear when the decision to subdivide and record the parcels of land in issue was made by the 1st respondent. This court cannot issue orders in vain and in vacuum. **Order 53** requires such a decision to be certified and attached to the verifying affidavit to the petition or the application for judicial review. The same case applies to a petition made under the Fair Administrative **Actions Act 2015**. A party is also required to show that he has exhausted the internal dispute resolution mechanism set out in the respective laws regarding the decision unless there are exceptional circumstances why the said mechanism has not been invoked. The petitioner has not demonstrated there exists any exceptional circumstances subsisting in this petition so as to be excused from submitting to the Land Adjudication Act.

21. In *Banard Murage –vs- Fine Serve Africa Ltd & 3 Others [2015] eKLR & Tom Kusienya & 11 Others –vs- Kenya Railways Corporation & 2 Others [2013] eKLR*, the court held that not every violation of law had to be raised before the court as a constitutional issue and where an alternative remedy exists such a remedy should be pursued first. The petition revolves around **Article 40** of the **Constitution** while the prayers sought and the supporting affidavit are based on the provisions of **Order 53** and the violation of the land adjudication process and procedure. It is therefore apparent there is lack of coherence between the reliefs sought and constitutional provisions alleged to have been violated.

22. In *Geofrey Muthinja Kabiru & 2 Others –vs- Samuel Munga Henry & 1756 Others [2015] eKLR*, the Court of Appeal held courts ought to be the fora of last resort and not the first port of call the moment a storm brews and further affirmed the doctrine of exhaustion as a sound one in line with Article 159 of the Constitution.

23. In view of the foregoing my conclusion is that the petition herein lacks merit. The same is struck out with no order as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 10TH DAY OF NOVEMBER, 2021

In presence of:

MISS GITONGA HOLDING BRIEF FOR MARANYA FOR PETITIONER

MR. KIETI FOR RESPONDENTS

COURT ASSISTANT - KANANU

HON. C.K. NZILI

ELC JUDGE