



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANG'A

PETITION NO 1A OF 2017

ESTHER MULEE.....1ST PETITIONER
NELIUS NYAMBURA MWANGI Alias NYAMBURA NDUATI.....2ND PETITIONER
PETER KANYONJI KIHARA.....3RD PETITIONER
JAMES MUNGAI MBURU.....4TH PETITIONER
FELIX MWAURA.....5TH PETITIONER
(REPRESENTING 2200 others)

VERSUS

HON ATTORNEY GENERAL.....1ST RESPONDENT
MUTHITHI SOCIETY (sued through Chairman Mbate Githua).....2ND RESPONDENT

AND

MURIGI WAINAINA.....1ST INTERESTED PARTY/APPLICANT
JOHN KIRAGU NDUNGU.....2ND INTERESTED PARTY/APPLICANT
MARGARET WAMBUI KARIRI.....3RD INTERESTED PARTY/APPLICANT
JOHN PETER GATHOGO.....4TH INTERESTED PARTY/APPLICANT
CHEGE MBUTHIA.....5TH INTERESTED PARTY/APPLICANT
GEORGE GATHOGO NGANGA.....6TH INTERESTED PARTY/APPLICANT
KITIVI MBINDA.....7TH INTERESTED PARTY/APPLICANT
REUBEN METHU WANGARI.....8TH INTERESTED PARTY/APPLICANT
NAUMI MUMBI NDUNGU.....9TH INTERESTED PARTY/APPLICANT
GEORGE KARANJA MBURU.....10TH INTERESTED PARTY/APPLICANT
CHRISTOPHER HENRY M KARANJA.....11TH INTERESTED PARTY/APPLICANT

JANE GATHONI WANGETHA.....12TH INTERESTED PARTY/APPLICANT

GEORGE MWANGI KIRAGU.....13TH INTERESTED PARTY/APPLICANT

PAUL KIARIE GICHAGA.....14TH INTERESTED PARTY/APPLICANT

SYMON MWANGI KARUGAH.....15TH INTERESTED PARTY/APPLICANT

JUDGMENT

1. The Petitioners commenced suit by way of a petition on the 11/10/13 against the Respondents. On the 19/11/14 they filed an amended petition.
2. The Petitioners aver that they are victims of land struggles predating independent Kenya. That they owned Land reference Numbers 9452, 14905 and 6727/22 (suit lands) by way of communal holding before independence. That their communal land was allocated to the white settlers who upon Kenya attaining independence in 1963, sold the suit lands to third parties, the 2nd Respondent included thus rendering them squatters in their own lands.
3. That they have remained in occupation of the suit lands until 1976 when the 2nd Respondent and 4 other societies claimed to have acquired the suit lands through purchase from a white settler namely Tom Frazier, in a transaction shrouded in secrecy and fraud. They contend that the action of the 2nd Respondent and the 4 societies was contrary to Article 40 and 39 of the Constitution.
4. The Petitioners aver that they have occupied the lands, raised their children and even buried their kin on the suit lands. That their occupation has yielded title in their favour by way of Adverse Possession.
5. It is their case that they were discriminated when Land ref No 9452 was subdivided out of which titles over L.R No 6727/22 were issued in 1999 to third parties (outsiders) and to their exclusion and yet by then they had been in occupation for 27 years. They contend that this was contrary to Art 60 (1) and 39(3) of the Constitution.
6. Through a litany of complaints against the local administration that is to say the Chief and the District Officer, they aver that they have been harassed and intimidated with the sole aim of removing them from the suit lands in favour of the 2nd Respondent but thanks to their tyranny of numbers they have always managed to repulse them. An incident was told that on the 19/9/2003, the District Officer Thika, through a Mr. Kanyua Kimani and Antony Ngugi unlawfully demolished the house of the 1st Petitioner occasioning damage and loss. The Petitioners blame the 1st Respondent for the harassment and attempts to evict them from the suit land. That the harassment is perpetuated by the officers of the 1st Respondent at the level of the local administration.
7. The Petitioners aver that they have petitioned the District Commissioner, the office of the President and the Kenya Human Rights Commission *inter alia* for help in vain. They posit that they are constitutionally entitled to own land like other Kenyans.
8. Consequently, they sought the following orders;
 - a. An injunction against the 2nd Respondent not to sell or subdivide or in any way interfere with the suit properties pending the determination of the petition.
 - b. The status quo of the suit property be maintained and restituted pending the determination of this petition.
 - c. There be a declaration that the Applicants are the bonafide owners of land LR No 6727/22 which was hived out L.R.6727/22.
 - d. The suit properties be restituted to the Petitioners or be held county government in trust for the Petitioners.
 - e. In the alternative, the Respondents compensate the Petitioners for breach of their Constitutional rights lost properties and for breach of their lifeline.
 - f. Cost of this petition be provided for.
9. The Petition is supported by the affidavit sworn by Peter Wainaina Mwangi who deposed that he was born in Mithini sublocation in 1953 where his parents owned 5 acres of land. He detailed instances where he was beaten up by agents of the 2nd Respondent with a view to force them out of the land. Though he reported to the police, no arrests were made.
10. James Mungai Mburu deposed that he and his parents lived on 5 acres of the suit lands and he even buried his son brother and sister thereon until 1975 when the 2nd Respondent invaded their land and demanded that they vacate the suit lands. That severally their houses were torched to force them to vacate the suit lands.
11. Felix Mwaura too reiterated the evidence of the two Petitioners and added that he was born in 1947 on the suit lands where his parents owned 30 acres of land until the tribal clashes of 1964 when they abandoned the land. On his return from an approved school in 1966 he

found that his parents had been murdered and the chief had taken over their family land. He sought for compensation.

12. Esther Mulee deposed that she has been on the land since 1920s. That after independence she occupied 5 acres of the suit land. Later the 2nd Respondent claimed the lands and started relentless attempts to evict them from the lands.

13. Others who filed affidavits supporting the petition are Jane Mirigo Kihara, James Mburu Njoroge, Damaris Muthoni, Peter Musau Kilonzo, Francis Mwangi Ndirangu, Peter Kimani Mubea, Joseph Githutha Njuguna, James Mutuku. In all their depositions they state that they have lived on the land with their families and that their occupation has not been peaceful as several attempts have been made by the 2nd Respondent using the local chief and administration to remove them from the lands.

14. On the 6/3/18 with the leave of the Court the Petition was amended to include a claim for Adverse Possession as an alternative prayer. That their occupation predates independence and have since lived there peacefully for more than 12 years without any interference.

15. Further amendment of the petition allowed the enjoinder of the interested parties as well as other Petitioners increasing the total number to 2200.

16. Whilst denying the Petitioners claims, the 1st Respondent termed the petition misguided, misconceived and untenable. It contended that the Petition and the pleadings does not disclose how their legal and Constitutional rights have been contravened by the 1st Respondent in any way and in particular Article 19, 25, 27, 39, 40 and 60 of the Constitution of Kenya, 2010 as alleged.

17. Further that the petition discloses no cause of action against the 1st Respondent and the same should be dismissed with costs.

18. The 2nd Respondent in denying the Petitioners claims contends that Land Ref No 9452 belonged to a white settler named Tom Frazier. That the suit lands were sold to Muthithi Farmers' Cooperative Society Limited by Tom Frazier on the 1/7/1988.

19. That the claim of the Petitioners that they owned and occupied the suit lands before and after independence are baseless and far-fetched at the very least.

20. The interested parties upon being enjoined did not file any pleadings.

21. By consent parties elected to canvass the petition by way of written submissions.

22. The Petitioners submitted that they settled in Mithini area, Gatanga Sub County in Murang'a before and after independence but were not issued with titles despite having occupied the suit lands for over 12 years carrying out farming and even buried their kin thereon. That in 1986 the 2nd Respondent claimed to have purchased the lands from the white settler. The Petitioners argue that the sale was shrouded in mystery and fraud and even if there was any sale the same was void on account of the title having been extinguished by the Petitioners occupation by 1986.

23. That the 2nd Respondent has not proved that it purchased the lands lawfully. That the 2nd Respondent did not produce any agreement for sale nor transfer instruments to support the alleged purchase.

24. Going by the consent orders of status quo issued by the Court in 2015, the Petitioners reiterated they are in occupation of the suit lands todate.

25. Further the Petitioners submitted that no proof of ownership has been adduced by the 2nd Respondent. The Petitioners contended that the 2nd Respondent is a trespasser.

26. That the summary of the supporting affidavits deposed by several of the Petitioners are; the suit land namely LR 9452 and 6727/22 have always been occupied by the Petitioners who have known the same as their land; the Petitioners farmed peacefully after they were settled in the land by the Government after the colonial period; the 2nd Respondent started interfering with the Petitioners occupation without any colour of right and with impunity and in collusion with the 1st Respondent with the aim of evicting the Petitioners; it is the only land the Petitioners know as their land where they have buried their dead and farmed for subsistence.

27. The 1st Respondent submitted that the Petitioners' claim is for Adverse Possession allegedly for having been in possession for a period of 30 years before the 2nd Respondent and 4 other societies claimed the suit lands. The Petitioners however did not disclose the names of the 4 societies being alleged.

28. Further the 1st Respondent faulted the Petitioners for failing to cite the specific provisions of the Constitution and clearly demonstrating how the same have been violated or threatened to be infringed by the 1st Respondent. That the Petitioners failed to plead their case with reasonable precision as to enable the Respondent to understand the Petitioners cause of action.

29. The 2nd Respondent submitted that it purchased L.R No 9452 situate within Murang'a south Sub County from the white settler after which the land was subdivided in 1988/89 by the Presidential commission on large scale farms and title deeds were issued to its shareholders. It contended that the Petitioners have settled on land that belongs to its former members who hold titles to the said lands. It averred that the land was acquired legally by the 2nd Respondent.

30. That the Petitioners are not original residents of the area as they have migrated from other areas to squat on land belonging to individuals who hold titles.

31. That the 2nd Respondent does not hold titles to the suit lands and for that matter is wrongly sued. It denied that it ever destroyed any houses or crops on the land as alleged by the Petitioners.

32. Having considered the petition, the rival affidavit evidence and the submissions, the issues for determination are; whether the petition is competently before the Court; whether the Petitioners have proved title by Adverse Possession; who meets the cost of the petition.

33. The case of the Petitioners is a claim of ownership of land reference Nos. 9452 and 6727/22. These titles were however not tabled in Court and therefore the Court does not have the benefit to see the nexus between the titles of the suit lands to either the Petitioners or the 2nd Respondent. The Petitioners have claimed that they are the owners of the suit lands albeit having failed to lay any evidence in support of the claim.

34. The 2nd Respondent has submitted that it bought the land from a Tom Frazier and later subdivided it and titles were issued to its members in 1988 and therefore holds no title as at the time of the filing of the suit. It emphasized the point that the land is now in the hands of its former members who were issued with titles.

35. According to the copy of the RIM No 135/4/1 for KAKUZI/KIRIMIRI /BLOCK 8(MUTHITHI) the suit lands have been subdivided into several plots. Going by the copies of titles annexed to the supporting affidavit of Murigi Wainaina the 1st interested party dated the 22/7/19, it would appear that subtitles have been issued to individual holders. If that is to be true then determining this petition in its current state when the would-be holders of the resultant titles who are not enjoined to the petition would be condemned unheard.

36. Article 258 (1) of the Constitution provides as follows;

Every person has the right to institute Court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

37. That said, it remains the duty of the Petitioner to disclose with a measure of clarity the nature of the right that has been violated or is being threatened with violation.

38. The yardstick used in enforcement of rights that are fundamental under our Constitution that have been threatened or infringed, is that the burden of proof rests with the Petitioner. The specific provisions and evidence in support of such acts of infringement or threats are to be precisely stated. This is the legal position as illustrated in the case of **Anarita Karimi Njeru vs R 1979 KLR 154** where the Court enshrined the principle in our jurisprudence in the following passage;

“We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, its important if only to ensure that justice is done in 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.”

39. In the case of **The Trusted Society of Human Rights Alliance vs Attorney General & 2 Others [2012] e KLR**. the Court stated thus;

"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a Court In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the Constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

The Court went on to express itself as follows;

"Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in **Anarita Karimi Njeru (supra)** that established the rule that requires reasonable precision in framing of issues in Constitutional al petitions is an extension of this principle."

40. In the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, the Court of Appeal had this to say concerning a similar pleading before it:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a Court...The principle in **Anarita Karimi Njeru (supra)** underscores the importance of defining the dispute to be decided by the Court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution ... Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in **Anarita Karimi Njeru (supra)** that established the rule that requires reasonable precision in framing of issues in Constitutional Petitions is an extension of this principle” The requirement for precise pleading is the essence of Rules 4 & 10 of the Mutunga Rules upon which the Petitioner has placed much reliance. A clearer form of pleading would have left little room for speculation regarding the rights and fundamental freedoms that the Petitioner is seeking to enforce under Article 22 of the

Constitution. From his pleading, it is not discernible whether the Petitioner is alleging contravention or infringement of his political right, right to equality and protection from discrimination, to fair hearing and fair administrative action there being no corresponding pleading in the body of the Petition. For instance, regarding Article 38 of the Constitution (political rights) he does not even claim to be a resident or registered voter in Mombasa County. Indeed in the affidavit sworn in support of this Petition and other affidavits filed, the Petitioner describes himself as a resident of Nairobi. In view of all the foregoing, we think the concession by Mr. Gikandi regarding the wanting state of the pleadings was the right thing to do”.

41. In **Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 Others [2014] eKLR**, High Court Of Kenya At Kerugoya Petition No 3 of 2014 (Formerly Embu Petition No 1 of 2014, the Court, while relying in the dicta as expressed in the **Anarita Karimi** case rendered itself as follows on whether the amended petition as drafted was incompetent:-

“However, our analysis cannot end at that level of generality. It was High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in **Anarita Karimi NJeru(supra)** underscores the importance of defining the dispute to be decided by the Court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the appellate Jurisdiction act (cap 9). Procedure is also a handmaiden of Just determination of cases. Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive Justice, as they give fair notice to the other party. The principle in **Anarita Karimi NJeru(supra)** that established the rule that requires reasonable precision in framing of issues in Constitutional petitions is an extension of this principle”.

42. It is to be noted that the Petitioners anchored their petition on Articles 19, 25, 27, 39 (3), 40 (3) b (i) and (ii) and 60 (i) of the Constitution, 2010. The Petitioners’ dispositions in the affidavit evidence failed to lay any foundation to support any violation or threat to violation of any of the Constitutional provisions cited above.

43. The case of the Petitioners is that the land belonged to them before independence and admit that at some point the land was in the hands of a white settler named Tom Frazier. It is said that he sold the suit lands to the 2nd Respondent who subdivided the land and sold to its members. The Petitioners are unhappy that they were bypassed in the allocation and issuance of titles by the Government of Kenya. They allege discrimination. It is their case that the Government should have issued them with titles just like other Kenyans. The 2nd Respondent stated that to the contrary the land was private land and not Government land and therefore the alleged claim of the Petitioners is untenable.

44. Although the Petitioners alleged discrimination, no particulars were laid before the Court in support therefore it remains a mere allegation. Neither did they place evidence to support restriction of their freedom and residence as alleged.

45. The cornerstone of Article 40 is to protect proprietary rights which are lawfully acquired. The Judges of the apex Court in Kenya in the case of **Rutongot Farm Ltd vs. Kenya Forest Service & 3 others [2018] eKLR**, had this to say:

“Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property.

46. For purposes of emphasis Article 40 (3) provides that 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 inter alia is for public purpose or in the public interest for which prompt payment in full of just compensation is paid and allows that person the right to access a Court of law. As alluded to earlier, there is no evidence to demonstrate that the Petitioners have been deprived of their property so much so as to warrant calling in aid the protections enacted in Art 40 of the Constitution. The converse abounds in this case. The Petitioners have come to Court to plead a land dispute and not that any acquired right has been violated and or threatened to be infringed.

47. The Constitution under Art 60 provides that land shall be held used and managed in an equitable efficient productive and sustainable manner and in accordance with the principles of the land policy. It is not clear what rights were violated under Art 60 of the Constitution.

48. Having considered the evidence of the Petitioners in totality, it is the view of the Court that the Petitioners are beseeching this Court to determine a land dispute and not a violation of a right under the bill of rights. In other words, this to me is a land dispute where the Petitioners have argued that the land belongs to them either under communal rights or in the alternative by way of Adverse Possession.

49. This Court is of the view that this being a land dispute the claim is best left to the ordinary suits so that evidence can be laid before the Court and its veracity tested through cross examination. A petition is least suited for this dispute.

50. Order 37 Rule 7 provides that an application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question in question has been annexed. In this case the Petitioners failed to annex the title of the registered owner of the suit lands. The extent of the land being claimed is not disclosed. In any event a claim of Adverse Possession has to be proved by evidence. None was produced to the Court.

51. In the end I find that the petition is incompetent and the same is for striking out. It is struck out.

52. Each party to bear their own costs.

53. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANGA THIS 27TH DAY OF FEBRUARY 2020.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Wangari HB for Kimwere for the Petitioner

1st Respondent – AG is absent

2nd Defendant – Absent

1st – 15th Interested parties – Absent

Irene and Njeri, Court Assistants