



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. 4 OF 2018

ISAAC KIPLETING KIBITOK *alias*

ISAAC KIPLETING KIBITOK.....PETITIONER

VERSUS

THE SECRETARY BOARD OF GOVERNORS

CHERANGANY PRIMARY SCHOOL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY

MINISTRY OF EDUCATION.....2ND RESPONDENT

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

JUDGMENT

BACKGROUND

1. The petition dated 27/2/2018 by the petitioner herein seeks orders against the respondents which are set out verbatim as hereunder:-

(i) A declaration be issued that the actions by the 1st and 2nd respondents are unlawful and that they infringed the petitioner's rights under Article 24, 27, 40, 60, 61 and 64 of the Constitution of Kenya, 2010.

(ii) A declaration for the forcible entry and/or non-compensation of the petitioner's rightful ownership as premised upon a letter dated 13/12/2001, letter dated 9/1/2002 Ref: LND16/1/1 Vol.XXXV1/77, letter dated 20/6/2015 Ref:NPK/1km/KKI/15/2023 by Kiarie & Co. Advocates, letter dated 12/4/2012 by Arap Mitei & Co. Advocates and letter dated 10/7/2017 by Chepkitway & Co. Advocates based in compensation showing the respondents' acts in remaining adamant on the issue being unjustifiable, unfair and unlawful constraining the petitioner economically.

(iii) An order that the petitioner be compensated and/or repossession of his parcel of land comprising 12 acres as exercised out of parcel number IR 35991 LR No. 2142/7 (original Number 2142/6/2) at his current value as per the valuation report having been compulsorily acquired property.

(iv) An order for compensation of loss of income with effect from the year 1970 to date.

(v) General damages for violation and/or breach of petitioner's constitutional rights in prayer (i) above.

(vi) Cost of this petition and interest on the sum awarded at the court rates.

(vii) Any other or further relief this court may deem fit to grant

The Petitioner's Case

2. According to the petition the petitioner alleges that his constitutional rights were violated by the respondents. He alleges that the actions of the 1st and 2nd respondents arbitrary deprived him of his ownership of **12 acres** of land with effect from year **1970**. He alleges that there were false promises of compensation ostensibly by the 1st and 2nd respondents which have never borne fruit. The petitioner avers that he acquired

his property comprised on **LR No. 2142/6/2** on **3/12/1981**; that he purchased the property from one **G.T. Stoneham** who dealt the sale on behalf of the trustees of **Col. H.F. Stoneham**; that the land measured **35.61 hectares**; that **12 acres** of the land he bought were carved out and given to Cherangany Primary School without any compensation. He places the current value of the land at **Kshs.18,460,000/=**.

3. The petition is supported by the petitioner's four paragraph "*verifying affidavit*" sworn on **27/2/2018**. However there is on the record what the petitioner refers to as "*statement by petitioner of facts on claim*". In that document he reiterates he is the owner of the suit land measuring approximately **99 acres** whose certificate of title was issued on **1/5/1925**; that he purchased the land for **Kshs.100,000/=**; that he was taken to the land control board on **9/7/1977** by the seller; that Cherangany primary school hived off **12 acres** from the suit land and that he sought redress from District Officer, Kaplamai and the school "Board of Governors" in vain. The verifying affidavit does not attach any documents as evidence of the statement made in the petition.

The Respondents' Response

4. The respondents filed a memorandum of appearance through Denis Wabwire, Senior State Counsel on **4/5/2018**, and a replying affidavit to the notice of motion dated **27/2/2018** sworn by the Secretary Board of Management Cherangany Primary School one **Lynetty Nambuye Atolla** on **6/6/2018** to which the petitioner responded through his affidavit dated **28/2/2019**. On the **23/7/2019** Mr. Odongo appearing for the respondents adopted that affidavit as the respondents' response to the petition. Thereafter parties filed submissions in compliance with the order of the court made on **23/7/2019** to the effect that that would be the manner of disposal of the petition.

5. In the response by the respondents, it is denied that the school forcefully invaded the applicant's land or that the **12 acres** were secured from the petitioner on lease or by way of purchase, or that the respondents have declined to compensate the applicant for that alleged acquisition. It is stated that Cherangany Primary School formerly known as Itsare Full Primary School is an old school that was started in **1926** by one G.T. Stoneham a white settler who operated the school on his compound on land parcel known as **LR No 2142**; that the school was registered and issued with a certificate of registration on **3/2/1964** with the physical location being clearly identified as **LR No. 2142**; that therefore even before the applicant developed interest in the land the school had been in possession and occupation of the **12 acres**; that the applicant under unclear circumstances caused **LR No. 2142/7** to be transferred his name on **3/12/1981**; that vide a letter dated **13/12/1983** the petitioner confirmed that he had donated the **12 acres** to the school as a gift.

6. The deponent further states that the petitioner, in the spirit of that surrender of land executed an application for consent to transfer **12 acres** to the school and gave authority that the transfer be effected; that however due to what the deponent calls "*logistical challenges*" the transfer was not effected; that at some point the petitioner attempted to excise **2 acres** from the surrendered school land and the same was resisted.

7. Thereafter the petitioner deliberately declined to surrender the original certificate of title to facilitate the transfer of the **12 acres** hence the school's attempt to seek intervention from the administration; that the applicant changed his narrative from donation or gift to land exchange and later to a land sale agreement and accused the State of neglecting to compensate him which allegation the respondents term as false. The deponent concludes by stating that the State is not liable to compensate the petitioner for land donated to the school by a white settler and which has been in the possession of the school for **92 years** and that if any cause of action was ever available to the petitioner the same is statutorily time barred by the provisions of **Section 7** of the **Limitation of Actions Act Cap 22**.

8. It is urged that the petitioner holds the **12 acres** in trust for the 1st respondent and that the petitioner's acquisition of the suit land was subject to an overriding interests on the application's title by virtue of **Section 30** of the **Registered Land Act Cap 300 (now repealed)** and **Section 28 of the Land Registration Act 2012**.

9. It is also urged that the wider public interest demands protection of the learning institutions and the balance of convenience therefore militates against the grant of orders of compensation to the petitioner.

The Petitioner's Rejoinder

10. The petitioner's rejoinder to the replying affidavit is contained in the petitioner's affidavit filed on **28/2/2019**. He reiterates the details relating to his ownership of **LR No. 2142/7** and maintains that the original owner of the property did not consider the school's existence on the land and that neither the petitioner nor the original owner ever allocated any land to the school; further that the petitioner acquired the property through a loan which he wanted the school management or the education department to help in defraying since he had saved the school by repaying the loan. He argues that even if the land was deemed to be a gift from him to the school there was no written acknowledgement thereof. He attributes his refusal to transfer the land to the school to the lack of participation on the part of the respondents in repaying the loan and that he had been compelled to sell some of the land and other agricultural assets to repay the loan. It is denied that the school was started by the original owner of the land. He maintains the 1st respondent's cause of action is time barred by virtue of **Section 9 of the Limitation of Actions Act** and that the petition is properly before the court.

SUBMISSIONS

The Petitioner's Submissions

11. The petitioner filed his submission on **2/10/2019** and supplementary submissions on **7/11/2019**. Citing the case of **National Bank Kenya Ltd -vs- Pipe Plastic Samkot Kenya Ltd & Another Civil Appeal No. 95 of 1999 [2002] EA 503** and **Juma Mochemi -vs- Agricultural Finance Corporation Nairobi Milimani HCCC No. 1265 of 2001** the petitioner urges the court not to "*rewrite*" or "*renegotiate the contract*" between the parties.

The Respondents' Submissions

12. The respondents filed their submissions on **16/10/2019** and relied on various decisions of court.

DETERMINATION

Issues for Determination

13. The issues that arise in this petition are as follows:

(a) *Whether the petition meets the threshold for the grant of orders in a Constitutional Petition as laid down in Anarita Karimi Njeru-vs- Republic (1976-1980) KLR 1272.*

(b) *Whether the petitioner's claim is time -barred.*

(c) *Whether the petitioner's constitutional rights have been violated.*

(d) *What orders should issue?*

(a) Whether the petition meets the threshold for the grant of orders in a constitutional petition as set out in Anarita Karimi Njeru -vs- Republic (1976-1980) KLR 1272

14. In their submissions on this issue the respondents set out the following passage from the **Anarita case** (supra):

“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 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.”

15. They also rely on the case of **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** and **Northern Nomadic Persons Organization (NONDO) -vs- Governor County Government of Garissa & Another 2013 eKLR**.

16. The respondents aver that the petition is devoid of precision to the extent that it is not easy to determine the real issues in contention. They also aver that the petitioner has failed to furnish adequate particulars of allegations of violation of his rights and the manner in which those rights have been allegedly violated. It is submitted that the petition has all the hallmarks of an ordinary land claim and the grievances that the petitioner alleges amount to civil wrongs rather than public wrongs. The respondents aver that the petitioner should have filed a claim for breach of contract. The respondents' wrapping up observation is that a litigant should not revert to a constitutional petition where an alternative forum is available.

17. The petition requires to be scrutinized carefully in order to address the above issues raised by the respondents.

18. In the title to the petition **Articles 24, 27, 35, 40, 61 and 64(d)** of the Constitution of Kenya are mentioned. However this mention is not sufficient to infer threat of or violation thereof of rights.

19. Under the subheading “*specific issues*” in the petition the petitioner states that **Articles 24(d), 27(i), 40 and 64** have been contravened.

20. Besides the above, **Articles 2(4), 24(d), 27, 60, 61, 64, and 105(3)** are mentioned in passing in a latter part of the petition.

21. Does the above analysis lead to a conclusion that the petitioner has:

(a) Set out with reasonable precision that which he complains of;

(b) Set out the provisions that are said to have been infringed with regard to him and

(c) The manner in which they are alleged to have been infringed?

22. Imprecise petitions do occasionally occur in our justice system, but it must be remembered that the litigants rely on their counsel to put forward their claim with precision. When a court of law is faced with the issue of whether a petition meets the threshold required in the **Anarita case** supra, it must be alive to the fact that there may be as many styles of pleadings as there are advocates in this nation and, without condoning laxity, or reckless draftsmanship and in order to do substantive justice to the parties the court may in certain instances be constrained to concatenate arguments and statements scattered across the entire length and breadth of the petition in order to see whether the petition has revealed any threatened or actual violation of provisions of the Constitution with regard to a particular petitioner. This is not a desirable thing, but a reaction by a court of justice to the reality of obviously poor pleading.

23. The impossibility of having a regimented style of pleading in all kinds of litigation was appreciated by the Court of Appeal in the case of **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** as follows:

“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 coterminous 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.”

24. In the **Mumo case**, the Court of Appeal found the petition to be full of serious shortcomings. It stated further as follows:

“The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.”

25. In the **Mumo case**, the court nevertheless concluded that the petition was defective and did not meet the threshold set out in the **Anarita case**.

26. In my view the instant petition where the alleged violation is in regard to the right to own property and the alleged act of deprivation thereof cannot be easily dismissed. The petitioner is a natural person and the property rights are relatively more tangible and less of an abstract theme than the issues of perceived “*overthrow of the Constitution*” and “*want of respect for the rule of law*” pleaded in the **Mumo Matemu case (supra)** whose amplification in pleading may to some extent be more daunting.

27. It is not in doubt that the petitioner’s complaint relates to land. As the respondents have observed and annexed documents have proved, the claim has mutated over time from a claim of donation of land as a gift to a land exchange arrangement and later on to a land sale agreement.

28. A perusal of the petitioner’s demand letter dated **12/4/2012** shows that he claimed that the school had promised to purchase the land and that he sought to be paid for the land at the current market rates.

29. The petitioner’s demand letter dated **20/6/2015** seems to suggest that the petitioner had only granted the school a licence which he by that letter purported to withdraw and offer the school the land for sale at the consideration of **Kshs. 1,000,000/=** per acre, making it a total of **Kshs.12,000,000/=** for the 12 acres.

30. The contents of the letters above notwithstanding the petitioner has conveyed to this court his claim which is to the effect that he has been arbitrarily, by whatever means, been denied the use of **12 acres** out of his land known as **LR 2142/7** by the school which is a public institution run by the respondents, without compensation. He has also cited some provisions of the Constitution which have allegedly been violated.

31. Though the petitioner has also failed to juxtapose the manner of violation with the provisions alleged to be violated in an exquisite fashion the final conclusion on this issue will necessitate a wholistic construction of the petition’s various sections.

32. A reading of **paragraphs 5-8** of the petition conveys the petitioner’s claim to the reader: it is clear that he is claiming that the respondents have excised and deprived him of the ownership and use of **12 acres** out of his parcel of land. It is also clear that he claims that his rights to cater for his family in respect of the **12 acres** have been hampered, and that compensation thereof has been withheld for a period of about **30 years**. It is also alleged that the respondents have failed to release the **12 acres** to the petitioner.

33. Under a heading titled “*nature of violation*”, the petitioner reiterates these transgressions as forceful entry, interruption of peaceful enjoyment, and failure to resolve the dispute over a long period.

34. The petitioner’s claim can be congealed into the following:

Whether the respondents have excised **12 acres** for the school’s use from his land and consequently whether he has been arbitrarily denied the use thereof for his benefit and that of his family without compensation.

35. It is noteworthy that the petitioner does not allege that the respondents set out deliberately to excise and compulsorily acquire the school land from his plot. Yet, based on those facts, he claims illegal entry, forcible occupation, arbitrary deprivation and denial of economic rights and that he has been left without any means of income.

36. A closer examination of prayer **No. (iii)** in the petition reveals that his entire claim is based on an expectation of compensation for compulsory acquisition and loss of income from the year **1970** to date.

37. Through Mr. Odongo, Learned Senior State Counsel, the respondents’ submission is that their interest in the land remained an overriding interest under **Section 30 of the Registered Land Act** (now repealed). They highlight the absence of a sale agreement between the plaintiff and the original owner, or at least any other evidence of purchase -including payment of consideration for the entire portion of **36 acres** - and the failure to call evidence from the vendor as a witness as a proper basis for confirming their assertion of an overriding interest over the land. In the light of the foregoing omissions which this court has confirmed, it is preposterous for the petitioner to urge this court not to “*rewrite*” or “*renegotiate*” the “*contract*” between him and the former “*owner*” of the land one G.T. Stoneham.

38. It is observable that the petitioner bought land which was already titled while the school was accommodated and operational on that land by the time of purchase. The school continued to operate for many years thereafter. Whether the respondents are duty bound to compensate

the petitioner for the land occupied by the school is debatable; at the heart of that discussion would be a minute examination of the documentation by which the petitioner purchased the land to determine what interest was sold to him by the owner, and the gauging of the true intent of the former owner who had allowed the school to operate on his property.

39. I find the specific submission regarding want of evidence of payment of consideration quite apt, for if such evidence had been given it would have introduced other perspectives in the matter such as validity or invalidity of contract or the doctrine of bona fide purchaser for value without notice.

40. Citing the case of **Suleiman Rahemtulla Omar & Another -vs- Musa Hersi Fahiyeh & 5 Others [2014] eKLR**, the respondents have brought up the possible lack of exercise of due diligence on the part of the petitioner and they aver that where due diligence lacks, the title held by a purchaser relying on the foregoing doctrine of bona fide purchaser may be cancelled.

41. They maintain, which submission is correct in my view, that had the petitioner conducted due diligence he would have established that the school's operations on the same site pre-dated his alleged purchase of the suit land by some 40 odd years.

42. Further in this regard the respondents aver, which is also correct, that there is no evidence that the claim for compensation was a feature passed on by the former title holder to the petitioner with the transfer of the land into his name.

43. They maintain that the petitioner's own act of initiating a process of excision and transfer of the 12 acres to the school was sufficient evidence that initially, he was not seized of the belief in possible compensation by the respondents and therefore that his latter day compensation claim has no merit.

44. All in all the respondents argue that no proof of violation of the petitioner's rights has been proved. They distinguish the cases of **Attorney General -vs- Halal Meat Products Ltd [2016] eKLR** and **National Land Commission -vs- Estate of Sisiwa Arap Malakwen [2017] eKLR** cited by the petitioner, stating that in the first decision there was evidence that the subject land was registered in the respondent's name at the time of taking over by the government.

45. Citing the decision of **Eldoret Court of Appeal Civil Appeal 55 of 2018, Richard Kipkemei Limo -vs-Attorney General & Others** the respondents aver that a vendor must establish root of title and he may not confer an illusory or non-existing title to a buyer simply by stating it in an agreement.

46. This court is alive to the fact that the instant petition is to be determined on the basis of the written submissions of the parties. That was the manner of disposal it ordered. The court is not bound to go further than what is contained in the petition and the supporting and opposing affidavits and determine whether in law any clear violation of the petitioner's rights has been established. It is not bound to call oral evidence or summon the parties for cross-examination on the veracity or otherwise of the documents they have exhibited.

47. Judging from the altercation between the two parties as outlined above, the elementary questions that arise in this dispute relate to "extent" and "intent": the full "extent" of the interest sold to the plaintiff and the true "intent" of the parties at the contracting stage which issues have not been settled. In this court's view these are matters not within the purview of a constitutional petition that should have been resolved in an ordinary civil claim.

48. In the light of the foregoing it is now clear that the petitioner should only have approached this court for remedies for violation of his constitutional rights once his interest in the land occupied by the school was clearly defined, crystallised; a citizen can not be permitted to purchase an already burdened private land title and subsequently foist the burden of compensation for that existing encumbrance on public authorities without sufficient proof of wrongdoing on the latter's part.

49. The petitioner's grievance as alluded to in the foregoing paragraph could have been appropriately ventilated in a civil claim. In this court's view the petition herein is premature and premised a plethora of assumptions on the part of the petitioner regarding his claim to the 12 acres, yet it is not crystal clear from the petition how he can claim to have acquired private interest in that portion while an ancient public institution was situated on it. His task was to first establish on a balance of probability that he had a valid interest in the 12 acres before he could competently claim that his rights under the Constitution had been violated.

50. In the case of **Gabriel Mutava & 2 others -vs- Managing Director Kenya Ports Authority & Another [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA)** the Court of Appeal observed as follows:

"Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done..."

51. This is the position taken in the decision in the cases of **International Legal Consultancy Group and Another -vs- Ministry of Health and 9 Others** and **Peter Ochara Anam and 3 Others -vs- Constituencies Development Fund Board and 4 Others, Kisii HC Petition No. 3 of 2020**. In the latter case it was held as follows:

“I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights.

... Coming to court by way of a constitution petition is not excepted either much as the Constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioner exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate Legal Avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose.”

52. The principal question that remains is if the petitioner’s root of title to the suit land is yet to be conclusively adjudicated, on what basis can his claim of violation of rights be determined? In the absence of such a determination how would this court ensure the safeguards against recognition of title to land which has been obtained illegally or fraudulently? This court has in the past declined to recognise such title in numerous cases: **Dyno Holdings Ltd -vs- National Land Commission & Another [2018] eKLR; Chemey Investment Ltd -vs- A.G. & 2 Others [2018] eKLR; Niaz Mohamed Jan Mohammed -vs- Commissioner of Lands & 4 Others [1996] eKLR and Funzi Island Development Ltd & 2 Others -vs- County Council of Kwale & Others**. Citing some of the above cases, the Court in the **Dyno case** (supra) said as follows:

“The effect of those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense...”

53. No matter from what angle one looks at it, the petitioner’s claim remains an ordinary private law claim deceptively cosmeticized with a spattering of constitutional provisions and popular public law litigation phrases. Notwithstanding the distinction between the instant petitioner’s claim and the claim in the **Mumo Matemu case** (supra), it is apparent that no amount of elastication of the rules of pleading in respect of constitutional petitions can save this petition from a certain dismissal. Though the petitioner purported to have constitutional issues for resolution by this court he has failed to adhere to the said rules of pleading or to prove that those issues he raises bring this claim within the threshold required in order to have a firm foundation upon which to sufficiently establish that his constitutional rights have been violated.

54. For the above reasons it is therefore obvious that the instant petition is hopelessly imprecise and it does not meet the threshold set out in **Anarita Karimi Njeru case** (supra), and the court should not investigate the merits of issues **No. (b)** and **(c)** set out in the list of issues.

CONCLUSION

(c) What Orders should issue?

55. In the final analysis the court finds that the petition dated 27/2/2018 has no merit and the same is hereby dismissed. However, each party shall bear their own costs.

Dated, signed and delivered at Kitale on this 10th day of February, 2020.

MWANGI NJOROGE

JUDGE

10/2/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Sambu for Isiji for petitioner

Mr. Kuria for respondent

COURT

The judgment is read in open court.

MWANGI NJOROGE

JUDGE

