



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

PETITION No. 9 OF 2018

ANNE WANJIRU GICHURU1ST PETITIONER
EVANSON KAMOTHO2ND PETITIONER
NICHOLAS GITIGI WAITHAKA3RD PETITIONER
JAMES OGUMA AKETCH4TH PETITIONER
HUMPHREY NDIRANGU GICHUKI.....5TH PETITIONER
HUMPHREY GITHENYA.....6TH PETITIONER
JOYCE WAMBUI IRUNGU7TH PETITIONER
ALEXANDER KAMAWIRA.....8TH PETITIONER

VERSUS

THE BOARD MANAGEMENT MBEGI PRIMARY SCHOOL.....1ST RESPONDENT
THE COUNTY GOVERNMENT OF NAKURU2ND RESPONDENT
THE NATIONAL LAND COMMISSION3RD RESPONDENT

JUDGMENT

1. By petition filed on 24th September 2018, the petitioners herein described themselves as the registered proprietors of the parcels of land known as Gilgil/Karunga Block 9/2078, Gilgil/Karunga Block 9/2152, Gilgil/Karunga Block 9/2054, Gilgil/Karunga Block 9/2055, Gilgil/Karunga Block 9/2056, Gilgil/Karunga Block 9/2161, Gilgil/Karunga Block 9/2046, Gilgil/Karunga Block 9/2041 and Gilgil/Karunga Block 9/2097 (hereinafter referred to collectively as “the suit properties”). They averred that the suit properties are private land as defined by **Article 64** of the **Constitution** and that they have not been made aware of any attempts to convert the suit properties to public land. That as registered proprietors, **Article 40** of the **Constitution** protects their right to property, **Article 27** of the **Constitution** guarantees their right as proprietors to the same protection and equal benefit of the law as other title holders, **Article 47** of the **Constitution** grants them right to fair administrative action and **Article 50** of the **Constitution** grants the right to a fair and public hearing before the court. They further averred that construction of a school on the suit properties has violated their constitutional rights and freedoms and that the respondents have an obligation under **Articles 1 (3) and 3** of the **Constitution** to perform their functions in accordance with the constitution.

2. They therefore seek judgment against the respondents for the following orders:

a. THAT a declaration be issued to declare that the Petitioners are the lawful owners of as (sic) Gilgil/Karunga Block 9/2078, Gilgil/Karunga Block 9/2152, Gilgil/Karunga Block 9/2054, Gilgil/Karunga Block 9/2055, Gilgil/Karunga Block 9/2056, Gilgil/Karunga Block 9/2161, Gilgil/Karunga Block 9/2046, Gilgil/Karunga Block 9/2041 and Gilgil/Karunga Block 9/2097 within the meaning of Article 40 of the Constitution.

b. THAT a declaration be issued to declare that the forcible entry, seizure and possession and construction of structures on the Petitioners' premises, Gilgil/Karunga Block 9/2078, Gilgil/Karunga Block 9/2152, Gilgil/Karunga Block 9/2054, Gilgil/Karunga Block 9/2055, Gilgil/Karunga Block 9/2056, Gilgil/Karunga Block 9/2161, Gilgil/Karunga Block 9/2046, Gilgil/Karunga Block 9/2041 and Gilgil/Karunga Block 9/2097 amount to violation of their rights to protection of property under Article 40 of the

Constitution.

c. THAT a declaration be issued to declare that the forcible entry, seizure and possession and construction of structures on the Petitioners' premises, Gilgil/Karunga Block 9/2078, Gilgil/Karunga Block 9/2152, Gilgil/Karunga Block 9/2054, Gilgil/Karunga Block 9/2055, Gilgil/Karunga Block 9/2056, Gilgil/Karunga Block 9/2161, Gilgil/Karunga Block 9/2046, Gilgil/Karunga Block 9/2041 and Gilgil/Karunga Block 9/2097 violates the Petitioners' right to human dignity and protection of law enshrined in Articles 28 and 50 of the Constitution.

d. THAT a mandatory injunction be issued to compel the Respondents either severally and jointly to demolish all the structures they have erected on Petitioners' properties being Gilgil/Karunga Block 9/2078, Gilgil/Karunga Block 9/2152, Gilgil/Karunga Block 9/2054, Gilgil/Karunga Block 9/2055, Gilgil/Karunga Block 9/2056, Gilgil/Karunga Block 9/2161, Gilgil/Karunga Block 9/2046, Gilgil/Karunga Block 9/2041 and Gilgil/Karunga Block 9/ 2097

e. THAT a permanent injunction be issued to restrain the Respondents either severally and jointly from entry into, seizure, confiscation, occupation, alienation and construction of further properties on forcible entry, seizure and possession and construction of structures on the Petitioners' premises, Gilgil/Karunga Block 9/2078, Gilgil/Karunga Block 9/2152, Gilgil/Karunga Block 9/2054, Gilgil/Karunga Block 9/2055, Gilgil/Karunga Block 9/2056, Gilgil/Karunga Block 9/2161, Gilgil/Karunga Block 9/2046, Gilgil/Karunga Block 9/2041 and Gilgil/Karunga Block 9/2097

f. THAT a declaration be issued to declare that the Respondents jointly and severally are liable to acquire all those Gilgil/Karunga Block 9/2078, Gilgil/Karunga Block 9/2152, Gilgil/Karunga Block 9/2054, Gilgil/Karunga Block 9/2055, Gilgil/Karunga Block 9/2056, Gilgil/Karunga Block 9/2161, Gilgil/Karunga Block 9/2046, Gilgil/Karunga Block 9/ 2041 and Gilgil/Karunga Block 9/2097 in accordance with the Land Acquisition Act, Cap 295 and Section 40 of the Constitution.

g. THAT a declaration be issued to declare that the Petitioners' titles to Gilgil/Karunga Block 9/2078, Gilgil/Karunga Block 9/2152, Gilgil/Karunga Block 9/2054, Gilgil/Karunga Block 9/2055, Gilgil/Karunga Block 9/2056, Gilgil/Karunga Block 9/2161, Gilgil/Karunga Block 9/2046, Gilgil/Karunga Block 9/2041 and Gilgil/Karunga Block 9/2097 are protected by Articles 40 and 50 of the Constitution from arbitrary and unlawful action by the Respondents or through their officers, agents and servants.

h. THAT a declaration be issued to declare that the Respondents are jointly and severally liable to compensate the Petitioners by way of damages for the loss of user and other infringements of their rights and privileges as registered owners of land parcels no. Gilgil/Karunga Block 9/2078, Gilgil/Karunga Block 9/2152, Gilgil/Karunga Block 9/2054, Gilgil/Karunga Block 9/2055, Gilgil/Karunga Block 9/2056, Gilgil/Karunga Block 9/2161, Gilgil/Karunga Block 9/2046, Gilgil/Karunga Block 9/2041 and Gilgil/Karunga Block 9 / 2097

i. THAT a declaration be issued to declare that under Article 40 of the Constitution the Petitioners' premises on parcels no. Gilgil/Karunga Block 9 / 2078, Gilgil/Karunga Block 9/2152, Gilgil/Karunga Block 9/2054, Gilgil/Karunga Block 9/2055, Gilgil/Karunga Block 9/2056, Gilgil/Karunga Block 9/2161, Gilgil/Karunga Block 9/2046, Gilgil/Karunga Block 9/2041 and Gilgil/Karunga Block 9/2097 cannot be taken possession of by the Respondents either jointly or severally unless and until this Honourable Court has found that the title to the said plot is a nullity or invalid.

j. General damages for breach of the Petitioners' rights and freedoms under Articles 27, 28, 40, 47 and 50 of the Constitution.

k. THAT the Respondents be ordered to bear the costs of this Petition in any event.

3. The petition is supported by an affidavit sworn by the 1st petitioner. She deposed that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th petitioners are the registered proprietors of the parcels of land known as Gilgil/Karunga Block 9/2078, Gilgil/Karunga Block 9/2152, Gilgil/Karunga Block 9/2054, Gilgil/Karunga Block 9/2055, Gilgil/Karunga Block 9/2056, Gilgil/Karunga Block 9/2161, Gilgil/Karunga Block 9/2046, Gilgil/Karunga Block 9/ 2041 and Gilgil/Karunga Block 9/2097 respectively. She annexed copies of title deeds and certificates of search. She added that sometime around the year 2016 the area Member of Parliament announced a plan to construct a primary school. Subsequently, a large portion of land which included the suit properties was fenced off for the construction which began the same year. That a sum of KShs 2,000,000 was set aside for the construction of two Early Childhood Development classes in the financial year 2017/2018. She further deposed that neither she nor the other petitioners were consulted and none gave their consent the development on the suit properties.

4. The 1st respondent opposed the petition through a replying affidavit sworn by Nicholas Gachunga Mihingo who described himself as its chairperson. He deposed that Mbegi Primary School is a duly registered public school. He annexed a copy of a certificate of registration issued by Ministry of Education, Science & Technology. He further deposed that during demarcation done by members of Rumuruti, Akorino, Waichakeheri and Kiamukie between the years 1987 to 1990, a 13 acres parcel of land was set aside for a primary school. That the land having been set aside for a public utility remained so until 2012 when a nursery school was set up paving way for a primary school. That sometime in the year 2012 strangers entered the property at night and erected an illegal fence on part of the property where the nursery was being built but members of the community uprooted the fence. That on 1st November 2012 members of Olburgel wrote a letter to the Ministry of Lands and Settlement protesting about grabbing of public land. Similarly, Elbegi Community Development Committee wrote a letter dated 21st February 2014 to the Land Registrar Naivasha protesting about illegal acquisition of public land and that the Member of Parliament for Gilgil Constituency wrote a letter dated 4th August 2014 to the 3rd respondent requesting for investigations into the grabbing of the school property. He further deposed that the community of Olburgel held meetings on 6th October 2013, 3rd November 2013 and 20th November 2013 and resolved to ahead with construction of the school as had been planned. He added that the grabbers have subdivided the school property into 90 subdivisions and obtained titles in respect thereof illegally and fraudulently. That public injustice and disenfranchising of the community will be occasioned if the orders sought are granted.

5. The 2nd respondent filed a replying affidavit sworn by Robert Kiprono who described himself as its County Director of Physical Planning. He stated that the dispute has nothing to do with the 2nd respondent since the running of Mbegi Primary School is not a devolved function and since the 2nd respondent has no role in the allocation of the suit land to private developers. He consequently stated that the suit against the 2nd respondent is ill-conceived and without basis. The 2nd respondent also filed a document titled “2nd Respondent’s Response to Petition” in which it averred that there are other suits being Nakuru ELC No. 4 of 2014, Nakuru ELC No. 35 of 2014 and Nakuru ELC No. 54 of 2014 which relate to the suit land and with same parties as this suit. No pleadings in those suits were exhibited and no details as to their status were availed.

6. The 3rd respondent did not file any replying affidavit despite being given opportunities to do so. Instead, it filed grounds of opposition in which it averred that the facts and issues in the case do not warrant invoking the constitutional jurisdiction of the court, that the dispute is one of ownership which should be litigated in an ordinary civil suit and that public interest takes priority over enjoyment of constitutional rights by an individual.

7. In response the petitioners filed a supplementary affidavit sworn by the 1st petitioner. She deposed that the petitioners have been agitating their rights since the construction of the school on the suit properties started and that a summary of the 2nd respondent’s ward projects for 2017/2018 showed that the 2nd respondent was financing the construction of the school on the suit properties.

8. The petition was canvassed through written submissions which all parties duly filed, save for the 3rd respondent. It is submitted on behalf of the petitioners that their property was illegally taken from them in violation of **Article 40** of the **Constitution** and **Section 111** of the **Land Act**. In that regard, counsel cited the case of **Rahimkhan Afzalkhan Rahimkhan & 4 others v Chief Land Registrar & 2 others [2017] eKLR**. It is further argued that the suit properties were never compulsorily acquired and that if the respondents were keen on having the public school erected on the suit properties, the laid down procedures on compulsory acquisition ought to have been followed as set out under **Section 115** of the **Land Act**. In that regard, reliance was placed on the case of **Patrick Musimba v National Land Commission & 4 others [2016] eKLR**. It is therefore argued in conclusion that the respondents’ acts amount to a breach of the petitioners’ rights and freedoms and that the reliefs sought should consequently issue.

9. For the 1st respondent, it is argued by learned litigation counsel that the petition is vague, imprecise and does not disclose the alleged violation of the petitioners’ constitutional rights contrary to the guideline set down in **Anarita Karimi Njeru v Republic [1979] 1 KLR 154** and reiterated by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**. It is further argued that the suit properties were at all material times public utility, not available for alienation and that therefore the purported subdivision and issuance of titles to the petitioners was a nullity. Further, that the purported titles exhibited by the petitioners are not certified and therefore unauthenticated. Citing **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** (Civil Appeal No. 239 of 2009), **Article 40 (6)** of the **Constitution** and **Section 26** of the **Land Registration Act**, it is argued that a title is an end to a process and that the beneficiary of a flawed process cannot seek to enforce a title from such a process, especially in the circumstances of this case where the petitioners have not demonstrated how they acquired their titles and further considering that they admit that they have not been in possession of the suit properties. In conclusion, the 1st respondent urged the court to dismiss the petition with costs.

10. On the part of the 2nd respondent it is argued in response to the petitioners’ contention that the 2nd respondent was financing the construction of the school on the suit properties that the document alleged to be a summary of the 2nd respondent’s ward projects for 2017/2018 is an unknown and uncertified document without any probative value. It is further argued that the petitioners having not shown that the 2nd respondent is an offending party, the petition against it should be dismissed with costs.

11. The 3rd respondent did not file any submissions.

12. I have carefully considered the petition, the affidavits, grounds of opposition and submissions. Only two issues emerge for determination: whether the constitutional jurisdiction of the court is properly invoked and whether the reliefs sought are available.

13. The petitioners contend that they are the registered proprietors of the suit properties. In support of that position, they have exhibited copies of title deeds and certificates of searches. In respect of Gilgil/Karunga Block 9/2078, a certificate of search as at 24th November 2017 which shows the 1st petitioner as owner is annexed. No copy of the title deed has been availed. Regarding Gilgil/Karunga Block 9/2152, a certificate of search as at 18th June 2018 which shows the 2nd petitioner as owner and a copy of the title deed are annexed. For Gilgil/Karunga Block 9/2054, a copy of the title deed which shows the 3rd petitioner as owner as at 3rd November 2011 and an illegible certificate of search are annexed. As for Gilgil/Karunga Block 9/2055, a copy of the title deed which shows the 4th petitioner as owner as at 19th June 2012 is annexed without any certificate of search. For Gilgil/Karunga Block 9/2056, a copy of the title deed which shows the 5th petitioner as owner as at 20th June 1996 is annexed without any certificate of search. In regard to Gilgil/Karunga Block 9/2046, a copy of a certificate of search as at 22nd June 2018 which shows the 7th petitioner as owner is annexed without any title deed and as for Gilgil/Karunga Block 9/2041, a copy of a certificate of search as at 22nd June 2018 which shows the 7th petitioner as owner is annexed similarly without any title deed. I have not seen any documents of title for Gilgil/Karunga Block 9/2161 and Gilgil/Karunga Block 9/2097. Some two illegible copies of title deeds are annexed but it is impossible to decipher them. The dates on the documents of title variously submitted by the petitioners should be viewed as against the date of filing of the petition: 24th September 2018. Save for the certificates of search which are dated June 2018, the petitioners ought to have provided more recent evidence of ownership.

14. The petitioners claim that their rights to property under **Article 40** of the **Constitution** have been violated. The said article provides as follows:

40. Protection of right to property

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) ...

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5)

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

15. They further argue that the suit properties were illegally taken from them in violation of **Section 111** of the **Land Act** which provides:

111. Compensation to be paid

(1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

(1A) The acquiring body shall deposit with the Commission the compensation funds in addition to survey fees, registration fees, and any other costs before the acquisition is undertaken.

(2) The Commission shall make rules to regulate the assessment of just compensation.

16. The petitioners acknowledge that their titles to the suit properties have been challenged by the respondents through the respondents' actions. The gist of the petitioners' case generally and particularly as disclosed at paragraphs 3 to 6 of the affidavit in support of the petition as well as paragraph 7 of the petitioners' further affidavit is that a public school has been constructed on all the suit properties herein. Indeed, the petitioners acknowledge at paragraph 13 of the further affidavit that they have never had possession of the properties. Considering that the documents of title which they have exhibited suggest that they have owned the properties from as far back as 1996, it is manifest that the dispute between them and the respondents has been a longstanding one. The correspondences exhibited by the 1st respondent also testify both to the age and the nature of the dispute. The 1st respondent sees the suit properties as land that was set aside for a public utility and thus not available for alienation to private individuals. They further see the petitioners as "land grabbers" and their titles as having been obtained illegally and fraudulently and therefore nullities. That the petitioners have not denied the existence of the correspondences exhibited by the 1st respondent shows that they have been aware of the 1st respondent's longstanding views as regards the nature of their titles.

17. Rights of a registered proprietor of land, in addition to being guaranteed by **Article 40** of the **Constitution**, are further protected by **Section 26** of the **Land Registration Act** which provides:

26. Certificate of title to be held as conclusive evidence of proprietorship

(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 a corrupt scheme.

(2) ...

18. None of the parties has adduced any evidence of any of the petitioners' titles having been declared a nullity and this court in its constitutional jurisdiction has not made any finding on the validity of the titles. Nevertheless, **Article 40 (6)** of the **Constitution** makes it clear that rights under **Article 40** do not extend to any property that has been found to have been unlawfully acquired. While considering the import of **Article 40** vis-à-vis **Section 26** of the **Land Registration Act**, the Court of Appeal stated in **Henry Muthee Kathurima v Commissioner of Lands & another** [2015] eKLR as follows:

We have considered the provisions of Section 26 of the Land Registration Act in light of the provisions of Article 40 (6) of the Constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of the Constitution. Guided by the provisions of Article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired. Further, it is our view that the Governments title to an un-alienated public land stems from the concept of radical title or eminent domain. Based on radical title, the government has superior title to all un-alienated public land and the appellant cannot challenge radical or eminent title.

19. So as to conclusively determine the dispute between the parties, the issue of validity of the titles herein must inevitably be addressed since if the titles turn out to be void, any judgment in the petitioners' favour founded on the titles will equally be void. As Lord Denning famously stated in **Macfoy vs. United Africa Co. Ltd** [1961] 3 All E.R. 1169:

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

20. I have no doubt whatsoever that the petitioners have a right under **Article 22** of the **Constitution** to institute proceedings in court claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. That said, right of access to the court is not everything. It must be exercised procedurally. See **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** (supra). In that regard, procedural law is clear that where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain the dispute. In essence therefore, when formulating his claim a party must take the statutory route where it is available as opposed to the constitutional one. There are many decisions to that effect. In **Sumayya Athmani Hassan v Paul Masinde Simidi & another** [2019] eKLR the Court of Appeal stated:

*... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in **Communications Commission** case (supra).*

[17] In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ...

21. In an earlier decision in **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another** [2016] eKLR, the Court of Appeal stated:

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.

...

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.

22. As I pointed out earlier in this judgment, the petitioners were aware prior to filing this petition that there are disputes concerning validity of their titles. Allegations had been made that the land where the suit properties stand had been set aside as a public utility and that their titles were obtained illegally and fraudulently. If those allegations are proven the titles will be rendered nullities. **Section 26** of the **Land Registration Act** makes provisions on the requirements for nullification of a certificate of title. It provides that a title can be nullified on the ground of fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Procedural law is clear that fraud, illegality and misrepresentation must be pleaded, particularised and strictly proven. See **Kuria Kiarie & 2 others v Sammy Magera** [2018] eKLR. There are ample provisions regarding the manner of pleading such a case within the **Civil Procedure Act** and rules made thereunder.

23. In view of the history of this dispute, the petitioners knew and ought to have known that a constitutional petition cannot resolve the dispute. There is need to provide a forum where all issues around the titles can be addressed. That forum is available through statute. The petitioners may respond to these concerns by saying that they have faith in their titles and that in any case it is the respondents who are raising the issues of fraud and illegality who should be required to plead them in the appropriate court. The simple answer to that is that the court cannot act in vain. Being fully aware of the nature and history of the dispute, the petitioners owe it to themselves to bring proceedings that can conclusively address the dispute. That certainly cannot be achieved through a constitutional petition. There will be need for example to take oral evidence and to physically examine originals of documents in parties' possession.

24. In view of the foregoing discourse, I find that the constitutional jurisdiction of this court has not properly been invoked in this matter.

That finding disposes of the entire petition and addresses the second issue for determination. The reliefs sought by the petitioners are not available.

25. In the end, the petition herein is dismissed. Each party shall bear own costs.

26. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 30th day of April 2020.

D. O. OHUNGO

JUDGE