



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 129 OF 2011

IN THE MATTER OF ARTICLE 22, OF THE CONSTITUTION OF KENYA

**AND IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOM UNDER ARTICLES 10, 23, 40, 47, 48, 50, 59 (2) (a) (b) & (d) OF THE
CONSTITUTION OF KENYA.**

FREDRICK MWORIA.....PETITIONER

VERSUS

DISTRICT LAND ADJUDICATION

OFFICER TIGANIA WEST/EAST.....1ST RESPONDENT

REBECCA KANYUA SAMSON.....2ND RESPONDENT

ISAAYA KIREMA SAMSON.....3RD RESPONDENT

TIMOTHY MWINGIRWA MUTIGA.....4TH RESPONDENT

R U L I N G

1. This Petition is dated 26th September, 2011 and was filed on 30th September, 2011.

2. The Petition states:-

PETITIONER

TO THE HIGH COURT OF KENYA AT MERU

The Humble Petition of Fredrick Mworria whose address for service is C/O

CHARLES KARIUKI & CO ADVOCATES

NJURICHEKE STREET,

KCB BUILDING, 1ST FLOOR,

P.O BOX 2387-00200

MERU Of the Republic of Kenya as follows: -

1. The applicant is lawful owner of land parcel No. 253 URINGU 11 LAND ADJUDICATION section that is currently under Adjudication.

2. That there have been several cases previously between the Exparte Applicant as well as predecessors of the Exparte Applicant and the 1st Interested Party including the following:-

(b) Civil case No. 111 of 1974-75

(c) A/B (Arbitration Board Case No. 17 of 1985)

(d) Objection Case No. 394 of 2009, which was wrongly, consolidated with other late objections Nos. 1659 and 851 of 2010.

(3) That following the outcome of A/B Case No. 17/85 the land was equally shared between the Exparte Applicant and the 1st Interested Party and each given their numbers.

(4) That the Applicant became registered owner of Land Parcel No. 253 and the 1st Interested Party No. 1096 URINGU 11 ADJUDICATION SECTION.

(5) The Applicant contends that the Objection No. 394 of 2009 was heard without giving him a chance to present his case and hence award is a nullity as the same is against the principles of Natural Justices.

(6) The Applicant contends the decision of the Land Adjudication Officer to lump together Objection Nos. 394, 1659 and 851 was also malicious and in bad faith and was made to facilitate a fake and fraudulent hearing and to deny justice to the Applicant.

Your petition (sic) therefore humbly prays that:-

a) An order of certiorari to call up the decision of 1st Respondent dated 01/04/2010 to this Honourable Court and quash the same.

b) Costs.

3. The juridical integrity of the Petition is challenged by a Notice of Motion application dated 1st March, 2016 filed by the 2nd and 4th Respondents/ applicants. The application seeks the following orders”-

1) THAT the application be certified extremely urgent and it be heard on priority basis.

2) THAT the Petition herein, dated 26.09.2011 be dismissed, as it seeks an order of certiorari to quash a decision which was made more than six (6) months from the date of filing the Petition, and for want of jurisdiction.

3) THAT costs of the Petition and this application be provided for.

4. The Application is supported by the Affidavit of TIMOTHY MWINGIRWA MUTIGA, the 4th Respondent /Applicant and has the following grounds:

i. THAT this Court has no jurisdiction to hear this matter since the petitioner/respondent did not follow or exhaust the procedure/remedies laid down under section 29 of the land Adjudication Act, Cap 284 laws of Kenya, because he did not appeal to the Minister as ordained in law, and held in MERU H.C. PET.NO. 21 OF 2012.

ii. THAT the decision sought to be quashed through an order of certiorari was made on 01.04.2010 and this matter was filed in court on 30.09.2011.

iii. THAT a certiorari order can only be sought within six (6) months from the date of the impugned verdict.

iv. THAT this matter was filed about 18 months from the date when the beleaguered decision was made on 04. 01. 2010.

v. THAT the 2nd Respondent /Applicant is an aged lady who prays that this matter to be disposed of timeously, as it is causing her anxiety and stress.

5. The Application is opposed through Grounds of Opposition filed by the Petitioner's Advocates dated 22nd April, 2016 which are in the following terms ;

“ TAKE NOTICE that the defendant shall raise the following grounds in opposition to the 4th Respondent's /Applicant's Notice of Motion dated 1st March 2016 on the following grounds;

1. That the Court has jurisdiction under Article 23,21,22 and 165 of the Constitution to grant any appropriate relief in any proceeding brought under the said land.

2. That the Constitution is the supreme and a constitutional position cannot be challenged by way of reference to unfair provisions of the statute.

3. That it does not lie in land that a party can seek for enforcement of bills of rights by invoking statute land (sic), in event the Constitution safeguards the same.

4. That the application by the 4th respondent/applicant herein is incompetent abuse of the Court process, vexatious and frivolous as if its (sic) trite law that an interim application cannot dispose the entire suit without first hearing the parties on merit , in a claim of (sic) enforce of (sic) bill of right for the supreme law.

5. That the application by the defendant/applicant is an abuse of the Court Process and the defendant urges the Honourable Court to dismiss the said application with costs to the defendant.

6. It is obvious that although the grounds of opposition in the preamble state that the grounds would be raised by the defendant, the intended opposer is the Petitioner.

7. By Consent of the Parties, the Petition was withdrawn against the 3rd Respondent on 23/09/2014.

8. On 21/03/2016, Miss Kungu, representing the Honourable Attorney General , indicated that she was not opposed to this application with the consequence that she was not going to file Submissions.

9. The Applicants herein have brought to the attention of the Court that Paragraph. 2 (b) (c) and (d) of the Petition lists other cases involving the parties, It is pointed out that there was Arbitration Board Case No. 17 of 1985 which gave rise to Objection Case Numbers 1659 and 851 of 2010 , which the Petitioner lost and the land was awarded to the 2nd and 4th Respondents. The applicants point out that the objections were heard and determined in accordance with Section 26 (1) of the Land Adjudication Act, Cap. 284, Laws of Kenya.

10. The Applicants say that since in Paragraph 5 and 6 of the Petition, the Petitioner alleges that he was denied a chance to be heard and that there was malice and bad faith, then he ought to have followed the correct procedure and to have exhausted available remedies provided for in the apposite statute. The Applicant submits that the Petitioner should have filed an appeal to the Minister Under Section 29 (1) of the Land Adjudication Act, Cap 284, Laws of Kenya which states;

“Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of that decision, appeal....to the Ministerand the

order (of the Minister) shall be final.

11. The Applicants opine that the Petitioner had an alternative and should have filed judicial review proceedings to quash the said A/R Objection proceedings within six months from the date of the impugned decision in accordance with Sections 8 and 9 of the Law Reform Act, Cap. 26, Laws of Kenya and order 53 of the Civil Procedure Rules, 2010.

12. The Applicants say that inexplicably the Petitioner did not pursue any of the two optional remedies provided for in statutes. The Applicants, therefore submit that this Court has no business to entertain this frivolous and vexatious Petition as by doing so, it would be usurping the powers of the Minister in view of Section 29 of Land Adjudication Act (op.cit).

13. To buttress the above proposition, the applicants have proffered MERU H.C. Petition NO. 21 of 2012 -STEPHEN MICHUKI KIUNGA versus NKUNI M'MTUTUCHIU and 2 others in which this Court opined, at page 7,

“...the issue as to whether a Court has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court can not entertain any proceedings” He also quotes the Court at pages -7 and 8 as having opined:

“...the Petitioner had not exhausted available remedies under the Land Adjudication Act... it is quite clear that the Petitioner had not exhausted the available remedies....had the Petitioner appealed to the Minister....he would not have filed this Petition.

“ Any Court would find it difficult to grant a declaration that the Constitutional rights of the Petitioner had been trampled upon, when the Petitioner had himself refused to exhaust the available appeal processes”.

14. The Applicants in support of their case also proffered the following authorities:

i. Mombasa High Court Petition 18 of 2013 -ANNE WAMUDA AND 3 OTHERS VERSUS KENYA RAILWAYS CORPORATION AND ANOTHER, [2015] e KLR, where the Hon Justice Anyara Emukule, J, opined as follows:-

“ In the Circumstances, the Court is bound to exercise its inherent power to prevent abuse of its process. In the words of the Court in , KARIUKI & OTHERS versus DAWA PHARMACEUTICALS COMPANY LIMITED AND OTHERS [2007] E.A 235, “....Nothing can take away the Court's inherent power to prevent abuse or trivializing of its process by striking out a frivolous and vexatious application. Baptizing such matters Constitutional can not make them so, if they were plainly frivolous or vexatious or elevate them to a Constitutional status when they are in fact an abuse of the Court's process”.

ii.Also proffered as an authority and quoted from Mombasa No 18 of 2013 (op.cit) is SPEAKER OF NATIONAL ASSEMBLY VERSUS KARUME [1992] KLR 425 IN WHICH THE Court held “...where there was a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed”.

iii. Also proffered as an authority and quoted from Mombasa Petition No. 18 of 2013 (ibid) is Kenya Bus Service Limited & 2 others versus attorney general [1992] KLR 787 which quoted with approval the Trinidad and Tabago Case of; RE Application by Bahadur [1986] LRC 9(CONST.) which said:-

“ The Constitution is not a general Substitute for the normal procedure for “ invoking Judicial control of administrative action where infringements of rights can find a claim under substantive law. The proper course is to bring the claim under that law and not under the

Constitution. (Harrikson Versus Attorney-General of Trinidad & Tobago [1979], 3 W.L.R. 62 applied).

iv. The South African case of ANDREW LIONEL PHILLIPPS & 15 OTHERS Versus NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS (CC -55 OF 2004) is also quoted from Mombasa Petition 18 of 2013 (ibid) in which JUSTICE S. KWEYIYA, J, opined:-

“..I do not think that an Act of Parliament can simply be ignored and reliance placed directly on provisions in the Constitution, nor is it permissible to side-step an Act of Parliament.

(v) Also the South African case of NARTOSA & OTHERS VERSUS MINISTER OF EDUCATION FOR WESTERN CAPE & OTHER quoted with approval in Mombasa Petition 18 of 2013 (ibid) is proffered as an authority where the Court opined:-

“ The Court was concerned with the appropriateness or otherwise of granting relief directly under the Constitution without a complaint that an Act of parliament was Constitutionally deficient in the remedies it provides.

“The Court could not conceive that it is permissible for an applicant , save by attacking the Constitutionality of the statute, to go beyond the regulatory framework, which is established”.

(vi) Also quoted from Mombasa Petition 18 of 2013 is the Case of ABDALLAH MANGI MOHAMED VERSUS LAZARUS & 5 OTHERS [2012]e KLR and which is proffered as an authority in support of the applicant's propositions. In this case the Hon. Justice Muriithi, J, opined as follows:-

“.....where there is a dispute as to the applicant's entitlement to property and where there exists a Statutory Mechanism for the Resolution of the Dispute, the Statutory Procedure should be utilized in the determination of the applicants claim to the property rather than clog the Constitutional Court with applications for enforcement of purported rights which require prior determination. The improper practice making all private disputes as to ownershi of property as applications for enforcement of Constitutional rights to property should be discouraged”.

15. Regarding Prayer (a) of the Petition that seeks an order of Certiorari to quash the 1st Respondent's decision dated 26/09/2011, the applicants contend that it lacked basis as the Petition was filed 1 year and 5 months from 01/04/2010 which was the date of the impugned decision. It is submitted that this is contrary to Order 53 Rule 2 of the Civil Procedure Rules, 2010 and Sections 8 and 9 of the Law Reform Act, Cap 26, which require that an order of certiorari should be applied for within 6 months from the date of the challenged decision. It is submitted that this prayer is statutorily time barred.

16. The applicants submit that in quoting Articles 21,22,23 and 165 of the Constitution of Kenya, in support of his allegations, the Petitioner has failed to set out which Constitutional rights of his had been violated and by who. The applicants say that he takes umbrage in the holding of this Court in STEPHEN MUCHUKI KIUNGA (op cit) at page 9 where the Court opined:-

“One would imagine a situation where litigants would refuse to appeal and then file Constitutional Petitions alleging that the Magistrates' Courts or superior Courts had trampled upon their rights and denied them fair hearing and access to justice. Yes, the Constitutional provisions are supreme. And yet the Constitution protects all other Laws including the provisions of the Land Adjudication Act. One can not have his cake and at the same time eat it. One cannot file a Constitutional Petition when an appeal under the land Adjudication Act has not been heard and determined . Also available appeal processes should be exhausted”.

17. The Applicants submit that even the Overriding Objective of dispensing justice and/or the “02” principle cannot salvage the Petition because the two can not breath life to a legally dead matter like this

one. The applicants proffer as an authority in support of this proposition the case of MALINDI CA NO. 46 OF 2014 -RANSA CO. LTD & OTHERS VERSUS MANCA FRANCESCO. [2015] e KLR where the Court opined as follows:-

“With the introduction of these principles parties can no longer hide their failures behind abstract excuses that their Advocates' mistakes cannot be visited upon them. Article 159 and Section 3A and 3B have clearly replaced Section 3 A of the Civil Procedure Act which was, before the enactment of Article 159 and the “02” principle, the most misapplied provision, where Advocates and parties took refuge in whenever they were not certain. These inherent powers are to be resorted to only in situations where there are no specific or alternative provisions of the law. We come to the conclusion that both the notice of appeal and the record of appeal are incompetent and accordingly strike them out with costs”.

18. The applicants also submitted that the application of the overriding objective/ double “O” principle /”02” principle had been elaborated by the Court of Appeal in NAIROBI CIVIL Application No. 6 of 2010- Hunker Trading Company Limited versus ELF OIL KENYA LIMITED where the Court opined:-

“However , having identified the principal points raised in the application and this being a novel situation, we have opted to focus our attention on the impact of the overriding objective on the special Circumstances of the matter before us.... the principal aim is for the Court to act justly in every situation either when interpreting the law or exercising its. Powers..”02” principle which must of necessity turn on the circumstances of each case is double -faced , and for litigants to thrive under its shadow they must place themselves on the “ right side.” In the Circumstances of this matter, the applicant is clearly on the wrong side and for this reason, the principle must work against it...we must insist on full compliance with past rules and precedents with are “02” Compliant so as to maintain consistency and certainty”.

19. In his Submissions the Petitioner has told the Court that in opposing this application , he among other things, relies on his grounds of opposition dated 22nd April, 2026 which have already been reproduced in full at paragraph 5 hereof.

20. The Petitioner says that this application is an abuse of the Court process, vexatious and frivolous in law and states that the prayers sought in the application do not lie in law because the remedies sought by the Petitioner are within the Constitution.

21. The Petitioner tells the Court that the remedies which were available to the Petitioner were :-

i. To appeal to the Minister under Section 30 (3) of the Land Adjudication Act, Cap 284, Law of Kenya ; or

ii. To seek an order of Judicial Review Under Sections 8 and 9 of the Law Reform Act, Cap 9 of the Laws of Kenya and Order 53 of the Civil Procedure Rules.

22. The Petitioner submits that the two alternative remedies mentioned above were overtaken by events after this Petition was filed . He says that he could not be left without a remedy for the wrong he had suffered and infringement of his Constitutional rights. It is submitted that Article 165 (2) of the Constitution supported his case. He also says that he had a right to institute this petition as contemplated in sub- Article 3 of Article 22 of the Constitution, 2010.

23. The Petitioner submits that this Court is a creature of Article 162 (2) (b) which bestows upon it the status of the High Court and therefore had the power to remedy infractions of the constitution which infringe on the fundamental freedoms circumscribed by the Bill of Rights in accordance with Article 23 (1) of the Constitution of Kenya.

24. The Petitioner submits that grant of relief under Article 23(3) of the Constitution is not subject to any

limitation under any statute such as the Law Reform Act and the Limitation of Actions Act. For this proposition the Petitioner has proffered as an authority the case of : KILUWA LIMITED & ANOTHER VERSUS COMMISSIONER FOR LANDS 3 OTHERS. In this case , Judicial Review orders were granted . However, the Court did not find definitively that the issues germane to limitation of time whether in the Law Reform Act, in the Limitation of Actions Act or any other statute are made inoperational and unnecessary in Constitutional Petitions.

25. The Petitioner has proffered the case of H.C.C.C Petition No. 336 OF 2015 MASAI MARA (SOPA LTD) VERSUS NAROK COUNTY COUNCIL in support of his proposition that Judicial Review orders are tenable in Constitutional Petitions.

26. I have carefully examined the pleadings and the Submissions proffered by the parties in support of their respective Submissions.

27. I opine that the authorities proffered by the parties are good authorities in their circumstances, No one case is exactly in congruence with another. No one shoe-size fits all. I am in agreement with the authorities proffered by the applicants in holding that Constitutional Petitioners cannot be substitutes for other legal processes and that where there are specific Statutory provisions litigants ought to prosecute their disputes in concordance with the available Statutory Law and remedies set out therein.

28. Regarding the authorities proffered by the Petitioner, I agree with the intimation that Judicial Review orders can be granted in Constitutional Petitions in the right Circumstances. In those 2 cases proffered by the Petitioner, the Petitioners had explained to the Court in detail what deleterious infractions had been occasioned upon them and by who. In the two cases, It is clear that the Petitioners had not failed to exhaust available remedies. In this Petition, the Petitioner had not appealed to the Minister as provided for in the Land Adjudication Act.

29. Indeed in the Submissions filed for the Petitioner, there is clear admission that the Petitioner had two choices: -

1. to file judicial Review proceedings. or

2. To appeal to the Minister.

30. The Petitioner admits that he did not take any of the 2 options. He merely submits that the filing of the Petition debunked the necessity of exploring and exhausting the available options. The Petitioner, however, does not admit that by the time he filed this Petition he was time barred to employ the available options. Firstly, an appeal to the Minister had to be lodged within 60 days of the challenged decision. Secondly , available Judicial Review remedies were required to be filed within 6 months of the impugned decision. I opine that by filing this Petition, the Petitioner was contriving to evade the consequences of his indolence.

31. The Petitioner has not demonstrated that the Minister would have infringed his fundamental rights if he had filed the necessary appeal as provided for by the Land Adjudication Act. I do not agree that the filing of every Constitutional appeal, by that fact alone, throws away the need to obey the stipulations of Statutory Laws. As this Court opined in Meru Petition 21 of 2012 (op.cit) at page 9 “.....the Constitution protects all other laws including the Land Adjudication Act”.

32. The Constitution is the Umbrella of all Statutory Laws and all subsidiary legislation. I agree with the opinion of the Hon. Justice Muriithi in ABDALLAH MANGI MOHAMED VERSUS LAZARUS & 5 OTHERS [2012] e KLR (op.cit) where he said:-

“.....Where there is a dispute as to the applicant's entitlement to property and where there exists a Statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicant's claim to the property rather than clog the Constitutional Court with applications for enforcement that require prior determination . The

improper practice of making all private disputes as to ownership of property as applications for enforcement of Constitutional rights to property should be discouraged”.

33. I am also in total agreement with the holding of the apposite Court in *SPEAKER OF NATIONAL ASSEMBLY VERSUS KARUME* [1992] KLR 425 where the Court said “.....***where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed***”. This position was adopted with approval by Hon. Justice. M.J. ANYARA EMUKULE, J, in *MOMBASA HIGH COURT PETITION NO. 18 of 2013: ANNE WAMUDA & 3 OTHERS VERSUS KENYA RAILWAYS CORPORATION & ANOTHER* [2015] e KLR (op.cit).

34. I make similar sentiments as I did in *MERU PETITION NO 21 OF 2012, STEPHEN MUCHUKI KIUNGA VERSUS NKUNI M'TURUCHIU & 2 OTHERS* (op.cit). I agreed with the Petitioner in that case that Constitutional provisions are supreme. They override all other Statutory Provisions. It is, however, true that the Constitution is the umbrella of all other Laws. It is the anchor upon which they operate. One would imagine a situation where litigants would be allowed not to exhaust remedies provided for in germane statutes or refuse to appeal in Civil or Criminal cases and then file Constitutional Petitions alleging that tribunals and appellate bodies such as the Minister under the Land Adjudication Act, Magistrates' Courts or superior Courts had trampled upon their rights and denied them fair hearing and access to Justice. And yet it is veritably true that the Constitution protects all other laws, including in this case, the Land Adjudication Act. One can not have his cake and at the same time eat it. One cannot file a Constitutional Petition when one has refused and/ or failed to exhaust, without proffering compelling reasons, the remedies provided for under the Land Adjudication Act or any other Statutory Law. Embracing such conduct would spawn veritably negative supercalifragisticexpialidocious ramifications capable of contriving an oxymoron which would discombobulate and dismember the presently known legal process and apposite norms relating to Judicial Review. This would have the effect of rendering Judicial Review comatose, nebulous and veritably opacified.

35. Article 23 (3) of the Constitution states as follows:-

(3) In any proceedings brought under Article 22, a Court may grant appropriate relief, including-

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

36. The Reference to Judicial Review must be reference to Judicial Review as is known in Kenya. In Kenya Judicial Review is governed by sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. I opine that except for doing away with the way parties cite Judicial Review Proceedings, which can be deemed as a procedural technicality, litigants should pay obeisance to all other requirements. For example, the Petition, if it seeks Judicial Review Orders Must be filed within the time prescribed by the Law Reform Act and Order 53 of the Civil Procedure Rules.

37. I find that though Courts can grant orders of certiorari in Constitutional Petitions, parties must demonstrate that they did not seek them in an attempt to avoid the application of the provisions of relevant Statutory provisions like in this case, where in my view, this Petition was filed to avoid the

consequences that would befall the Petitioner for having avoided to abide by the stipulations contained in the Land Adjudication Act.

38. I find that this application is meritorious. In the Circumstances, this PETITION is dismissed.

39. Costs are awarded to the 2nd and 4th Respondents.

40. It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 14TH DAY OF SEPTEMBER, 2014 IN THE PRESENCE OF:

CC:

Miss Kiome for Respondent

Miss Muna h/b Carlpeters/Mbaabu for 2nd and 4th Respondents

P. M. NJOROGE

JUDGE