



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. E005 OF 2022

LYDIAH KAGENDO & JOSEPH MWITI
(Suing as the Legal Representatives of
the estate of THURANIRA KABERIA-
DECEASED).....**PETITIO**
TERS

=VERSUS=

SAMUEL MWONGO MUTUNGI - (Deceased
and Substituted by his Legal
Representative, KENNEDY NKONGE).....**1ST**
RESPONDENT

DEPUTY COUNTY COMMISSIONER,
TIGANIA WEST SUB-COUNTY *(On behalf*
of the Minister for Lands).....**2ND**
RESPONDENT

LAND REGISTRAR, URRU.....**3RD**
RESPONDENT

ATTORNEY GENERAL.....**4TH**
RESPONDENT

JUDGMENT

Introduction

1. This petition challenges the proceedings and the judgement/ award of the Cabinet Secretary's/Minister's

delegatee (the Deputy County Commissioner, Tigania West Sub-County) in **Appeal No. 42 of 2021**. The appeal related to a land adjudication dispute in respect of land parcel number **Thau/Mumui/256**, measuring approximately 9 areas. The petitioners contend that the late Samuel Mwongo Mutungi, whose estate is the 1st respondent in this petition, failed to file an appeal within 60 days in 1997 after the Land Adjudication Officer rendered an award on 3/8/1997 relating to Adjudication Register Objection Number **138 of 1997** which he had filed.

2. The petitioners add that in 2021, the 1st respondent colluded with the 2nd respondent to register an appeal outside the prescribed limitation period of 60 days for the purpose of annulling the registration of the late Kaberia as proprietor of land parcel number Thau/Mumui/256. One of the key issues to be determined in the petition is whether the late Samuelk Mutungi lodged an appeal to the Minister against the Land Adjudication Officer's award/decision dated 3/8/1997 within the limitation period of 60 days as required under Section 29 of the Land Adjudication Act. Before I analyse and dispose the issues that fall for determination, I will summarize the parties' respective cases.

Petitioners' Case

3. Through a petition dated 20/4/2022 and amended on 5/3/2024, the Legal Representatives of the late **Thuranira Kaberia** [*hereinafter referred to as "the late Kaberia"*] seek the following reliefs:

- (a) A declaration that the proceedings and judgement in Case No. 42/2021: Samuel Mwongo Mutungi v Thurania Kaberia (deceased), disguised as “Appeal to Minister” over L.R No. Thau/Mumui/256 do not amount to an appeal to the Minister envisaged under Section 29 of the Land Adjudication Act, Cap. 284, Laws of Kenya, against the decision dated 3/08/1997 in A/R No. 138, are statutorily time-barred and therefore, null and void.**
- (b) A declaration that the transfer by the 3rd respondent, of L.R No. Thau/Mumui/256 from the name of Thurania Kaberia to the name of Samuel Mwongo Mutungi on 24/2/2022 and issuance of a title deed to him on the same date, yet Thurania Kaberia died on 20/1/2018, is irregular, unprocedural, unlawful and therefore, null and void.**
- (c) A judicial review order of certiorari be issued to call into this court and quash the proceedings and judgement in Case No. 42/2021: Samuel Mwongo Mutungi vs Thurania Kaberia (deceased), disguised as “Appeal to Minister”, over L.R No. Thau/Mumui/256.**
- (d) A mandatory injunction be issued, compelling and directing the 3rd respondent to re-instate registration of L.R No. Thau/Mumui/256 to the name of Thurania Kaberia as the registered owner thereof, by deleting/cancelling the name of Samuel Mwongo Mutungi from the register and in**

doing so, do dispense with the necessity of production/surrender of the original title deed by Samuel Mwongo Mutungi.

(e) A permanent injunction be issued, restraining the 1st, 2nd and 3rd respondents and anybody else acting at their behest, direction or instructions, from whatsoever interfering with L.R No. Thau/Mumui/256, both in the register & on the ground.

(f) Costs of the petition plus interests thereon, against the respondents jointly and severally.

- 4.** The petition was premised on the grounds outlined therein and in the affidavit of **Joseph Mwit** sworn on 20/4/2022. It was canvassed through written submissions dated 19/12/2024, filed by **M/s Carl Peters Mbaabu & Co. Advocates**. The case of the petitioners is that, the late Kaberia lived on the suit land, parcel number **Thau/Mumui/256** (*hereinafter referred to as “the suit land”*), from his childhood days. He subsequently gathered the land in 1970. He developed the land and lived on it with his family up to the time of his death in 2018. During land adjudication exercise, the late **Samuel Mwongo Mutungi** [*hereinafter referred to as “the late Mutungi”*] objected to the adjudication register (AR) which reflected the late Kaberia as the adjudicated owner of the suit land. His objection was heard and disposed by the Land Adjudication Officer through a decision rendered on **3/8/1997**. The Land Adjudication Officer upheld the late Kaberia’s ownership. The late Mutungi did not lodge an appeal to the Minister within 60 days as provided under

Section 29 of the Land Adjudication Act. Consequently, the dispute was considered settled and the adjudication register was finalized. The late Kaberia was subsequently registered as proprietor of the land in 2004.

5. The petitioners add that the matter relating to ownership of the suit land remained settled from 1997 to 2020. In 2020, the late Mutungi filed **Tigania SPMC E & L Case No. 40 of 2020** alleging that **Lydia Kagendo** and **Consolata Nkirote Kinyua** had procured registration of the suit land through fraud, secrecy and misrepresentation. He sought an order annulling the registration. He also sought a permanent injunction restraining the two defendants against entering, cultivating, developing, utilizing, fencing, alienating, selling or interfering with the suit land. The petitioners filed a defence in the said case, contesting the claim and clarifying that the suit land was still registered in the name of the late Kaberia. The petitioners contend that the late Mutungi kept on applying for adjournments in the case.
6. The petitioners add that on 22/3/2022, while **Tigania SPMC E & L Case No 40 of 2022** was still pending, the late Mutungi confronted them on the suit land and threatened to evict them, alleging that he had been registered as proprietor of the suit land after winning an appeal to the Minister. The petitioners procured a search which confirmed that the Land Registrar had registered the suit land in the name of the late Mutungi on 24/2/2022 and issued to him a title on the same day.

7. The petitioners state that no appeal was lodged to the Minister in 1997 against the award of the Adjudication Officer in AR Objection No 138 of 1997. It is their case that Appeal No 42 of 2021 was registered in 2021 outside the statutory period for the sole purpose of illegally deregistering the late Kaberia as proprietor of the suit land. They point out that if an appeal had been lodged in the year 1997, it would be having a registration number of the year 1997. They add that the purported award of the Minister is blank in the space provided for the receipt number, meaning that no legitimate appeal was lodged in 1997. They further argue that if the late Mutungi had filed an appeal to the Minister in 1997, he could have served it and prosecuted it and Tigania SPMC E & L No 40 of 2020 would not have been necessary. They add that the estate of the late Kaberia was not a party to the appeal and was never served with papers and notices relating to Appeal No. 42/2021.
8. The petitioners argue that the conduct of the 1st, 2nd and 3rd respondents violated the estate's rights under Articles 27(1) & (2), 40, 47, 48 and 50 of the Constitution, respectively, and deprived the estate of the deceased the suit land. They further fault the 2nd respondent for condemning the deceased unheard. They urge the court to grant the reliefs sought in the petition.

1st Respondent's Case

9. The 1st respondent opposed the petition through a replying affidavit sworn on 19/6/2024 by **Kennedy Nkonge** and written submissions dated 23/1/2025, filed

by **M/s Mutuma Gichuru & Associates**. In the replying affidavit, the 1st respondent contends that the petition offends Sections 8 and 9 of the Law Reform Act and Sections 7, 8, and 9 of the Fair Administrative Action Act.

- 10.** The 1st respondent further contends that the petition does not meet the threshold set out in **Anarita Karimi v Republic, Nairobi High Court Misc Criminal Application No 4 of the 1979**. He states that the nature of injuries and the manner of infringement have not been pleaded with precision.
- 11.** The 1st respondent adds that it is trite law that any challenge against the decision of the Minister in adjudication proceedings should be through judicial review process and not through a constitutional petition. He adds that, the petitioners participated in the appeal proceedings. He further states that the late Mutungi was allocated 35 acres in 1969 by the Minister of Lands, adding that the late Kaberia encroached on the land in the 1990s.
- 12.** On the allegation that the late Mutungi did not lodge an appeal in 1997, the 1st respondent contends that Appeal No 42/2021 was lodged on 13/8/1997, adding that the Form of Appeal and the relevant receipt have been exhibited by him as exhibit No. **“KN 11”** and **“KN 12”**. He contends that the fact that the appeal was admitted in 2021 was due to administrative lapses from the relevant authorities and this should not be visited upon the deceased who filed the appeal “timorously” sic. He urges the court to reject and dismiss the petition.

Case of the 2nd - 4th Respondents

- 13.** The 2nd - 4th respondents filed grounds of opposition dated 17/9/2024 and written submissions dated 13/2/2025. Despite the serious allegations made against the 2nd respondent in relation to the registration and disposal of the appeal, the 2nd respondent elected not to tender evidence in the petition. The case of the three respondents is that the petition does not meet the threshold in **Anarita Karimi Njeru v Republic (Supra)** because it does not raise any constitutional issues. They add that the petition contravenes the doctrine of exhaustion of remedies, hence it offends Sections 7, 8 and 9 of the Fair Administrative Action Act. They further state that the petition offends Sections 8 and 9 of the Law Reform Act. Lastly, they contend that no constitutional and/or legal basis has been laid by the petitioners to warrant grant of the orders sought in the petition. They argue that a challenge against the decision of the Minister ought to have been mounted through judicial review as opposed to a constitutional petition.
- 14.** In their submissions, the 2nd - 4th respondents identified the following as the issues that fell for determination in the petition: (i) Whether the amended petition raises issues; (ii) Whether the petition offends the doctrine of exhaustion; (iii) Whether the petitioners are entitled to the reliefs sought; and (iv) What order should be made with regard to costs of the petition.
- 15.** On whether the petition raises constitutional issues, the 2nd - 4th respondents cited the threshold outlined in the case of **Anarita Karimi Njeru v Republic (1979) eKLR**.

Counsel for the 2nd - 4th respondents submitted that the petition did not meet the threshold. Counsel argued that whereas the petitioners cited Articles 27 (1) & (2), 40, 47, 48, and 50 of the Constitution as having been violated, they did not prove the allegations on how they have suffered injustices in relation to the ownership of the suit land by specifying the wrongs alleged to have been committed by the 2nd, 3rd and 4th respondents. Counsel contended that the petitioners failed to prove that their rights were infringed.

- 16.** On whether the petition offended the doctrine of exhaustion of remedies, counsel submitted that the petitioners had failed to pursue the remedy of an appeal.
- 17.** On the allegation that the appeal was filed outside the prescribed time, counsel submitted that the 1st respondent had presented, as exhibits, a copy of the appeal and a receipt bearing the date of 13/8/1997, meaning that the appeal was filed within time. Counsel added that rectification of the land register by the Land Registrar demonstrated that the requisite procedural technicalities were adhered to. Counsel urged the court to reject the petition.

Analysis and Determination

- 18.** The court has considered the petition; the responses to the petition; and the parties' respective submissions. The following are the key issues that fall for determination in the petition: (i) Whether a constitutional petition is available as a platform on which to challenge the Minister's decision under Section 29 of the Land

Adjudication Act; (ii) Whether the petition meets the threshold of a constitutional petition under the law; (iii) Whether the late Mutungi lodged an appeal to the Minister within the prescribed limitation period to challenge the Land Adjudication Officer's decision rendered on 3/8/1997; (iv) Whether the Minister's delegatee [the Deputy County Commissioner, abbreviated as "DCC"] unprocedurally and illegally admitted and entertained Appeal No. 42/2021 against the law; (v) Whether the Minister's delegatee (the DCC) had jurisdiction to entertain an appeal in 2021 relating to land that had been registered on finalization of the adjudication exercise in 2004; (vi) Whether any of the respondents violated the rights of the estate of the late Kaberia; and (vii) What orders should be made with regard to the costs of this petition.

- 19.** Is a constitutional petition available to an aggrieved party as a platform on which to challenge the Minister's decision under Section 29 of the Land Adjudication Act? The instrument of a petition is provided for under **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules 2013** [the **Rules**] as the vehicle through which to ventilate claims relating to breach/violation or threat of breach/violation of any part of the Bill of Rights. Article 23(3) of the Constitution contains the following framework relating to reliefs that an appropriate court of law may grant in relation to the Bill of Rights.

“(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."**

- 20.** The tenor and import of Article 23(3) of the Constitution, when read together with the Rules, is that, a constitutional petition is the instrument through which an aggrieved party may approach the High Court or either of the two courts of equal status with the High Court to seek judicial review orders, declaration of rights, injunction, conservatory orders, declaration of invalidity and compensation.
- 21.** Secondly, when discharging her mandate under Section 29 of the Land Adjudication Act, the Minister/Cabinet Secretary exercises quasi-judicial jurisdiction and her decisions are subject to review by this court within the framework of Articles 22 and 23 of the Constitution. As stated, the vehicle for review under the Rules is a petition. For the above reasons, the court comes to the finding that a constitutional petition is properly available to an aggrieved party as an instrument through which to challenge the decision of the Minister under Section 29 of

the Land Adjudication Act. The party bringing the petition must, however, satisfy the requirements of rule 10 and thereafter discharge the burden of proof.

- 22.** Does this petition meet the threshold of a constitutional petition under the relevant law? Prior to the promulgation of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** (*the Rules*), the threshold on the basic/essential contents of a constitutional petition was outlined in the famous case of **Anarita Karimi Njeru v Republic (1979) eKLR**. The above rules now provide a clear legislative framework on the essential contents of a petition brought to the court to enforce a provision of the **Bill of Rights. Rule 10** provides as follows:

“10. Form of petition

(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a) the petitioner’s name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners,

which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.”

- 23.** The court has evaluated the amended petition in the context of the mandatory requirements of rule 10. The names and address of the petitioners are contained in paragraph 1 of the amended petition. The facts relied upon are contained in paragraphs 6 to 29 of the petition. The constitutional provisions alleged to have been violated are set out in paragraph 29. They are Articles 27 (1) & (2), 40, 47, 48 and 50 of the Constitution. The nature of injury alleged to have been caused to the petitioners is set out in paragraph 29. Related cases and proceedings have been disclosed in paragraphs 12, 13, 14 and 22. Both the original and the amended petition were signed by the

petitioners' advocate. Lastly, the reliefs sought have been set out in the last paragraph of the amended petition.

- 24.** It therefore does emerge from the petition that, although the petitioners did use sub titles to identify the particulars required under rule 10, all the mandatory requirements of rule 10 are contained in the amended petition. Consequently, it is the finding of this court that the amended petition meets the threshold of a constitutional petition.
- 25.** Did the late Mutungi lodge an appeal to the Minister within the stipulated period? The **late Mutungi** lodged Adjudication Register (A/R) Objection No. 138 of 1997 objecting to the adjudication register which reflected the late **Kaberia** as the adjudicated owner of the suit land. The Adjudication Officer heard and disposed the Adjudication Register (A/R) Objection vide an award rendered on 3/8/1997. Under Section 29 of the Land Adjudication Act, the late Mutungi had 60 days within which to file an appeal to the Minister and serve a copy of the lodged appeal on the Director of Land Adjudication. On filing the appeal to the Minister, the appeal was to be assigned an appeal number indicating the year it was filed.
- 26.** From the documentary evidence presented by the 1st respondent, Appeal No. 42/2021 which is the subject matter of this petition was lodged/registered in 2021. That is why it bears 2021 as the year of filing/registration/lodging. If any other appeal was lodged/registered in 1997, the identity of that other

appeal has not been disclosed by the respondent. That other appeal was not the subject of the impugned proceedings and decision.

27. From the evidence before court, there are compelling reasons that clearly point to the fact that no appeal was lodged/registered by the late Mutungi in 1997 and none was lodged/registered by him between 1997 and 2020. Why does the court take that view? On the face of the appeal number, it is clear that the appeal was lodged/registered in 2021 as Appeal No 42/2021. Secondly, in July 2020, the late Mutungi filed **Tigania PMC E & L Case No. 40 of 2020** seeking an order annulling the registration of the 1st petitioner and one **Consolata Nkirote Kinyua** as proprietors of the suit land. There was no mention of any appeal case identified as an appeal that had been lodged/registered in 1997. Secondly, if any appeal had been registered by the late Mutungi in 1997, it could have been prosecuted by him and disposed by the Minister within the long duration of 23 years that lapsed prior to the filing of the case at Tigania Principal Magistrate Court.

28. Thirdly, and most significant, copies of all appeals filed under **Section 29** of the **Land Adjudication Act** were supposed to be served on the Director of Land Adjudication. At the time of presenting the final adjudication register to the Chief Land Registrar, the Director of Land Adjudication would endorse in the final adjudication register all the parcels that had pending appeals. The Chief Land Registrar would in turn cause individual parcel registers to be opened and thereafter

register restrictions against all the registers relating to parcels that had pending appeals to the Minister.

- 29.** The entry in the adjudication register relating to Thau/Mumui/256 did not have evidence of a pending appeal to the Minister. The parcel register opened by the Chief Land Registrar did not, similarly, have any evidence of a pending appeal. For this reason, no restriction was registered against the late Kaberia's registration. Consequently, the late Kaberia was issued with a title upon finalization of the adjudication exercise in 2004. The obligation to cause an appeal to be registered was that of the late Mutungi.
- 30.** The obligation to cause the registered appeal to be served upon the Director of Land Adjudication was that of the late Mutungi. Clearly, the reason why no registered appeal was served on the Director of Land Adjudication and on the Chief Land Registrar is that no appeal had been lodged and none existed in 1997. The idea of an appeal to the Minister in relation to the suit land was conceived in 2021. Appeal No. 42 of 2021 was lodged in 2021. Consequently, the finding of the court on the issue is that the late Mutungi did not lodge/register an appeal to the Minister in 1997 within 60 days as required under Section 29 of the Land Adjudication Act.
- 31.** Did the Minister's delegatee admit and entertain Appeal No. 42/2021 unprocedurally and illegally? The limitation period for lodging an appeal to the Minister under Section 29 of the Act is 60 days. The law does not grant the Minister discretionary jurisdiction to enlarge the limitation

period of 60 days. The court has made a finding to the effect that Appeal No. 42/2021 was filed in 2021. It challenged a decision made in 1997, a period of 23 years. Clearly, the appeal was an illegality and a nullity. The Minister's delegatee acted illegally and unprocedurally in admitting and entertaining the statute-barred appeal.

- 32.** Did the Minister's delegatee have jurisdiction to entertain an appeal in 2021 relating to land that had been registered and titled in 2004. Under the Land Adjudication Act, the Minister's powers under Section 29 subsist only when an appeal has been lodged within 60 days. Once the 60 days window lapses without an aggrieved party lodging an appeal to the Minister, the Minister has no jurisdiction to thereafter entertain any dispute relating to the adjudicated land or to interfere with the adjudication register.
- 33.** Secondly, because there was no pending appeal against the adjudication officer's decision dated 3/8/1997, a non-encumbered parcel register relating to the suit land was opened on 25/2/2004 and a title was subsequently issued. Under Sections 24, 25, 26, 79 and 80 of the Land Registration Act, the jurisdiction to cancel a registration and a title at that stage is vested in the courts. The minister has no powers to cancel or invalidate a registration or cancel an issued title.
- 34.** Thirdly, succession to the estate of the late Kaberia was initiated in 2022. The two petitioners were issued with a limited grant on 28/3/2022. There was no duly appointed personal representative of the estate of the late Kaberia at

the time the Minister's delegatee purported to hear and dispose the appeal. The estate was, under the law, condemned unheard?

- 35.** Against the above background, the Minister's delegatee purported to admit and entertain an appeal that was 23 years stale. The delegatee purported to entertain an appeal against a deceased respondent without first resolving the question of administration of the estate of the late Kaberia. That was legally wrong. Once the late Mutungi failed to lodge an appeal within 60 days, the Minister's delegatee had no jurisdiction to entertain Appeal No. 42/2021 or to issue the purported award/judgment dated 24/6/2021. That is the finding of the court on the fifth issue.
- 36.** Have the respondents or any of them violated the petitioner's rights as pleaded? The import of the impugned proceedings and award is that the 1st, 2nd and 3rd respondents have illegally taken the late Kaberia's land and the land has been given to the estate of the late Mutungi. The actions of the three respondents, as outlined in the preceding paragraphs of this judgment, constitute violations of the petitioners rights under Articles 27, 40, 47, 48 and 50 of the Constitution.
- 37.** In light of the above findings on the key issues in the petition, it is the finding of this court that the estate of the late Kaberia has made out a case for the reliefs that were sought in the amended petition. Consequently, prayers 1, 2, 3, 4 and 5 are granted as prayed.

38. Due to the nature of this petition, parties will bear their respective costs of the petition.

**DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY
OF DECEMBER, 2025.**

B M EBOSO [MR]

ELC JUDGE

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