



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. E004 OF 2022

**MARGARET MAKENA KITHINJI & BETH
KAWIRA KITHINJI (*Suing as the Legal
Representatives of the estate of
MOSES KITHINJI LITHARA -
DECEASED*)PETITIONER**

=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. 143 of 2020**. The appeal related to a land adjudication dispute in respect of land parcel number **Thau/Mumui/246**, measuring approximately 3.49 hectares. The petitioners contend that the late **Samuel Mwongo Mutungi**, whose estate is the 1st respondent in this petition, failed to lodge an appeal to the Minister within 60 days in 1997 when the Land Adjudication Officer rendered an award relating to Objection No. 137 of 1997 which he had filed. The Land Adjudication Officer's award was rendered on 13/8/1997.
- 2.** The petitioners add that in 2021, the 1st respondent colluded with the 2nd respondent to lodge/register an appeal outside the prescribed limitation period of 60 days, with a view of annulling the registration of the late **Moses Kithinji Lithara** as proprietor of land parcel number **Thau/Mumui/246**. One of the key issues to be determined in the petition is whether the 1st respondent lodged an appeal to the Minister against the Land Adjudication Officer's award within 60 days in 1997 as required under the law. 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 **Moses Kithinji Lithara** [the petitioners] seek the following reliefs:

(a) A declaration that the proceedings and judgement in Case No. 143/2020: SAMUEL MWONGO MUTUNGI VS MOSES KITHINJI LITHARA (deceased), disguised as "Appeal to Minister" over L.R No. Thau/Mumui/246 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 13/08/1997 in A/R No. 137, 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/246 from the name of previous registered proprietor to the name of one Samuel Mwongo Mutungi (deceased) on 14/03/2022 and issuance of a title deed in his name on the same date, 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. 143/2020: Samuel Mwongo Mutungi vs Moses Kithinji Lithara (deceased), disguised as

“Appeal to Minister”, over L.R No. Thau/Mumui/246.

(d) A mandatory injunction be issued, compelling and directing the 3rd respondent to re-instate registration of L.R No. Thau/Mumui/246 to the name of the previous registered proprietor by deleting/cancelling the name of Samuel Mwongo Mutungi (deceased) from the register and in doing so, do dispense with the necessity of production/surrender of the original title deed by Samuel Mwongo Mutungi (deceased).

(e) A permanent injunction be issued, restraining the 1st, 2nd and 3rd respondents and anybody else acting or claiming for, or through them or at their behest, direction or instructions, from whatsoever interfering with L.R No. Thau/Mumui/246, both in the register and on the ground.

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

- 4.** The petition was premised on the grounds outlined therein and in the supporting affidavit of **Margaret Makena Kithinji** dated 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, **Moses Kithinji Lithara** (*hereinafter referred to as “the late Lithara”*) gathered land parcel number **Thau/Mumui/246** (*hereinafter referred to as*

“the suit land”] in 1974. He developed the land and lived on it with his family up to the time of his death in 2006. During land adjudication exercise, the late **Samuel Mwongo Mutungi** [hereinafter referred to as **“the late Mutungi”**] objected to the adjudication register (AR) in which the late Lithara had been adjudicated as the owner of the suit land. His objection was heard and disposed by the Land Adjudication Officer on **13/8/1997**. 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 Lithara was subsequently registered as proprietor of the land on 25/2/2004 and was issued with a title.

5. The petitioner adds 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 the late Lithara had procured his title through fraud, secrecy and misrepresentation. He sought an order annulling the registration of the then registered proprietors of the suit land. He also sought a permanent injunction restraining the petitioners who were the registered proprietors against entering, cultivating, developing, utilizing, fencing, alienating, selling or interfering with the suit land. The petitioners who were sued in their personal capacities filed a defence in the said case, contesting the claim. 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 transferred the suit land to the late Mutungi on 14/3/2022. The petitioners contend that when they lodged a complaint at the Land Registry, they were informed that the registration was effected on the basis of the proceedings and judgment of the 2nd respondent (the Deputy County Commissioner) in Appeal No 143 of 2020 made to the Minister.
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 137 of 1997. It is their case that Appeal No 143 of 2020 was lodged/registered in 2020 outside the statutory period of 60 days for the purpose of deregistering the then registered proprietors 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 lodged/filed an appeal to the Minister in 1997, he could

have served the appeal papers on the late Lithara and could have prosecuted the appeal, adding that **Tigania SPMC E & L Case No 40 of 2020** would not have been necessary. They add that the estate of the late Lithara was never served with papers and notices relating to Appeal No. 143 of 2020.

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 late Lithara 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, having chosen not to oppose the appeal to the Minister, the estate should not be allowed to do so through this petition. The 1st respondent argues that the issue of ownership of the suit land has been settled by the Minister and cannot be revisited through a petition.
- 12.** The 1st respondent states that the proceedings dated 2/3/2021 relating to the hearing before the Minister's delegatee [the Deputy County Commissioner] annexed to his affidavit as **Exhibit No. 15** are evidence that the petitioners attended the hearing and knew about it, adding that parties were accorded an opportunity to be heard. He emphasizes that there was no collusion as alleged by the petitioners. The 1st respondent states that there is no evidence suggesting that the 2nd respondent's [the Deputy County Commissioner's] decision is unconstitutional, fraudulent, arbitrary or wrongful. He faults the petitioners for the delay in bringing the petition.
- 13.** Citing Section 29 of the Land Adjudication Act, the 1st respondent argues that the Minister's decision is final, and that this court has no jurisdiction to entertain the petition, moreso when an order of certiorari is being sought outside the six (6) months period. The 1st respondent argues that the role of the court during land adjudication is limited to supervision of the process, pointing out that in this

petition, the petitioner is challenging the merits of the decision.

- 14.** Citing **Sections 29** of the Land Adjudication Act, the 1st respondent argues that the petitioners have not exhausted the available mechanisms prescribed by the law and therefore the petition is statute-barred. Relying on the pronouncement in ***Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR***, the 1st respondent states that the petitioner's claim remains statute - barred under the statute of limitation.
- 15.** On the allegation that the late Mutungi did not lodge an appeal in 1997, the 1st respondent contends that Appeal No 143/2020 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 12"** and **"KN 13"**. He contends that the fact that the appeal was "admitted in 2020" 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

- 16.** The 2nd - 4th respondents filed grounds of opposition dated 17/9/2024 and written submissions dated 13/1/2024. Despite the serious allegations made against the 1st and 2nd respondents relating to the registration of the appeal 23 years after the impugned decision, the 2nd respondent elected not to tender evidence in the petition

relating to the registration/lodging of the appeal. 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, contending that 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.

- 17.** In the written submissions dated 13/1/2024 expressed as filed on behalf of the 4th respondent, the Learned Counsel identified the following as the issues that fell for determination in the petition: (i) Whether the amended petition dated 5/3/2024 satisfies the precision threshold required of constitutional petitions; (ii) Whether the 3rd respondent fraudulently transferred the suit land; and (iii) Whether Appeal No 143 of 2020 was filed outside the time prescribed under the Land Adjudication Act, hence time-barred.
- 18.** On whether the petition meets the precision threshold outlined in the case of **Anarita Karimi Njeru v Republic (1979) eKLR**, the learned counsel 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 had suffered injustices in relation to the ownership of the suit land, adding that the petitioners failed to specify the wrongs committed by the 2nd, 3rd and 4th respondents. Counsel contended that the petitioners failed to prove that their rights were infringed.

- 19.** On whether the 3rd respondent fraudulently transferred the suit land, counsel submitted that any allegation of fraud must be specifically pleaded and strictly proved. Counsel argued that the 3rd respondent should not be held liable because he transferred the suit land to the rightful owner based on the “title deed at hand”.
- 20.** On whether 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 requirements were adhered to. Counsel urged the court to reject the petition.

Analysis and Determination

- 21.** 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 of 60 days against the Land Adjudication Officer's award dated 13/8/1997; (iv) Whether the Minister's delegatee (the Deputy County Commissioner) unprocedurally and illegally admitted and entertained Appeal No. 143/2020 against the law; (v) Whether the Minister's delegatee (the Deputy County Commissioner) had jurisdiction to entertain an appeal in 2020 relating to land that had been registered and titled in February 2004; (vi) Whether any of the respondents violated the petitioners rights; and (vii) What orders should be made with regard to the costs of this petition.

- 22.** 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.”

23. 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.

24. 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.

- 25.** 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 of 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."

- 26.** 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 23 of the petition. The constitutional provisions alleged to have been violated are set out in paragraph 23. 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 23. Related cases and proceedings have been

disclosed in paragraphs 12, 13, 21, 22 (v), 22 (v) and 22 (vi). 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.

- 27.** It therefore does emerge from the contents of the amended 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.
- 28.** Did the late Mutungi lodge an appeal to the Minister within the stipulated limitation period of 60 days? The **late Mutungi** lodged Adjudication Register (A/R) Objection No. 137 of 1997 objecting to the adjudication register which reflected the **late Lithara** as the adjudicated owner of the suit land. The Adjudication Officer heard and disposed the AR Objection vide an award rendered on 13/8/1997. Under Section 29 of the Land Adjudication Act, the late Mutungi had 60 days within which to file/lodge/register an appeal to the Minister and serve a copy of the registered appeal on the Director of Land Adjudication. On presenting the appeal to the Minister, the appeal was to be assigned an appeal number. The appeal number would bear the year it was lodged/filed/presented.
- 29.** From the evidence presented by the 1st respondent, Appeal No. 143 of 2020, which is the subject matter of this

petition, was lodged/registered in 2020. If any other appeal was lodged/registered in 1997, the identity of that appeal has not been disclosed by the respondent. That other appeal was not the subject of the impugned proceedings and decision.

- 30.** 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 say so? On the face of the appeal number, it is clear that the appeal was lodged/registered in 2020 as Appeal No 143/2020. 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 petitioners 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.
- 31.** 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 register restrictions against all the parcel registers that related to parcels that had pending appeals to the Minister. These were mandatory statutory requirement that were in force and are still in force.

- 32.** The entry in the adjudication register relating to Thau/Mumui/246 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. It is due to the fact that no appeal had been lodged that no restriction was registered against the late Lithara's registration. Consequently, the late Lithara was issued with a title.
- 33.** The obligation to cause an appeal to be registered was that of the late Mutungi. The obligation to cause the appeal number and the pleadings relating to the appeal to be conveyed to the Director of Land Adjudication was that of the late Mutungi. Clearly, the reason why no appeal case number was issued in 1997 and no appeal case details were presented to the Director of Land Adjudication and to the Chief Land Registrar is that no appeal had been lodged and none existed in 1997. The idea of an appeal to the Minister was conceptualized in 2020. Appeal No. 143 of 2020 was lodged in 2020. Consequently, the finding of the court on the second issue is that the late Mutungi did not lodge/register an appeal to the Minister in 1997 within 60 days of the Adjudication Officer's decision as required under Section 29 of the Land Adjudication Act.

- 34.** Did the Minister's delegatee admit and entertain Appeal No. 143/2020 unprocedurally and illegally? The limitation period for lodging an appeal to the Minister under Section 29 of the Act was 60 days. The law did not grant the Minister discretionary jurisdiction to enlarge the limitation period. The court has made a finding to the effect that Appeal No. 143/2020 was filed in 2020. 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. That is the finding of this court
- 35.** Did the Minister's delegatee have jurisdiction to entertain an appeal in 2020 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 the prescribed limitation period of 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.
- 36.** Secondly, because there was no pending appeal against the adjudication officer's decision rendered on 13/8/1997, a non-encumbered parcel register relating to the suit land was opened on 25/2/2004 and a title was subsequently issued to the late Lithara. Under **Sections 24, 25, 26, 79 and 80** of the **Land Registration Act**, the jurisdiction to

cancel that kind of registration and title in 2021 was vested in the courts. The Minister had no powers to cancel or invalidate the registration and the issued title in 2021.

- 37.** Thirdly, succession to the estate of the late Lithara was initiated in 2013 and a confirmed grant was issued in June 2014. The suit land was given to Harun Mburugu M'ikiugu and Margaret Makena Kithinji. The duo were subsequently issued with titles. Against the above background, the Minister's delegatee purported to admit and entertain an appeal against a deceased respondent without joining the personal representatives of the deceased as respondents in the appeal. He purported to annul titles that were registered in the names of people who were not parties to the stale appeal. The delegatee had no power under the law to do the above. Once the late Mutungi failed to lodge an appeal within 60 days, the Minister's delegatee had no jurisdiction to entertain Appeal No. 143/2020 or to issue the award/judgment dated 24/6/2021. That is the finding of the court on the issue.
- 38.** 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 Moses Kithinji Lithara'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 as pleaded in the petition.

39. 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 Lithara has made out a case of breach of the cited Articles of the Constitution. The estate has made out a case for the reliefs that were sought in the amended petition. Consequently, prayers 1, 2, 3, 4 and 5 of the amended petition are granted as prayed.

40. 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