



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC. PET. NO. 5 OF 2014

MARY JEMUTAI TONJE.....PETITIONER

VERSUS

RAPHAEL CHEBII.....1ST RESPONDENT

ISAAC LETTING.....2ND RESPONDENT

JACOB BIRECH.....3RD RESPONDENT

RASHID BAKARE.....4TH RESPONDENT

THE DISTRICT LAND REGISTRAR

TRANS-NZOIA COUNTY.....5TH RESPONDENT

THE HON.ATTORNEY GENERAL.....6TH RESPONDENT

JUDGMENT

1. The petition dated 27/6/2014 seeks the following orders:

(1) That this court be pleased to declare that land parcel No. Kitale Municipality Block 13/4 measuring approximately 0.5300 Ha within Trans-Nzoia County are registered in the name of the petitioner belongs and is owned solely by the petitioner and the respondents and their agents be restrained from trespassing, wasting or in any other manner whatsoever interfering with it and

(2) That the 1st, 2nd, 3rd and 4th respondents be ordered to hand over vacant possession of the said land to the petitioner failure to which they be evicted therefrom forcefully.

(3) That costs be provided for in favour of the petitioner.

2. The 1st - 4th respondents are natural persons. The 5th and 6th respondents are officers in the National Government of Kenya, named by their respective offices. The petitioner's case is that she owns the subject matter land which was allocated and a Certificate of Lease issued to her on 1st November, 1994, having paid all the dues required by the Kitale Municipality and the Commissioner of Lands; however the respondents have encroached on the suit land. The petitioner pleads that it is against natural justice for the respondents to take the law into their own hands and take over the land which belongs to her and without her consent and knowledge.

3. The petitioner states that she has been treated inhumanly and against the letter and spirit of **Article 28 of the Constitution** and alleges that her dignity has been violated as her land is "likely to be taken away with impunity" unless the court intervenes. She also states that her rights have been violated in contravention of **Article 40 (2) (a) and (b)** and **Article 47 (1)** of the **Constitution**.

4. The petition is supported by the petitioner's affidavit sworn on 27/6/2014. In that supporting affidavit the petitioner reiterates the matters set out in the petition. She adds that she has tried to use the local administration and the 5th respondent but the respondents have failed or neglected to vacate from her land. The 5th respondent's only response was to write to the Officer Commanding Police Station, Kitale, to the effect that the land belongs to the petitioner.

5. In response the 1st, 2nd, 3rd and 4th respondents filed their replying affidavits on 10/6/2015.
6. The 1st respondent replied to the petition vide his sworn affidavit dated 9/6/2015. He stated that he is merely a caretaker to one Joseph Chebii (now deceased) who is the owner of **Plot No. 28 (New Number 136)**. He avers that the deceased was allocated the plot on 5/10/1994 by the Commissioner of Lands. He further avers that he was asked to take care of the land in 1994 and he has been in quiet possession of the plot since then.
7. The 2nd respondent claims to be the lawful owner of **Plot No. 25 (New No. 133)** having been allocated the same by the Commissioner of Lands. He avers that upon allocation the plot was surveyed by the Government Surveyor Trans-Nzoia and issued with new number so that it became known as **Kitale Municipality Block 13/133**. He claims to have been shown the plot which he took possession of and which he has been in quiet occupation of to date. He denies having trespassed onto the petitioner's plot.
8. The 3rd respondent's response is that he was allotted **Plot No. 27 (New Number 135)** by the Commissioner of Lands. On 5/10/1994. Subsequently the plot was surveyed by the District Surveyor, Trans-Nzoia and a new issued whereupon it became known as **Kitale Municipality Block 13/135**. He denies having trespassed onto the petitioner's land parcel.
9. The 4th respondent avers in response to the petition that he bought **Plot No. 26 (New No. 134)** from one Kevin Samandwa Mafura and Bhelbin Naliaka whose father had bought the plot from one Simon Kipketer. He avers that the plot was originally Simon Kipketer's, who had been allocated the land by the Commissioner of Lands; and that the 4th respondent has been in possession of the said plot since the year 2010. He denies having encroached on the petitioner's plot.
10. The 5th and 6th respondents did not file any responses to the petition.
11. According to the petitioner's further supporting affidavit the letters of allotment exhibited by the 1st to 4th respondents have nothing to do with her titled land. She avers that she was allocated the land vide a letter of allotment dated 1/11/1994 and she accepted the offer and paid the relevant sums required in respect of the plot.
12. She outlines the disputes she had with the person who sold the 4th respondent the land, saying Charles Aseneka, the seller was arraigned in court for causing damage to her beacons. She also avers that on 20/3/2013, she complained to the District Surveyor who restored her beacons. She avers that the respondents have been asked to vacate the land on several occasions and that they have no title to the land portions they are claiming. She states that letters of allotment cannot override a title deed to land.
13. On 21/7/2015, Mr. Odongo appearing for the 5th and 6th respondents stated that they were not opposed to the petition. On 30/7/2015 the parties, being represented in court by their respective advocates, consented to a surveyor visiting the disputed land. According to that consent the surveyor was to establish the boundaries of the **Plots Nos. Kitale Municipality Block 13/4 and Kitale Municipality Block 13/133, 134, 135 and 136**. He was also to establish their actual position on the ground. He was required to file his report in 30 days.
14. The Report was duly filed and the surveyor came to court on 22/2/2016. He stated that he visited the land as per the consent order. He testified that Plot No. 4's survey was done and the survey deposited in the Survey Registry in 1995.
15. When the beacons for Plot Nos.4, 133,134,136 and 136 were put in place, it was found that Plots Nos. 133, 134, 135 and 136 had all overlapped on Plot No. 4. They also had overlapped on Plot No. 3 and Plot No. 5. He found that Plot No. 4 had been duly drawn and a Lease Certificate issued. He found that on the other hand, Plots Nos. 133, 134, 135 and 136 had not been drawn on the Registry Index Map and their Lease Certificates could not be traced.
16. PW1 testified that the Office of the Director of Surveys had found that there was a problem with the survey in the area, and had written to the then District Surveyor asking if there was an overlap. A visit to the ground confirmed that there was an overlap on Plots Nos. 4,133,134,135 and 136. The Surveyor who visited also confirmed that the survey which resulted in Plot Nos. 133, 134, 135 and 136 was not done as per the Part Development Plan of the area.
17. At first, parties appeared to accept the PW1's opinion that a resurvey carried out in accordance with the Part Development Plan could resolve the issue of the overlap. This proposal however seems to have run aground on 13/10/2016 when counsel for the petitioner and the 1st - 4th respondents argued that the report by PW1 would not resolve the issues. Subsequently this petition was fixed for hearing.
18. On 31/10/2017 this court ordered that the petition be tried by way of written submissions. All the parties except the 5th and 6th respondents filed their submissions on the main petition.
19. I have considered those submissions. In my view the issues for determination in this matter are as follows:

(1) Has the petitioner established a violation of her rights?

(2) What orders should issue?

The issues are addressed as hereunder.

(1) Whether the petitioner has established a violation of her rights

20. It is now clear that the petitioner is the registered proprietor of the land known as LR. No. Kitale Municipality Block 13/4. She is in possession of a Certificate of Title in her name. This is not disputed by the 5th and 6th respondents. The 5th respondent is the custodian of titles within the area of jurisdiction in which the Plot No. Kitale Municipality Block 13/4 falls. The 6th respondent is the Chief Legal Advisor to the Government of Kenya. Proof of ownership does not necessarily lead to the conclusion that an owner's rights have been violated.

21. A petitioner has to establish by way of clear pleading that she has certain rights and that those rights derive from certain constitutional provisions and that those rights have been violated. This court must therefore examine if the petitioner has fulfilled these trite requirements to warrant the remedies sought.

22. At **paragraph 9** of her petition the petitioner avers that she has been treated inhumanly and against the spirit of **Article 28 of the Constitution**. **Article 28** states as follows:-

“Every person has inherent dignity and the right to have that dignity respected and protected”

23. According to the petition her dignity *“has been violated as the petitioner’s land is likely to be taken away with impunity”*. The Cambridge English Dictionary defines dignity as *“the importance and value that a person has, that makes other people respect them or makes them respect themselves”*. The very language of the Constitution suggests the *“dignity”* that is to be protected is *“inherent”* in a person. It has to do with the attribute that bring forth self-respect in a person or respect by other people.

24. In the case of *A.N.N -vs- Attorney General [2013] eKLR NBI HC Petition 240 of 2012*, the court observed thus:-

“It is thus apparent that human dignity is the foundation for recognition and protection of human rights, which, as provided at Article 19(3)(a), ‘belong to each individual and are not granted by the State.’ Regardless of one’s status or position, or mental or physical condition, one is, by virtue of being human, worthy of having his or her dignity or worth respected. Consequently, doing certain things or acts in relation to a human being, which have the effect of humiliating him or her, or subjecting him or her to ridicule is, in my view, a violation of the right to dignity protected under Article 28.”

25. The question that arises is whether the petitioner has demonstrated how her inherent dignity has been affected by encroachment on her land.

26. First, the petitioner does not assert, and the 1st - 4th respondents have denied, that she lives on the said land. No eviction has been alleged. No denial of residence accommodation or occupation thereof has been claimed. No improper physical treatment of the petitioner's person has been demonstrated. In my view in the absence of the elements that tend to deduct from the *inherent personal* dignity of an individual there is no evidence that **Article 28** has been violated with regard to the petitioner.

27. In my view even in the widest sense of the word *“dignity”* as understood from the contents of **Article 28 of the Constitution**, it can not be dependent or external factors such as ownership of land or invasion thereof without any nexus being drawn between those external factors and the *“...doing certain things or acts in relation to a human being, which have the effect of humiliating him or her, or subjecting him or her to ridicule...”* as observed in the case of *A.N.N -vs- Attorney General [2013] eKLR [NBI HC Petition 240 of 2012]* above.

28. The petitioner's second claim is that **Article 40 (2) (a) and (b)** has been violated with regard to her. **Article 40 (2)** states as follows:-

“Parliament shall not enact a law that permits the State or any person (a) to arbitrarily deprive a person of property of any description or of any interest in or right over, any property of any description; or (b) to limit or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4)”.

29. In her petition the petitioner describes that Article as guaranteeing the rights as to land and the enjoyment of these rights. But does the Article really provide for that?

30. **Article 42 (2) (a) and (b)** does not establish any guarantee to rights to land. That Article, in my view, merely injuncts Parliament from enacting Laws that may permit the State or any person from arbitrarily depriving a person of property, or laws that may limit or in any way restrict the enjoyment of any right under **Article 40** on the basis grounds that may be found to be discriminatory by **Article 27 (4)** e.g. race, sex and others. The inviolable right to acquire or own property is provided for elsewhere. The provision that the State shall not deprive a person of property of any description is also provided for elsewhere in the Constitution.

31. There are no rights provided for under **Article 40 (2) (a) and (b)** that may be violated with regard to the petitioner. And I do not hear the petitioner to be saying that Parliament has enacted a Law that violates the provisions of **Article 40 (2) (a) and (b)**, or that such a law, if any, has adverse effect on her rights and should be nullified.

32. I therefore find that **Article 40 (a) (a) and (b)** have not been shown to have been violated with regard to the petitioner.

33. The petitioner's third claim is that **Article 47 (1)** has been violated. She avers that she has been unfairly treated against the spirit of that Article. **Article 47 (1)** of the **Constitution** provides as follows:-

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

34. What is the evidence that the petitioner brings to court on this issue? A look at the petitioner's affidavit will clarify this. The invocation of **Article 47** implies that an issue or grievance has been presented before the relevant and competent authorities for a resolution and that those authorities have failed or refused or neglected to deal with that issue or grievance. I will pick out the relevant paragraphs in the petitioner's supporting affidavit that directly focus on this issue. And they are few.

35. **Paragraph 7** of the petitioner's supporting affidavit dated 27/6/2014 states as follows:-

"7. That I have tried to use the local administration but the respondents have failed and or neglected to vacate".

Paragraph 10 states as follows"-

"10. That I have made complaints to the 5th respondent herein but his office has also not helped me much despite having written that the land belongs to me to the OCS Kitale COPY OF THEIR LETTER ATTACHED AND MARKED MJ1-4".

36. It is quite instructive that the paragraphs reproduced herein do not allege with specificity who refused, failed or neglected to act as per the wishes of the petitioner or in accordance with the petitioner's grievances to resolve it so that such refusal, failure or neglect may be deemed to be a violation of the provisions of **Article 47** of the *Constitution*.

37. Specificity in petitions was underlined by the case of *Anarita Kanini Njeru (No.1) [1979] 1 KLR 154*. While accepting that the *Anarita case (Supra)* is still good law, the court in *David Ngige Tharau & 128 Others -vs- Principal Secretary, Ministry of Land Housing and Urban Development & 2 Others 2016 eKLR* had this to say:-

"30. Whereas the Annarita (sic) Case is, in my view, still good with respect to the need for precision in matters seeking application and interpretation of the Constitution, the said decision must be read in a manner that resonates with the provisions of the current Constitution. Under Article 22(3) of the Constitution, the Chief Justice is enjoined to make rules providing for the court proceedings relating to the Bill of Rights which Rules are required to satisfy inter alia the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation. In my view, where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former. However, parties ought not to simply throw at the Court the provisions of the Constitution without expounding on the facts on which they are based and expect the Court to look for the facts itself. It is upon the parties to bring themselves within the ambit of the relevant constitutional provisions by relating the facts of their case to the said provisions and explain how in their view those provisions are relevant to their case. This threshold, with due respect, the Petitioners have failed to meet.

38. Later in the same judgment the court stated as follows:

"33. It was upon the Petitioners to satisfactorily prove that the actions taken by the Respondents were not consultative and lacked the ingredients of public participation. Apart from bare allegations there was no concrete evidence on the basis of which favourable findings could be made in their favour. The Respondents on the other hand enumerated instances showing that in fact the process was consultative. As was appreciated by Lenaola, J in *Moses Munyendo & 908 Others vs. AG Nairobi HC Petition No. 16 of 2013*:

"Whether or not there was public participation in this case is a question of fact and it is for the petitioners to prove that in fact the Constitution was violated to an extent that the resulting law is null and void..."

39. In the case of *AKMM -vs- EMKK & 2 Others 2014 eKLR Nbi Petition No. 37 of 2014*, the court addressed the issue of specificity as follows:

"Article 22 of the Constitution grants every person the right to move the High Court to enforce fundamental rights and freedoms contained in the Bill of Rights. These rights are very specific and a petitioner who comes before the court must set out with some level of particularity the specific right and how it is violated. This principle was established in the case of *Anarita Karimi Njeru -vs- Republic (No. 1) [1979] 1 KLR 154* and augmented by the Court of Appeal recently in the case of *Mumo Matemu -vs- Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 [2013] eKLR.*" (emphasis mine.)

40. Setting out facts and proving those facts is a burden that falls squarely upon on the shoulders of a petitioner. Where a petitioner, like in the present instant, does not clearly state the facts he relies on and also fails to demonstrate any nexus between those facts and certain clauses of the Constitution that petitioner may not succeed in his petition.

41. I therefore find that the instant petition does not disclose any violation of Constitutional rights as against the petitioner.

(2) What orders should issue?

42. I have already stated that the petitioner has failed to demonstrate that her rights under the specific provisions of the Constitution have been violated. It's a consequence of that the prayers in the petition are not merited. The upshot of the above is that the petition dated 27/6/2014 is dismissed with costs to the respondents.

Dated, signed and delivered at Kitale on this 19th day of **March, 2018**.

MWANGI NJOROGE

JUDGE

19/3/2018

Coram:

Before -Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for Mokuu for Petitioner

N/A for the Respondents

COURT

Judgment read in open court in the presence of counsel for the Petitioner.

MWANGI NJOROGE

JUDGE

19/3/2018