



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**PETITION NO. 2 OF 2012**

**ZIPPORAH NKOYAL.....PETITIONER**

**VERSUS**

**JAMES KABERIA M & 2 OTHERS.....RESPONDENTS**

**JUDGMENT**

1. This petition was filed on 12.3.2012. There in, the Petitioner claims that she is the registered proprietor of land parcel No's 1458, measuring about 3.36 acres, and parcel no. 8206, measuring about 3.15 acres (herein referred to as the suit land), both situated in Antuamburi Adjudication section, within Tigania East District.
2. Petitioner further claims that she inherited the suit land from her (now deceased) father, M'Elongi Ndegwa in or about 1992 and ever since to-date, she has been quietly and exclusively cultivating the same, with such developments as inter alia Miugu, Miangua, Mithanduku, Mikwego, Mianguu, Mitunguu & Mienjela, nappier grass, a live fence, coffee, a dug pit latrine, cow peas, sorghum, maize, beans and black beans.
3. Petitioner avers that on or about 30.01.2012, the 2<sup>nd</sup> respondent, who is the Land Adjudication Officer Tigania East and West Districts, summoned her for hearing of an undisclosed case between her and the 1<sup>st</sup> respondent on 07.02.2012 over an undisclosed subject matter, but when she appeared, the 2<sup>nd</sup> respondent deferred the hearing to 28.02.2012 without giving any details thereof to the petitioner to enable her prepare for her defence and call witnesses.
4. When the petitioner re-appeared on or about 28.02.2012 as summoned, the 2<sup>nd</sup> respondent forced her to thumb print some documents whose content was neither shown nor explained to her, then ordered her to leave his office.
5. Petitioner claims that the 1<sup>st</sup> respondent has never had any justiciable claim over the suit land, but he vowed to effectuate his plan on allegations that petitioner, being a woman is disentitled to own (family/ancestral) land.
6. Petitioner contends that if the threats of 1<sup>st</sup> and 2<sup>nd</sup> respondents' are carried out, it will amount to contravention of the petitioner's constitutional right to acquire and own property as enshrined under article 40(1) of the Constitution of Kenya.
7. The petitioner's prayer is for; A permanent injunction to be issued, restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents and their representatives/successors, agents, servants, employees or anybody else acting at their behest, direction or instruction, from entering into, excising any portion from, and/or tampering with, or altering the map sheet and/or whatsoever interfering with the petitioner's/applicant's quiet, peaceful, undisturbed, uninterrupted, exclusive and actual possession, cultivation, user and enjoyment of land parcel No. 1458, measuring about 3.36 and 8206, measuring about 3.15 acres, both situated in Antuamburi Adjudication Section. The petitioner also prays for costs and interest thereof.
8. A statement of defence and counter claim was filed by 1<sup>st</sup> respondent on 22.10.2014, whereby petitioner's claim is generally denied.
9. The 1<sup>st</sup> Respondent in his counterclaim has stated that the suit land belonged to one M'ELONGI NDEGWA, who died childless, and he is an uncle to all persons who are in occupation of the suit land. 1<sup>st</sup> Respondent claims that Petitioner is only after her own interests and is set on depriving the rest of the family members a share of the suit land. He also avers that the petitioner never inherited the suit lands from their deceased uncle (M'Elongi Ndegwa).
10. 1<sup>st</sup> Respondent's prayer is for a declaration that the suit land belongs to the extended family of M'ELONGI NDEGWA, including the Petitioner and 1<sup>st</sup> Respondent.
11. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent filed grounds of opposition on 29.10.2014 where they aver that no cause of action has been disclosed against

the respondents herein, that the petitioner has not exhausted all available remedies before filing of the petition and that the petition lacks merits.

12. During the course of litigation an application was made to enjoin five persons as interested parties, which application was apparently allowed on 24.10.2012. These parties appear to have entered the scene quietly and also left the scene in the same manner. The petitioner and 1<sup>st</sup> respondent appear to have a tumultuous litigation history, with numerous applications stemming from the initial court order given herein on 13.3.2012, whereby orders of injunction were granted in favor of the petitioner as against respondents. The orders were eventually lifted vide the ruling of 2.9.2013 in respect of the application of 12.3.2012.

13. On 19.4.2016, directions were given by the court for the main suit to be heard by way of written submissions. Such submissions were eventually filed on behalf of petitioner and on behalf of 1<sup>st</sup> respondent only. The Attorney General never complied with this direction despite the fact that they were given sufficient time to do so.

14. I note that Submissions of 1<sup>st</sup> respondent were filed under protest. 1<sup>st</sup> respondent contends that he was denied a chance to adduce oral evidence, and that pleadings had not even closed by the time directions on submissions were given.

15. These are however misplaced sentiments as 1<sup>st</sup> respondent's counsel (Mrs. Kaume) had clearly expressed a desire to comply with the directive on 19.4.2016 when she addressed the court as follows: **"I can have 30 days after being served with the petitioner's submissions"**. Even when I took over the matter on 26.7.2017, there was never any prayer made to the court to vary the directions as how the suit should be heard.

16. I will therefore proceed to determine the issues arising in this matter on the basis of the filed pleadings and submissions.

17. This being a constitutional petition, it was incumbent upon the petitioner to state her claim with precision by making reference to the provisions of the constitution which have been violated and to state how such violation has occurred. In **Annarita Karimi Njeru Vs Attorney General (1979) KLR (supra)**, it was stated that a petitioner who seeks redress under the Constitution must state his claim with precision by reference to the provisions of the Constitution that have been violated. This position was re-stated by the court of appeal in **Mumo Matemu vs Trusted Society of Human Rights Alliance and others Nairobi, CA Civil Appeal No. 290 of (2013)eKLR**.

18. This petition is brought under article 22, 23 and 165 of the constitution. However, these are general provisions. Article 22 and 23 are concerned with enforcement of the bill of rights whereas article 165 deals with the establishment of the high court and courts of equal status.

19. In the body of the petition, only article 40 (1) of the constitution is invoked in paragraph 14 where it is stated that ; **"The 1<sup>st</sup> and 2<sup>nd</sup> respondents threats if effectuated, shall contravene the petitioner's constitutional right to acquire and own property as enshrined under article 40 (1) of the constitution"**.

20. From the materials presented before me, it emerges that there is an ownership dispute regarding the suit land. Both the Petitioner and the 1<sup>st</sup> Respondent are in agreement that the suit land belonged to M'ELONGI NDEGWA who is deceased. Petitioner has claimed that M'Elongi was her father, while 1<sup>st</sup> Respondent says M'Elongi was their uncle who was childless.

21. Whereas petitioner has a right to own property, a constitutional petition is not the right forum to determine her claim of ownership of the property.

22. I note that 2<sup>nd</sup> respondent is the land adjudication officer Tigania East and West districts. This means that the matter was still at the stage of ascertaining rights and interests in the land by the time the petition was filed. Though none of the parties have informed the court under what legal regime the adjudication process was anchored on, it is clear that the 2<sup>nd</sup> respondent's role and mandate are enshrined in some statutes, primarily the land adjudication Act and the land consolidation Act. That is why objection proceedings were under way when the petition was filed.

23. In **Tobias Achola Osindi and 13 others versus Cyprianus Otieno Ogalo and 6 others ELC No. 4 of 2011 at Kisii**, it was held that; **"The Act has given full power and authority to the land adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest"**.

24. The court in **Tobias Achola case** further noted that **"The court has no jurisdiction to ascertain and determine interest in land in an adjudication area. In my view the role of the court is supposed to be supervisory only....."**.

25. The petitioner ought to have exhausted available remedies under the applicable law particularly the aforementioned statutes concerned with matters adjudication before coming to this court.

26. In paragraph 13 of the petition, petitioner avers she was discriminated upon because she is a woman. No article of the constitution has been cited to support this averment. The petitioner has also not demonstrated as to how she was discriminated on the basis that she was a woman. If she is claiming the suit land on the basis that she is a daughter of M'ELONGI NDEGWA then, what prevented her from filing a succession cause to that effect. After all, that is the forum to claim the property of a deceased person. Section 4 of the law of succession Act provides that **"Except as otherwise expressly provided in this act or by any other written law, succession to immovable property in Kenya of a deceased person shall be regulated by the law of Kenya, whatever the domicile of that person at the time of his death ....."**

27. For the petitioner to stake a claim on the property of M'Elongi Ndegwa, she had to submit herself to the law applicable, either the law of succession or the **any other written law**, which I believe is the law on ascertainment of rights and interests in land covered by the land

adjudication Act or the Land consolidation Act. It follows that the cases cited by the Petitioner touching on equality of all children, **Francis Mwangi Thiongo & 4 others versus Joseph Mwangi Thiongo (2015) eKLR**, and **Rono Vs Rono (2005) IEA** are not applicable in this matter.

28. On the issue of fair administrative action, no article of the constitution has been invoked. The petitioner has not demonstrated how this violation occurred save to state that she was forced to thumb print on some documents. The **Kuria green case** cited by the petitioner is nowhere similar to this one since in the former case, the registrar of titles and commissioner of lands had set out to cancel title deeds of the petitioner without a hearing. In the present case, petitioner had actually been summoned to participate in the proceedings before 2<sup>nd</sup> respondent. Further, this is not a case where petitioner's rights and interest have crystallised into rights of proprietorship.

29. This court cannot declare that petitioner is the owner of the suit land. Likewise, I cannot declare that the land belongs to the family of M'Elongi Ndegwa as claimed by 1<sup>st</sup> respondent. The dispute should be ventilated in the proper forum and not through a constitutional petition.

30. The upshot of my findings are as follows:

- (1) The petition is hereby dismissed with costs to 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
- (2) The counter claim of 1<sup>st</sup> respondent is dismissed with no orders as to costs.
- (3) The land ownership dispute to be resolved through the available dispute resolution mechanisms and applicable law.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 11<sup>th</sup> APRIL, 2018 IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

K. Gitonga for petitioner

Kaume for 1<sup>st</sup> respondent – absent

Attorney General for 2<sup>nd</sup> and 3<sup>rd</sup> Respondent absent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**