



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO 3 OF 2009

IN THE MATTER OF SECTIONS 84(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED

CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER SECTIONS 70,72,75,76, & 77 OF THE CONSTITUTION OF KENYA

BETWEEN

SAMUEL MUTHEE 1ST PETITIONER

GEOFFREY ABURUKI2ND PETITIONER

STANLEY KARUTHI3RD PETITIONER

JOHN MBAABU.....4TH PETITIONER

STELLA MWONJIRU..... 5TH PETITIONER

MARY NTHIGA 6TH PETITIONER

FREDRICK MWENDA7TH PETITIONER

JOHN KABURU 8TH PETITIONER

JULIUS KIRIMI9TH PETITIONER

ISAAC NGEERA.....10TH PETITIONER

MARY CIOKIRIMA..... 11TH PETITIONER

JOSEPH KINYUA.....12TH PETITIONER

SAMUEL THURANIRA13TH PETITIONER

KAILUTHA NAITULI14TH PETITIONER

JOSEPH MUGAMBI15TH PETITIONER

JULIUS MBURUNGA.....16TH PETITIONER

VS

THE OFFICER COMMANDING STATION,

CIOBUIGA POLICE STATION.....	1ST RESPONDENTS
DIVISIONAL OFFICER, TUTUA DIVISION,	
BUURI DISTRICT.....	2ND RESPONDENTS
THE CHIEF RUIRI RWARERA	
LOCATION TUTUA DIVISION	3RD RESPONDENTS
THURANIRA MBAABU MWITIMBA.....	4TH RESPONDENTS
THE CHIEF MAGISTRATE COURT AT MERU.....	5TH RESPONDENTS
HON. ATTORNEY GENERAL.....	6TH RESPONDENTS
PHILIP KANGETHE.....	7TH RESPONDENTS

JUDGMENT

The introduction and Evidence

1. On the 2.11.2009 the Petitioners filed a petition initially against 5 Respondents alleging contravention of rights and fundamental freedoms under section 70, 72, 75, 76 & 77 of the Constitution (now repealed).
2. The facts relied on are stated in the affidavit of support sworn by the 1st Petitioner in which he deposed under the express written authority of 15 other Petitioners that they are the residents of Maili Tatu, along the Isiolo -Meru Road, Meru County. That by dint of customary claims and rights, have grazed animals and farmed their respective parcels of land at Maili Tatu area through their ancestry from time immemorial. That the land is communal and occupied by the Tigania Sub-tribe of the Ameru People. That there was an attempt to kick them out by the Ameru from Imenti by changing the boundaries of Tigania/Imenti border but the same was stopped by the Court in JR 344 of 2003 at Nairobi.
3. That on 19.2.2009 the District Land Adjudication Officer, Meru Central District purported to declare the area as an adjudication area. That the Tigania People moved to Court vide judicial review (JR) proceedings and quashed the decision. That an appeal proffered against the decision of the High Court in Judicial Review proceedings is still pending.
4. That the 1st Petitioner contends that people from Central Imenti sought to claim the land at Maili Tatu as theirs and want to evict all the people from Tigania for reasons that the area is part of Imenti Central. Further that the 4th Respondents is claiming ownership of the land on the basis that he hails from Imenti.
5. That the 1st – 4th Respondents have in cahoots been harassing the Petitioners as a way to evict them from their land. That the 4th Respondents has severally through the 1st -3rd Petitioners caused the arrest of the Petitioners for trespass and robbery with violence. That the documents relied by the 4th Respondent to proof ownership of the land were nullified by the Court. That the arrests are one way to force them to vacate the land thus infringing on their constitutional rights to the land.
6. The Petitioners have sought the following orders;
 - a. Declarations do issue that the Petitioners fundamental rights have been violated by the actions of the Respondents.
 - b. A declaration do issue that the Petitioners are entitled to equal protection of the law.
 - c. A declaration that the land at Maili Tatu area along Isiolo- Meru Road is the Petitioners ancestral land.
 - d. A conservatory order do issue stopping the summoning reporting arresting and or preferring criminal charges against the Petitioners by the 1st -3rd Respondents in regard to the complaints over the land at Maili Tatu area along the Isiolo Meru Road.
 - e. An order do issue staying the hearing and or further proceedings in criminal cases No.s 1458 of 2009 and 1457 of 2009 pending the hearing and determination of the petition.
 - f. Other such conservatory orders directions and writs against the Respondents as may be necessary to safeguard and prevent violation of the Petitioners' rights and freedoms.
7. By a replying affidavit filed on 22.1.2015 the 1st, 2nd, 3rd and 5th Respondents opposed the petition vide an affidavit sworn by Philip Kangethe Kahoro Lemarasia, the District Officer 1 – Buuri in 2009 but then Senior Assistant Commissioner County Commissioner- Athi

River Sub County. He deponed that he was the District Officer 1 – Buuri. That he owns land parcel No. 6226 measuring 8 acres in Ruiri Rwarera adjudication section which he bought from Daniel Kibiti in 2008. That his land borders that of the 4th Respondent and Intex Road Construction Company that owned parcel No 2447. That as they endeavoured to develop their parcels they faced hostilities from unknown persons who would damage fences, beacons and properties at night. The 1st, 3rd, 4th Petitioners were amongst those arrested in respect to trespass the land.

8. He gave other incidences such as on 22.9.2009 when a group invaded their parcels and that of other residents (approx. 50 acres in total) and begun subdividing them into small portions leading to arrest of the Petitioners, amongst others and charged in Court.

9. He denied the Petitioners claim that the land is ancestral nor belongs to them. He contends that their parcels are on the left side of Ruiri-Isiolo tarmac road where the process of land adjudication was ongoing while the land claimed of the Petitioners is on the right side of the said road and which has been a subject of protracted case that was eventually settled by consent of the parties in the Court of Appeal CA No 129 of 2005. He annexed the orders of the Court dated 30.10.2014, the letter dated the 8.10.2008 from the Ministry Of Lands and Settlement confirming that he is the registered owner of parcel No. 6266 measuring 8 acres and a certified copy of the plan by the District adjudication officer showing the affected parcels of land in the area.

10. Further Sammy Kamau, the Chief Inspector of Police in charge of Ciobugia Police Station swore an affidavit filed on the 16.2.2015 detailing the arrests of the 1st, 2nd, 3rd, 4th, 5th, 6th 7th & 8th Petitioners. They were charged for trespass on to the 4th (in respect to plot No. 3947) and 6th (in respect to plot Nos. 2447 & 750) parcels of land at Chief Magistrate’s Court at Meru on 29.9.2009. He opined that the Petitioners have filed this petition to delay the prosecution of the criminal cases aforesaid.

11. The 4th Petitioner in opposing the petition deponed that on 15.9.2007 he was attacked at his father’s farm by the Petitioners in the company of others. That their intention was to invade the farm and subdivide amongst themselves. That the land belongs to his father, Mbaabu Mwithimbu M’Mburugu. That other parcels of land in the area were also invaded by the Petitioners. That they were charged and the case is still pending in Court.

12. He contended that the Petitioners have not proved ownership of the said parcels of land they claim to own as ancestral. He opined that the criminal cases should be allowed to proceed to conclusion so that the Petitioners may be accorded the opportunity to defend themselves against the criminal charges leveled against them. That the area is subject to adjudication with clear laid down procedures to follow in the event of a claim. He urged the Court to dismiss the petition for the reasons that the Petitioners have not established any violation of any rights by the Respondents.

13. The 7th Respondents gave evidence on his own behalf vide a replying affidavit dated the 20.7.2012 and deponed that he is the registered owner of plot No 831 measuring 8 acres having bought the same from one Sacinta Daniel Kibiti in 2008. That the Petitioners have severally committed acts of trespass on his land and other neighbours despite warnings from the local administration. That there is no communal land referred to as Mailu Tatu along Isiolo-Meru Road. That all the land in the area are private parcels owned by individuals. That the Petitioners were arrested on 24.9.2009 and charged in Court for trespass and malicious damage to property. That as a Public servant he is entitled in his right to own property and be protected by law like any other citizen. That the Petitioners have not demonstrated by documentary evidence or otherwise their claim on the land.

The Submissions.

14. The Petitioners reiterated the contents of the supporting affidavit of the 1st Petitioner dated the 30.10.2009 in their submissions. They contend that all the land at Mailu Tatu along the Isiolo -Meru Road is their ancestral land. That the land is part of their inheritance from their forefathers. That the Respondents acts of harassment, arrests and intimidation is aimed at forcefully removing them from their land to pave way for their acquisition to their exclusion.

15. Relying on Article 27 of the Constitution, they contend that they are entitled to the equal protection of the law as citizens. That under Art. 40, their right to own property is guaranteed and pursuant to Article 65 of the said Constitution, they can acquire individually or as a group property in any part of Kenya. That the Constitution prohibits the deprivation of a person of his property of any description as well as limitation of enjoyment of such rights to property. That the 1st, 2nd and 3rd Respondents have intimidated, harassed, preferred criminal charges against them in various Courts and frightened them out of their land. The Petitioners submitted that the acts of the Respondents described in the preceding paragraph have the effect of depriving them of their land as well as restricting their enjoyment of the same.

16. They submitted that the 7th Respondent has variously abused his office as a senior Government officer to deny them their rights to own and occupy their ancestral land without being subjected to fair hearing as enshrined in Article 50 of the Constitution. Further that the actions of the Respondents are in violation of Article 47 of the Constitution. That the Respondents have employed state machinery to take away their land, which actions are unconstitutional.

17. The 4th Respondent submitted that the Petitioners have confirmed that the land they allege to own is an adjudication area which is pending in the Court of Appeal. That the Petitioners have not availed the relevant documents to support their averments. That the Petitioners have not presented any tangible evidence to support ownership or occupation of the lands they allege to own.

18. Further the 4th Petitioner stated that he has proved his ownership through a letter from the Ministry of Lands and settlement aforesaid. That the petition is intended to delay the prosecution of criminal charges against the Petitioners for breach of the law. That the Court of Appeal has pronounced itself on this matter through CA No 344 of 2015 and it would appear that the Petitioners are seeking a reversal of the Court of Appeal orders through the backdoor. They have sought declaratory orders on ownership of land owned by third parties including the 4th Respondents’ father. In any event that there is no documentary evidence to show that they ever owned the land. That they have no property needing protection under the constitution or this Court.

19. He further submitted that the 1st, 2nd, 3rd Respondents are civil servants who have no claim in the land and were only discharging their duties as law enforcers to protect the right of property that was under threat of invasion by the Petitioners. He submitted that the Petitioners have refused to subject themselves to the process of adjudication and have not placed their claims (if any) before the adjudication process for consideration. He cited the case of **R Vs. JSC exparte Pareno KLR (2004)**.

Analysis and determination

20. On the 10.3.2015 the parties appeared in Court through Counsel and agreed to canvass the petition by written submissions. The 1st, 2nd, 3rd, 5th, 6th and 7th Respondents did not file any written submissions.

21. I have read and considered the Petition, the rival affidavits, the annexures, the written submissions and case law where supplied and the following are the issues for determination;

A; Whether the Petitioners rights to land, freedom and liberty, fair hearing and fair administrative action have been violated.

B; Costs

I shall now address the issues in turn.

Issue A; -infringement of rights

22. The Petitioners filed their case under Sections 70,72,75, and 76 of the Constitution (now repealed). In their submissions they stated that their claim falls under Chapter Four of the Constitution, 2010 – protection of fundamental rights and freedoms. Their main complaint centres on rights to property and freedom of liberty. They claim their rights under Art 40, 47, 50 have been violated, that is to say the right to property, right to liberty and freedom, right to fair administrative action and right to be heard. The Petitioners claim over the Mailu Tatu land is based on customary and ancestral tenure. That the land belonged to their forefathers who owned and occupied it from time immemorial. On 19.2.2003 Ruiru – Rwarera area covering Marere, Munanda, Maili Tatu and Mumui areas (the lands) was declared an adjudication section by the then Meru Central Adjudication Officer. The Petitioners claim that this declaration was arbitrary and illegal in that they were not consulted and feared that they would lose their lands aforesated.

23. The Petitioners aver that in 2003 Justus Muthuri, Robert Mwongo, M’Minyori Kiriamemba, Wilson Mutai Charles Lintari and 88 others being residents of Marere, Munanda, Maili Tatu and Mumui areas of Tigania West Division, Meru North District filed judicial review proceedings in Misc Appl. HCCC No 344 of 2003, Nairobi seeking to quash the decision of the Adjudication officer on various grounds; That the lands are part of Meru North and not Meru Central which is traditionally occupied and owned by the Tigania speaking subtribe of the Ameru People (That Meru Central is predominantly occupied by the Imenti people); That the name Ruiru- Rwarera is Imenti dialect and not Tigania; that it would alter the boundaries of the Meru North thus arbitrarily taking parts of Meru North into Meru Central District; that the adjudication was done secretly without their involvement; that they feared loss of their land to people from other parts of Meru interalia. Vide a judgment delivered on 29.3.2004 the High Court quashed the decision of the District Land adjudication Officer in declaring the lands an adjudication section of Ruiru- Rwarera with Meru Central District whilst the lands fall under Meru North District and without consulting the residents.

24. The matter did not end there. It would appear that the Applicants were dissatisfied with the decision of the High Court aforesated and filed an appeal CA No 129 of 2005. This appeal was settled by consent of the parties recorded as an order of the Court on 30.10.2014. By this order the parties agreed to establish an overseer committee chaired by eminent persons to assist in the adjudication of the lands. I will reproduce excerpts of this order that are relevant to this case;

“1. That the appeal herein and the judgement of the Hon Justice Fred Ochieng of 29.3.2004 (in HCCC No 344 of 2003) and the decree obtained on 7.7.2004 be and is hereby set aside.

4. That the adjudication section previously known as Ruiru Rwarera be divided into two sections with reference boundary point starting from the junction to Mumui Catholic Church and Mumui dispensary running along Ruiru -Isiolo road straight to River Rugusu.

5. That the remaining part of the former adjudication section on the left side approaching from Ruiru to isiolo to proceed from where it was stopped by the judgment of Hon Justice Fred Ochieng on the 29.3.2004 but on the following parameters and considerations;

i). those people who are already settled and genuinely in occupation of the land will have their land adjudicated and the concerns catered for

ii). The notice of completion of the said adjudication process under section 25 and 26 of the Land adjudication Act, Cap 284 be and be made for the remaining 3 days after an adequate and reasonable announcement to be made effectively through public meetings, barazas church sessions made by the Land Adjudication Officer in close consultation with the overseer adjudication committee after thirty (30) days from the filing of consent in Court.

6. That the adjudication section on the right side approaching from Ruiru to Isiolo to be declared a new adjudication section and handled through the provisions of the Land adjudication Act, Cap 284 on the following priorities;

i). the issue of land adjudication numbers in the said land to be set aside.

ii). Those persons who are already settled on the land will have their land adjudicated.

iii). Those persons who were genuine land owners though were wrongly and illegally evicted from the land will have their cases considered in accordance with the due process of law by the Overseer Committee for resettlement.

iv). Anyone else claiming land and who is not settled will have their names and cases forwarded to the Meru County Government for consideration.”

25. Further the said Court of Appeal Order directed the Overseer committee to *interalia*; draw a work plan and program of activities in respect to the two adjudication sections to be undertaken within 6 months from October 2014 to 3.3.2015 for the old section and upto October 2015 for the new section; audit various criminal and civil cases relating to the land dispute pending before Courts and attempt an out of Court settlement; undertake arbitration if need be; facilitate smooth issuance of titles to all the beneficiaries and bring the adjudication process to a closure and file a consent order to finally mark the settlement of the case before the Court of Appeal.

26. It is clear that the lands at Maili Tatu were part of the then Ruiru Rwarera adjudication section which was quashed by the High Court decision in 2004. That the Court of Appeal directed that the nullified Ruiru Rwerera adjudication section be split into two adjudication sections; the right side and the left side of the Ruiru-Isiolo with the boundary point starting from the junction to Mumui Catholic Church /dispensary running along the Ruiru-Isiolo Road straight to the river Rugusu. The Petitioners have claimed land at Mailu Tatu along Isiolo-Meru road. Unlike the Respondents, the Petitioners have not presented any evidence, documentary or otherwise, to show occupation or ownership of the said lands in terms of the description, delineations of their claim on the land at Maili Tatu. They have not presented any map or registration records to assist the Court to clearly identify the lands. The 7th Respondent swore an affidavit dated the 21.1.2015 that his land and that of the 4th Respondent are on the left side of the road while that being claimed by the Petitioners is on the right side of the said road. He annexed a certified copy of the area plan by the adjudication officer, Imenti North to support the position of the plots Nos. 2447 & 750 (belonging to Mbaabu Mwithumbu) and 6260 (belonging to the Patrick Kangethe). The Petitioners have not contested this evidence.

27. That said, it is also clear from the evidence on record that the 4th and 7th Respondents occupy their aforesaid parcels of land and carry out farming activities. Each has stated as much in their affidavit evidence. There was an attempt to restrain the 7th Respondent from buying his mother on the land. Occupation can also be presumed from the alleged acts of trespass by the Petitioners. There is no evidence that the Petitioners occupied the land nor that they were forcefully removed from the said parcel of lands. I will return to this later.

28. It is common ground that the ownership of the lands is in dispute. The Petitioners claim ownership of the same under communal and ancestral tenure while the 4th and 7th Respondents claim ownership based adjudication and on letters dated the 8.10.2008 and 23.9.2009 from the Ministry of Lands and settlement confirming that Plot No. 6266 is registered in the name of Patrick Kangethe Kahoro Lemarasia while Plot Nos. 2447 & 750 in Ruiru Rwerera adjudication section are registered in the name of Mbaabu Mwithumbu M'Mburugu (4th Respondent).

29. The evidence in Para 28 conforms with Para 5 & 6 of the Court of Appeal order referred to earlier. It would appear that the 4th & 7th Respondents' lands are situate on the left side of the road and on the old adjudication section. Here, this adjudication had been halted by the High Court ruling of 29.3.2004 but was ordered to proceed from where it had stopped by the Court of Appeal. Those persons who were already settled would have their lands adjudicated and concerns addressed. I agree with the Petitioners that the confirmation letters referred to above from Ministry of Lands in respect to Plot Nos 750, 2447 and 6260 were halted by High Court order of 29.3.2004. However, their occupation was not affected. Ownership by registration and occupation are not necessarily the same. In as much as their rights to the said lands was to be adjudicated again, it does not negate occupation if indeed they were in occupation. It would then appear that the claims of the Petitioners would be catered under the new adjudication section as stated in the said Court of Appeal Order.

30. The preamble of the Land adjudication Act Cap 284 states that it is to provide for the ascertainment and recording of rights and interests in Trust land and for purposes connected therewith and purposes incidental thereto. At the time this petition was filed it is clear that the rights of all the parties were at various stages of ascertainment. The Court of Appeal decision referred to has given a clear road map on how these rights were to be ascertained and finally registered under the Land Registration Act, 2012. The role of the adjudication officer is to ascertain the rights of the claimants, address the disputes using the laid down mechanism in the Act, prepare the final register and submit the same to the Chief Land Registrar for eventual registration of the parcels in the names of the beneficiaries. The role of the Court is to determine rights and interests in land that have already been ascertained and registered. From the evidence on record the ascertainment of claims have not been completed, at least by the 30.10.2014 as the adjudication is still ongoing. The process should be left to be completed, if it has not yet been completed by now. The Court was not given an appraisal of the process. It would be premature for this Court to determine whether or not rights of the Petitioners to land have been violated or not nor that the land along Isiolo-Meru Road is the Petitioners' ancestral land.

31. The issue whether or not the Petitioners right to fair hearing and right to fair administrative action was dealt with in the Court of Appeal orders referred to earlier. The Petitioners have not adduced evidence to demonstrated that any of their rights complained of are threatened and/or are being violated.

32. There is no evidence that the Court of Appeal orders have been stayed, varied or set aside. The orders set out in paragraph 24 effectively disposed the civil claim of the Petitioners except the one seeking an order of prohibition from prosecution which I will revert to shortly.

33. The Petitioners have claimed that the alleged arrests harassment and intimidation by the Respondents is geared at evicting them from their ancestral land. The Petitioners have presented copies of charge sheets detailing the nature of charges that were preferred against them by the Police. Sammy Kamau, the Chief Inspector of Police in charge of Ciobugia Police Station informed the Court that the 1st, 2nd, 3rd, 4th, 5th, 6th 7th & 8th Petitioners were arrested on the 16.2.2015 for trespass on the 7th (plot No. 3947) and 5th (plot Nos. 2447 & 750) parcels of land and charged at Chief Magistrate's Court at Meru on 29.9.2009. The nature of the charges in the charge sheets range from trespass to private property, malicious damage to property, and robbery with violence. The 4th Respondent gave evidence which has not been challenged that he was attacked by the named Petitioners with others while working at his father's land sustaining injuries in the process. In view of the averments contained in the Replying Affidavits referred to above, it is not appropriate to stop the advancement of the criminal

case against the Petitioners. The Petitioners may be heard in defence of their rights in respect of the suit land and appropriate orders made by the trial Court.

34. In view of the reasons given above, prayers ,1,2,3,4 and 5 are not available to the Petitioners. I see no reason to grant other conservatory orders for which no ground has been laid before the Court.

35. Before I conclude, I have noted that Mbaabu Mwithimba was, at the institution of the suit, sued as the 4th Respondent. On 6.7.12 one Thurania Mbaabu swore a Replying affidavit and states that he is named as the 4th Respondent and therefore competent to swear the said affidavit. By a replying affidavit dated the 10.3.2010 Thurania Mbaabu states that he is the legal representative of the estate of his father, Mbaabu Mwithimba (who was the 4th Respondents at the inception of the petition) who is deceased. He states that he died on 11.2.1998, that is before the petition was filed. There are no letters of grant of administration in the file although Thurania Mbaabu is described as a legal representative of the estate of the 4th Respondent, Mbaabu Mwithimba.

36. I have perused the record and note that the original parties in this petition were the 16 Petitioners and 5 Respondents. Later the 5th and 7th Respondents were enjoined without the leave of the Court. There is no order permitting joinder of the three into the suit. Equally there is no substitution or amendment of the plaint to bring in the current 4th Respondent. I have seen an application dated 24.2.10 by the Petitioners seeking inter alia leave to amend the petition dated the 30.10.2009 by enjoining Philip Kangethe as the 7th Respondent. By an application titled Notice to Withdraw, the Petitioners sought to withdraw the application for amendment to the petition on 23.3.2010. According to the record, neither the application of 24.2.2010 nor the one for withdrawal were ever prosecuted, effectively the petition duly and properly on record remains the original one dated the 30.10.2009. There is no explanation as to how the new parties were admitted into the suit.

37. In view of the incomplete applications stated above, it is irresistible to conclude that the joinder of the 5th and 7th Respondents in the Petition and Thurania Mbaabu on account of the estate of Mbaabu Mwithimba without leave of the Court is irregular. The Petitioners detour from established rules of litigation cannot form a proper basis for determination of the dispute between the parties in this case. The rules are meant for each party and the Court to clearly understand the case with a view to attaining substantial justice. This Petition has been rendered incompetent as a result.

B; Final Orders & Costs

38. In the upshot the Court does not find merit in the Petitioners' claim and makes the following orders;

(a) The petition dated 30.10.2009 be and is hereby dismissed.

(b) The Petitioners shall jointly and severally pay the Respondents' costs of the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MERU THIS 28TH DAY OF JUNE, 2018.

J.G. KEMEI

JUDGE

In the presence of:

C/A Mutua

N/A for Petitioners 1-16

Kiongo for 1st to 3rd Respondents

Muthamia for 4th Respondent

Kiongo for 5th – 6th Respondents

N/A for 7th Respondent