



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT CHUKA
CHUKA ELC PETITION CASE NO 23 OF 2017
FORMERLY MERU PETITION CASE NO. 31 OF 2016
IN THE MATTER OF THE CONTRAVENTION OF
FUNDAMENTAL FREEDOMS AS ENSHRINED
UNDER CHAPTER 4 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF ARTICLES 27, 40, 47, 48 AND
50 OF THE CONSTITUTION OF KENYA
BETWEEN
NKOROI NJERU.....PETITIONER
VERSUS
DISTRICT LAND ADJUDICATION & SETTLEMENT
OFFICER MERU SOUTH DISTRICT.....1ST RESPONDENT
DIRECTOR OF LAND ADJUDICATION.....2ND RESPONDENT
HON. ATTORNEY GENERAL.....3RD RESPONDENT
BAUNI M'NKAMBI.....4TH RESPONDENT
JUDGMENT

1. This petition was filed by the petitioner on **8th November, 2016**. It is in the following format.

PETITION

The humble petition of NKOROI NJERU OF P. O. Box 174, MAUA in the Republic of Kenya is as follows:

1. That the petitioner is a Kenya person peasant farmer living within lower Kandungu within Meru South District.
2. That the 1st respondent is the district land adjudication officer in Meru-South District.
3. That the 2nd respondent is the director of land adjudication of Arithi (sic) house at the ministry headquarters.

4. That the 3rd respondent is the Hon. Attorney General of the Republic of Kenya.
5. That the 4th respondent is a male adult of sound mind of lower Kandungu location Meru South.
6. The petitioner herein is capable of presenting this humble petition appertaining P/NO's 1243 and 1415 all of lower Kandungu adjudication section within Meru South District.
7. That the suit land is occupied by the petitioner and it had been with land cases wherein the petitioner have been emerging winner.
8. That the cause of this petition has arised (sic) as a result of the 1st respondent refusing to sale (sic) the A/R proceeding (sic) despite of applying and paying for it.
9. That the 1st respondent went further and registered the title deed to the fourth respondent which he is using to evict me from my own land.
10. That that action of the 1st respondent was motivated by the desire to give my land to 4th respondent illegally.
11. That the 4th respondent as a result of the action of the 1st respondent he has served me with the eviction notice dated 23.8.2016 which have (sic) prompted me to file this petition.
12. That the respondents actions have infringed on the petitioners right to protection of the land and as such his fundamental rights have been infringed.
13. That I am intending to file this humble petition as matter of fact as is stipulated in my supporting affidavit.
14. That the respondent's (sic) action has infringed the petitioner (sic) right to protection of the land and as such his fundamental rights have been infringed.
15. That if this petition is not granted it will render loss of land and other properties which will make the petitioner (sic) family destitute.
16. Your petitioner therefore humbly prays:-
 - a. That declarations do issue that the petitioner (sic) fundamental rights has (sic) been violated by the actions of the respondents.
 - b. A declaration that the denial of the proceedings in relation to objections No. 661 was illegal.
 - c. A declaration that the petitioner is entitled to parcel Nos. 1243 and 1415 of lower Kandugu registration section of Meru South District.
 - d. An order do issue restraining the 4th respondents, (sic) his agents or assignees from entering, remaining or doing anything over parcels Nos. 12433 and 1415 lower Kandugu registration section.
 - e. Reverting of parcel Nos.1243 and 1415 lower Kandugu registration section from the 4th respondent to the petitioner.
 - f. Other such directions and writs against the respondents as may be necessary to safeguard and prevent violation of the applicant's fundamental right to own property.

DATED AT MERU THIS 8TH DAY OF NOVEMBER, 2016

FOR: ELIJAH K. OGOTI & CO. ADVOCATE

FOR THE PETITIONER

2. I do note that an application dated **8th November, 2016** seeking, among other things, an injunction restraining the 4th respondent from entering, remaining or interfering with the land in dispute was allowed through a ruling dated **7th March, 2016**. However, after the 4th Respondent satisfied the court that he lived on the suit land, the orders issued on **7th March, 2016** were vacated as their purport was to evict the 4th Respondent through the back door.

3. The petition was canvassed by way of written submissions.

4. The petitioner has filed two sets of admissions.

5. The first set of submissions is dated 17th March, 2017 and takes the following form:

PETITIONER'S SUBMISSIONS

MY LORD this submission is in respect of the petition herein dated 8th November, 2016. The petitioner is praying for declarations as per paragraph 15 a to f.

My lord from the word go we submit that the petition is not opposed since none of the respondents from 1st to 4th have filed any replying affidavit against the same.

My lord more so to the above the petition herein points to the 1st to 3rd respondents ie the government offices plus the Hon. Attorney General who refused to issue proceedings to enable the petitioner file an appeal to the minister.

My lord the petitioner has annexed receipts attached to the notice of motion dated 8.11.2016 confirming that the petitioner paid for the proceedings on time but the same was not issued.

My lord prove (sic) in Civil or Petition as such is on balance of probability which the petitioner has proved since demand notice dated 23.8.2016 (attached to the supporting affidavit) the 4th respondent confirmed that it is the petitioner who was in occupation of the suit land. The petitioner has annexed sale agreement (Exhibit 1) in the supporting affidavit to notice of motion dated 8.11.2016 which shows that he is entitled to this (sic) parcels.

My lord when the petitioner pleaded that he was not given the proceedings the 1st to 3rd respondents were to disapprove (sic) the same which they have not done.

My lord again since the 1st to 3rd respondents did not participate in denial of the proceedings they have no audience to submit on behalf of the Attorney General.

My lord also for the interest of justice and fair play this petition should be allowed since it is the petitioner who is in occupation of the suit land.

My lord the petitioner won the committee case and the 4th respondent appealed to the AR stage and won which verdict the petitioner herein wanted to appeal but was denied the proceedings.

My lord since now the titles to the affected section have been issued you have the powers to revert this (sic) parcels to the petitioner as per paragraph 15 (e) prayers.

What we are submitting is that since now the titles have been issued the appeal to the minister has been overtaken by events thus your court having jurisdiction to deal with land cases it has powers to deal with the petition herein.

My lord also is paragraph 15 (f) we are praying for any direction (writ) as it may be necessary to safeguard the fundamental rights of the petitioner.

My lord vide his advocates letter dated 28.8.2016 (sic) confirmed that the petitioner has been in occupation of the suit land since 2004 (more than 12 years) which the court should take into consideration in deciding this matter as far as occupation is concerned.

My lord through a petition this honourable court has wide powers to decide such a petition.

My lord there was no need to repeat exhibits in the affidavit in support of petition since everything was on record vide affidavit dated 8.11.2016 in support of motion. This issue of exhibits are (sic) taking care of under Article 159 (2) (d) of the constitution.

That the court is referred to paragraph 8 of the notice of motion where facts of the matter are mentioned that the petitioner bought this land paragraph 8 (a) to (d) of the supporting affidavit to application.

My lord the petitioner submits that he won several committee cases which the court is urged to take judicial notice of as prove that the petition herein has all chances of success. (See exhibits 1 and 6 of the affidavit to notice of motion).

Lastly my lord we reiterate that the respondents have not filed any reply and if any it is time barred since the proceedings were closed on 7.3.2017 when we took a date for submissions and though the counsel for the 4th respondent was in court he did not seek leave to file reply out of time and the Attorney General who are (sic) directly affected by this petition did not file any pleading.

We submit as above.

DATED AT MERU THIS 17TH DAY OF MARCH, 2017

FOR: ELIJAH K. OGOTI & CO. ADVOCATES

FOR THE PETITIONER.

6. The second set of submissions is dated **13th November, 2017** and take the following form:

PETITIONER'S FURTHER SUBMISSIONS IN SUPPORT OF THE PETITION

My lord, I have had the benefit of reading the submissions filed by Mr Ogoti who acts with me for the petitioner and the response thereof by Mr.Murithi dated 19.7.2017.

To begin with, my lord, it is instructive for this court to note that the 1st, 2nd and 3rd Respondents did not as it were respond to the petition. On this basis therefore, I invite your lordship to find the averments made against them in the petition are admitted, if not admitted, proved.

ADMITTED FACTS BY THE 1ST, 2ND AND 3RD RESPONDENTS, these admitted facts include the averments in paragraph 7, 8, 9, 10, 11, 12, 14 and paragraph 15 of the petition. If these averments are in law presumed to have been admitted, I invite the court to rule in favour of the petitioner since the averments are not controverted and neither has the supporting affidavit dated 8.11.2016 been controverted by the 1st, 2nd, 3rd and 4th Respondents.

The 4th respondent

The 4th Respondent though correct in filing the grounds of opposition, has not confronted factually the petition but has raised grounds of opposition and no affidavit evidence.

In other words, I am submitting that the grounds of opposition per se, in the instant suit do not offer a sufficient answer to the petition, I submit with respect to the 4th respondent that his grounds of opposition do not answer the fact that the petitioner's parcel of land Muthambi /Lower Kandungu/1423 was by the 4th respondent in collusion with the 1st, and 2nd respondents alienated which fact infringes on accused's property rights in ownership of property contrary to article 40 (1) of the Constitution of Kenya, and of course a denial to fair administration action contrary to Article 47(1) of the constitution of Kenya, and of course a denial to fair administration action contrary to Article 47(1) of Constitution of Kenya. These two constitutional rights of the petitioner on the evidence on record have been infringed and the petitioner is entitled to the prayers sought. The 1st and 2nd Respondents made sure by means of fraud and procrastination that the petitioner never appealed to the minister by failing to release the A/R record to the petitioner. This is unlawful.

Whether this suit ought to have been brought by way of a plaint or petition. The constitution in Article 22 (1) provide for the filing of a suit for the enforcement of the fundamental rights in court, and further provides in article 22 (3) b that the fees for the filing of the suit be kept to the minimum and that in article 22(3) "C" no fee may be charged for commencing the proceedings", and in Article 159 (2) the constitution of Kenya, enjoins this court to go to the substance of the petition before it, as opposed to technicality of whether this matter has been brought by way of plaint or petition. In my respective submission under the petition the court has wide powers to grant the prayers sought.

In the petition, once the facts have been established, which I submit they have, the petitioner is entitled to the prayers sought, and in particular prayer (c) and invite the court to order the land registrar Meru South/Tharaka Districts to cancel the name of the 4th respondent on parcel number Muthambi/Lower Kandugu/1243 and direct the same be registered in the name of the petitioner.

In short, the 4th respondent has failed to tender evidence to show that he has a genuine claim on the disputed land. The 4th respondent has no answer to the fact that the petitioner has lived on the disputed land since time immemorial was awarded the land by the adjudication committee, only for the 1st and 2nd respondent to manipulate the system by hiding (or is it hoarding the record?) to prevent the petitioner from following the due process to get his land back.

IN CONCLUSION

I fully associate myself with Mr.Ogoti's submissions that the petition on evidence has been substantiated and the prayers thereof be granted.

In particular I pray that this honourable court do confirm that land parcel number Muthambi/Lower Kandugu/1243 is the property of the petitioner and this court be pleased to direct the land registrar Meru South/Tharaka/Districts to cancel the name of the 4th respondent on title No. Muthambi/Lower Kandugu/1243 and register and substitute the name of the 4th respondent with the name of Nkoroi Njeru who is the petitioner herein.

We so humbly pray.

DATED AT CHUKA THIS 13TH DAY OF NOVEMBER, 2017

P. M. MUTANI ADVOCATE

FOR THE PETITIONER

7. The 1st to 3rd respondents, on **20th March, 2018** told the court that they would rely on the Grounds of Opposition and the submissions filed by the 4th Respondent. Mr. Kiongo, on their behalf, however submitted that the petitioner had filed this suit to avoid the deadlines stipulated by the applicable law. He told the court that these proceedings constituted a suit disguised as a petition so as to beat the said

deadlines. He termed this as an abuse of the court process. He further opined that the petitioner had discovered an anomaly in his petition and said that this was why he had filed an application dated 15th November, 2017 seeking that the petition be heard through oral evidence, the way suits filed by way of plaints are heard. Mr Kiongo further submitted that it would be inappropriate to grant orders of injunction in constitutional matters, and, particularly, in this case, against the shaky weight of the evidence proffered by the petitioner.

8. The 4th respondent's advocate filed Grounds of Opposition dated **30th March, 2017**. They take the following form:

GROUND OF OPPOSITION

TAKE NOTICE that Counsel for the 4th Respondent shall in opposition raise and urge the following grounds:

1. That the entire petition is fatally defective and bad in law for reasons that:-

- a. There is no sufficient material placed before the court as evidence of the alleged violation of the constitutional rights of the petitioner.
- b. The petition does not raise any constitutional issues and the only viable remedy available to the petitioner in respect of prayers (a) and (b) of the petition is to approach court through a prayer for mandamus through Judicial Review proceedings.
- c. The petition as drafted and presented is vague and wanting in both form and substance.
- d. Prayers (c), (d) and (e) of the petition can only be determined in a substantive suit and not through a constitutional petition.
- e. The petition as presented is an appeal against the decision of the relevant statutory body disguised as a constitutional petition and hence improper in law.

REASONS WHEREFORE the 4th Respondent prays that the entire petition be dismissed with costs.

DATED AT CHUKA THIS 30TH DAY OF MARCH, 2017

FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES

ADVOCATES FOR THE 4TH RESPONDENT

9. The 4th respondent's submissions dated **19th July, 2017** take the following form:

SUBMISSIONS FOR THE 4TH RESPONDENT

Your lordship we do tender submissions for the 4th respondent as hereunder:-

Introduction:

Your lordship the petitioner instituted a constitutional petition seeking several declaratory orders. In answer to the said petition the 4th respondent filed grounds of opposition.

The petition

Your lordship, the following facts can be deduced from the petition as constituting the framework of the petitioner's claim.

- a. There has been disputes between the petitioner and 4th respondent relating the ownership of P/Nos. 1243 and 1415 Kandungu Adjudication Section.
- b. The petitioner has allegedly been unable to secure proceedings of the determination of a dispute whose particulars are not clear.
- c. The 4th respondent is the registered owner of the suit lands in possession of title deeds.
- d. The petitioner is in occupation of one of the suit lands.
- e. The 4th respondent has sought to evict the petitioner from one of the suit lands.
- f. The petitioner feels that his constitutional rights have been violated.

The legal position

Your Lordship, the import of the grounds raised by the 4th respondent in opposition to the petition is that the issues raised by the petitioner do not qualify as proper constitutional questions.

It is absolutely clear that the petitioner has a land ownership dispute against the 4th respondent which has apparently been adjudicated upon in some undisclosed forum.

We submit that such a dispute is better ventilated in an ordinary suit where evidence will be adduced and tested.

It is for instance, presenting the court with a difficult task by asking it to determine issues of ownership of land in a constitutional petition when it is admitted that such dispute was adjudicated in another forum.

It would also be an affront to the established practice of litigation to require the court to issue restraining orders against a party in a petition of this nature when no tangible evidence of trespass or attempted trespass has been provided.

In a nutshell, we submit that the petition as presented is incompetent and incapable of conveying any benefit to the petitioner in its current forum.

Regarding the issue of the proceedings of the arbitration board, it is our view that the most plausible route to compel the adjudication officer to release them is through judicial review proceedings. Definitely, the choice of a constitutional petition for this purpose is not the most efficacious one.

In any case your lordship, the petitioner has not sought to have the court direct the 1st respondent to furnish him with the proceedings if one were to carefully read the prayers set out in the petition.

In conclusion, the petitioner is attempting to circumvent the requisite legal procedures in pursuit of his claim particularly because the period stipulated for challenging the decision of the arbitration board has lapsed.

This is an obvious abuse of the process of court and we urge your lordship to dismiss the petition with costs to the 4th respondent.

We so humbly pray.

DATED AT CHUKA THIS 19TH DAY OF JULY, 2017

FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES

ADVOCATES FOR THE 4TH RESPONDENTS

10. The issue for determination in this matter is if or if not the petitioner has satisfied the court that the orders he seeks in this petition are merited.

11. I have carefully examined the pleadings, the highlighting of the parties' respective assertions and the written submissions proffered by the parties when buttressing their diametrically opposed positions.

12. All parties agree that the petitioner did not exhaust the remedies stipulated by the apposite statutory provisions. Except for the mere allegation that the 1st respondent had refused to avail to him A/R proceedings, the petitioner has not provided tangible evidence that this was the case. He is economical with important facts such as when the impugned proceedings were held. This makes it very difficult for the court to find whether or not the petitioner was trying to escape the stipulations provided for in the Land Adjudication Act and in the Land Consolidation Act regarding within what period of time parties should file apposite appeals.

13. Ascertainment of rights in community land must follow the process envisaged by the Land Adjudication Act. Ascertainment of rights and interests in and for consolidation of land in special areas is governed by the Land Consolidation Act. These processes are very important. I opine that you cannot claim that your right to ownership of land can be infringed upon when that right has not been ascertained through the laid down procedure. That is to say, you cannot claim unascertained rights.

14. I do agree with the 4th respondent that the petitioner should have moved to court through another procedure. If he felt that the 1st respondent had refused to avail to him proceedings which would have enabled him to file an appeal against the impugned decision, he should have moved the court by way of Judicial Review so that an order of mandamus could have been issued to compel the 1st respondent to perform his legally required duty.

15. I do not find it necessary to rule whether or not prayers (c), (d) and (e) in the petition could only be determined in a substantive suit. This is because I have already found that ascertainment of the petitioner's right to the parcels numbers 1243 and 1415 Lower Kandugu registration section of Meru South District was inchoate at the time this petition was filed.

16. Article 61(2) of the Constitution of Kenya classifies land as public, community or private. It is pellucid that the land in dispute is not

public or community land. The petitioner is, ipso facto, claiming that his right to own private land has been infringed upon. And yet there is no known law that has determined that the land in dispute belongs to him.

17. The sword of law cuts both ways. It protects the petitioner as well as the respondents. The constitution is the umbrella upon which all statutory laws are anchored. The constitution recognizes both the Land Adjudication Act and the Land Consolidation Act. I find that the respondents have not breached any provisions of the two pieces of legislation. I find that the petition is intended to by-pass the stipulations of the applicable law.

18. In the circumstances, I find that prayers a, b, c, d, e and f in the petition are not merited.

19. I enter judgment for the respondents in the following terms:

- a. This petition is dismissed.
- b. Costs shall follow the event and are awarded to the respondents.

20. It is so ordered.

Delivered in open court at Chuka this 25th day of July, 2018 in the presence of:

CA: Ndegwa

Nkoroi Njeru – Petitioner – present

Mark Muriithi h/b Kiongo for 1st to 3rd Respondents

Mark Muriithi for 4th Respondent

P. M. NJOROGE

JUDGE