



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC. PETITION NO. 24 OF 2013

FREDRICK LAICHENAPETITIONER

VERSUS

JULIUS BAARIU.....1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION OFFICER TIGANIA

WEST/EAST DISTRICT.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The petitioner filed this Petition dated 31/10/2013 on 6th November, 2013 seeking the following prayers:

- (a) A declaration that the petitioner's constitutional right to protection of right to own property has been infringed.
- (b) A declaration that the petitioner's constitutional right to a fair administrative action has been violated.
- (c) A declaration that the petitioner's constitutional right to be given written reasons for an administrative action where the petitioner's rights are likely to be adversely affected by the action has been denied.
- (d) A declaration that the petitioner's rights to a fair hearing has been violated.
- (e) An order directing the 2nd respondent to rectify the records relating to parcels of land numbers 1933 and 5066 as they presently appear and restore parcel number 1933 as was initially reflected in map sheet number 108/4/2/5 as fronting the Meru-Maua Road.
- (f) Such other orders as the court may in the circumstances deem as fair, just and expedient to grant in order to serve the ends of justice.

The said petition is supported by the affidavit of the petitioner sworn on the 5th November, 2013.

The Petitioner's Case

2. The petitioner has sworn an affidavit in support of the petition. The petitioner avers in that affidavit that he is the registered owner of **Plot No 1933** Kitharene Adjudication Section; that to the best of his knowledge the said plot is situated off the Meru Maua road; that now the records show that the petitioner's **Parcel No 1933** is at a different location and in a different Map Sheet number. He avers that he was not consulted when the changes were done. He avers that the economic value of the plots near the road is higher than that of the land located where his plot was transferred to. He avers that he has been in actual physical possession of the land and that the records have been altered to force him to vacate the land in favour of the 1st respondent. He avers that that action has not only deprived him of his property but has also subjected him to discrimination. He avers that the 1st respondent now intends to remove him from the said parcel of land and settle himself thereon and develop the same and that the District Land Adjudication and Settlement Officer has supported this change and maintained that the current records will be maintained as they are.

The 1st Respondent's Defence

3. The 1st respondent filed his replying affidavit dated **3rd March, 2014** on the same date.

4. The 1st respondent's 23- paragraph affidavit raises several facts as follows: that **Lintari Ithiuki** sold **Parcel Number 528** to the petitioner and **John Kalawa Michira** in 1984; that the parcel was 1 acre in size and was approximately 5 kilometres from the Meru-Maua highway; that the said Lintari had another parcel of land, **Parcel No 479** situate at Nchui; that Lintari and his wife lived on **Plot 479** which has always been family land; that during the process of gathering of land in the 90s John Kalawa attempted to superimpose **Land Parcel 528** onto **Parcel Number 479** but the attempt was thwarted when Lintari's wife reported the matter to the lands office, that after Lintari died the petitioner and Kalawa forcibly entered **Parcel Number 479** and fenced it and attempted to evict Lintari's widow; that the Njuri Ncheke, upon being apprised of the matter by the widow issued a determination that **Parcel Number 479** was Lintari's; that later on the petitioner, Kalawa and his wife interfered with the land after the Njuri Ncheke decision and even threatened Lintari's widow with death; that the District Commissioner also dealt with the matter and when he asked the District Land Adjudication and Settlement Officer for the details on the ownership of the land the latter confirmed in writing that **Parcel Number 479** belonged to Lintari while **Parcel Number 1939** belonged to John Kalawa; that the 1st respondent purchased **Plot No 5066** from Lintari and the same was excised from **Parcel 479**; that it was after this purchase that the petitioner removed his focus from Lintari's widow and started pursuing the 1st respondent;

The 2nd and 3rd Respondent Defence

5. The 2nd and 3rd respondents filed Grounds of Opposition dated **4th February, 2014** on **10/2/2014**.

1. There is no constitutional cause of action that has been set out against the 2nd and the 3rd respondents.

2. The petition herein is defective, incompetent and an abuse of court process.

3. The petition herein lacks merit in its entirety.

4. The orders sought are not tenable.

The 2nd and 3rd respondents pray that the petition be dismissed with costs.

6. The petitioner filed his submissions on **22/8/2018**. The 1st respondent filed his submissions on **8/3/2018**. The 2nd and 3rd respondents filed their submissions on **9/3/2018**. I have considered those submissions.

7. DETERMINATION

Issues for Determination

8. The issues for determination in this matter are as follows:

a. Has the petitioner established that his rights under the constitution have been violated?

b. What orders should issue?

9. On the first issue herein above the rule of practice in the Kenyan jurisprudence regarding petitions is that a petitioner must give the particulars of the alleged violation of right, the manner of alleged violation and the particular clauses of the constitution under which provide for the petitioner's rights which are alleged to have been violated.

10. To put it differently, when a person files a petition alleging a violation of right he must state with specificity the right so violated, the clause of the Constitution on which he relies and the manner in which that right provided for under that clause has been violated.

11. What the petitioner has done is merely to mention **Articles 22(3), 23, 40, 47 and 165(3) (b)** of the Constitution in the petition's heading. Even if this court were to shut its eyes to the fact that no provisions have been relied in the body of the petition, a few flaws still emerge: **Article 22(3)** does not aid the applicant as it merely provides for the powers of the Chief Justice to make rules providing for the court proceedings referred to in that Article, and the criteria which they shall satisfy, and that notwithstanding absence of the rules, a petitioner is still entitled to lodge proceedings; **Article 23** empowers the courts to uphold and enforce the Bill of Rights and it lists some of the remedies that the court may issue in proceedings commenced under the Constitution; **Article 40** provides for, among others, the protection of right to property and **Article 40(1)** provides that Subject to **Article 65**, every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. **Article 40(3)** provides that (subject to the conditions in that article including prompt compensation therefor) the State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description. **Article 47** which addresses the subject of fair administrative action is equally wide.

12. As I have earlier mentioned the petitioner has merely mentioned the provisions of the constitution in the petition's heading; he has not specified which part of those stated provisions he seeks to invoke.

13. One would expect the clauses of the constitution cited to be mentioned in the body and prayers of the petition as the petitioner attempts to establish his case regarding violation of right. Not even one paragraph of his petition bears any clause of the constitution. I find this to be irregular. This court should not proceed on the basis of conjecture as to what a petitioner's object is.

14. Firstly, in my view the kind of disclosure of the provisions of the constitutional provisions violated envisaged by **rule 10 (2) (c) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 [L.N. 117/2013]** goes beyond merely stating the particular clauses in the heading: one must appropriately interweave the provisions with his facts so as to project a tangible constitutional grievance, without which action the court can not be in a position to issue any remedy. The petition therefore fails the test in the **Anarita Karimi case (Anarita Karimi Njeru and [1979] KLR 162)**.

15. Besides, as this court deals with this case, the dicta of the Court of Appeal in the case of **Mumo Matemu (Mumo Matemu -vs- Trusted Society of Huma Rights Alliance & 5 Others [2013] eKLR)** cannot be easily forgotten:

“What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

16. Secondly, a party must be ready to respond to any allegations made against him in an affidavit by the party he has sued if those allegations are not to be taken as the truth. Controverting of allegations made gives the court the task of weighing the allegations by both sides in order to know where the justice of the case lies. Where a petitioner as in the present case proceeds to the hearing of a petition with a litany of unanswered allegations raised against by the 1st respondent dangling dangerously over his head, he must be presumed to be by his very silence accepting and indeed verifying those factual allegations to be true.

17. An examination of the facts presented by the 1st respondent shows that the dispute between the petitioner and the respondent and others who are not enjoined to this petition has a long history and emanated from commercial transactions between the petitioner and some of those other absent persons. First, a constitutional petition is not the proper forum for the ventilation of commercial, contractual and other grievances that would otherwise be better dealt with in an ordinary suit by way of plaint. The cases of **Harrkissoon Vs. Attorney-General Of Trinidad And Tobago [1980] A.C. 202, Karume Vs Republic, Alphonse Mwangemi Munga & 10 Others V African Safari Club Limited [2008] eKLR**, and others have held that where there was a clear procedure provided for, that procedure needed to be followed and that a constitutional petition could not be made a substitute for such a process.

18. In the **Alphonse Mwangemi** case (supra) the court stated as follows:

“In the instant case, we wish to emphasize the point that parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the Constitutional court and making constitutional issues of what is not. They have as a result lost valuable time to pursue contractual claims and / or to have the Industrial Court settle the trade dispute (if any) relating to the matter. The upshot of this petition is that it is an abuse of the court process and it is hereby dismissed.”

19. In **Benson Ruiyi Njane v Kenya Rural Roads Authority & 36 others [2016] eKLR** the court observed as follows:

“25. It was contended by counsel for the Petitioner that his right to property had been violated by detention of his vehicle for over fifty two (52) days. Detention, is, with respect is not taking over of property in terms of Article 40(3) of the Constitution. Article 40(3) contemplates, an “expropriation” the permanent taking away of property usually land or building for public purposes which attracts just compensation in terms of both the Constitution and the Land Acquisition Act, [Cap 295, Laws of Kenya]. The detention of a motor vehicle, a vessel, aircraft, may give rise to an action in damages, not a Constitutional Petition. That is why these sort of Petitions are frowned upon by courts.”

Without more, it is therefore clear to see why this petition must fail. There is no grievance raised by the petitioner that could not have been addressed by the land adjudication or other authorities and or the ordinary dispute resolution process by way of plaint in a competent court of law, if it had to come to that point. I find that there is nothing constitutional in the petitioner’s case.

CONCLUSION

20. From the foregoing the conclusion is that the petition dated **31/10/2014** has no merit and it is hereby dismissed with costs to the respondents.

Dated, and signed at Kitale on this **1st** day of **August ,2018**.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 29th day of August, 2018 in open court in the presence of:

Mr. Kiongo for 2nd and 3rd respondents

N/A for the petitioners

N/A for the 1st respondent

C/A: Mutua

MWANGI NJORGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE.