



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC PETITION CASE NO. 10 OF 2017

FORMERLY MERU ELC PETITION CASE NO.27 OF 2016

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLE 40 (1) OF THE CONSTITUTION

BETWEEN

JOSEPH MUTIRIA KITHUA.....PETITIONER

VERSUS

ZAKARIAH KILONZI.....1ST RESPONDENT

JOHN MWARIRI.....2ND RESPONDENT

MARY KAITHI W/O KIREMA.....3RD RESPONDENT

FAITH GACOKA W/O IGUNA.....4TH RESPONDENT

SALOME KAJIRA MUTIRIA.....5TH RESPONDENT

ESTHER KATHINA MUTIRIA.....6TH RESPONDENT

TABITHA NKURU MUTIRIA.....7TH RESPONDENT

RULING

1. On 18th September, 2018, Mr. Murango Mwenda, the respondents’ advocate orally moved the court to give directions regarding how this petition should be handled. He opined that the petition should be deemed to have died a natural death because the Petitioner, who had sued the members of his family had died. His advocate had also died.

2. To put matters into perspective and to bring out all the circumstances surrounding this matter, I find it necessary to reproduce in full an interlocutory ruling concerning this petition which I delivered on **20th day of March, 2018.**

RULING

1. This petition reads as follows:

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLE 40(1) OF THE CONSTITUTION

BETWEEN

JOSEPH MUTIRIA KITHUKA.....PETITIONER

VERSUS

i) ZAKARIAH KILONZI.....1ST RESPONDENT

ii) JOHN MWARIRI.....2ND RESPONDENT

iii) MARY KAITHI W/O KIREMA....3RD RESPONDENT

iv) FAITH GACOKA W/O IGUNA.....4TH RESPONDENT

v) SALOME KAJIRA MUTIRIA.....5TH RESPONDENT

vi) ESTHER KATHINA MUTIRIA.....6TH RESPONDENT

vii) TABITHA NKURU MUTIRIA.....7TH RESPONDENT

THE HIGH COURT OF KENYA,

MERU HIGH COURT,

MERU.

The petition of **JOSEPH MUTIRIA KITHUKA** of Mukothima Location, Tharaka North Division – Tharaka Nithi County, in the Republic of Kenya is as follows:-

1. That the 1st to 6th Respondents are all the offsprings/children of the petitioner herein.
2. That the last Respondent Tabitha Nkuru is the 1st wife of the Petitioner and the mother of all the other Respondents.
3. That the Petitioner herein owns at least three parcels of lands namely:-
 - a) Mukothima sub-location – Nos. 330 and Nos.338. All comprising of 22.00Acres or thereabouts.
 - b) Tharaka/Irunduni/875 comprising of 7.08 Hectares = 19.00 Acres or thereabout.
 - c) Gikingo Location – at Ntorori Sub – location comprising of 20.00 Acres.
4. That the Respondents have invaded the Petitioners land and have ejected the Petitioner from the same, chased his workmen, tenants and agents by force of arms – claiming family rights.
5. That the Petitioner states that all these lands are not at all family lands as the Respondent’s grandfather’s lands are at Ucweni in North Tharaka and these lands consist of more than one hundred acres (100) Acres or thereabout.
6. That if the Respondents want any family land it is to my father’s lands is (sic) where they should go, since that is what they can term as ancestral land.
7. That the Petitioner states that he has educated all the Respondents and they are all adults and should not interfere with the personal property of the Petitioner.
8. That the Petitioner states that the Respondents have threatened to kill him so that they could share his property. They have violated the provisions of Article 40 (i) (sic) of the constitution of Kenya and the provisions of Land Registration Act 2012 and the Land Act 2012 (Ref. S. 24 and 25).

Your Petitioner therefore prays that this court do grant orders provided under provisions of Article 23 (3) at the Constitution of Kenya, as follows:-

- 1) An injunction orders (sic) that the Respondents or any of them cease to interfere with the Petitioner’s rights to his parcel of lands or any of his property whatsoever and wherever it may be situated.
- 2) A declaration that the Petitioner’s parcels of lands above mentioned belong to the Petitioner absolutely and that these parcels are not family property whatsoever.
- 3) That the Respondents be ordered to cease the use of force in interference with the Petitioner’s property and any such use of force (sic) OCS Gatunga Police Station be authorized to specifically prevent and protect the Petitioner herein from these violations.

4) The Respondents be ordered to pay mesne profits to the Petitioner amounting to Kshs.10,000/= each from the 1st to 6th Respondents respectively.

Or that such other orders as this Hon. Court shall deem fit and just.

DATED THIS 25TH DAY OF SEPTEMBER, 2016

.....

M. M. KIOGA & CO.

ADVOCATES FOR THE PETITIONER.

2. The petition is supported by the Petitioner's affidavit sworn on **26th September, 2016** which states:

I, **JOSEPH MUTIRIA KITHUKA** of Mukothima Location, Tharaka Nithi County – make oath and states as follows:-

1. That I am the Petitioner herein and wish to make this affidavit to verify my Petition to be filed with this affidavit.
2. That all the Respondents herein are my own offsprings except the 7th Respondent who is my wife and the mother of all the other Respondents.
3. That I acquired all my three parcels of lands privately and solely (alone) without assistance or contribution of any other person including my spouses. These parcels are Mukothima Sub-Location Nos. 330 and 338, Irundinii No. 875 and Gikingo (not numbered)
4. That I include copies of titles and copies of Agreements I used to buy these lands (marked M. K. "A", M.K. "B" and M.K."C")
5. That since 2009, these Respondents have been instigated by their mother the 7th Respondent to interfere with my lands, to chase me by violence from my lands, to molest my tenants and my workmen.
6. That I have reported many cases to police and one Zachary Kilonzi who is more foolish than the others, has been instigated by the others to attempt to kill me. All the others render assistance to him by providing him with money and means to defend himself. (see Marimanti Court – Cr Case Nos. 578/2009 and 548/2011 – copies marked "M.K 'D' and "M.K 'E' respectively)
7. That the 3rd Respondent Maria (MARY) Kaithi is a teacher and is married by one Kirema yet she is not satisfied with her husband's property but instigates the others to invade my property.
8. That the other of my daughters is 4th Respondent. Faith Gacoka also married by one Iguna. She is an assistant chief who uses her "crown" to chase and threaten my workmen and my tenants from my parcels of lands above referred.
9. That also the 5th Respondent Salome Kajira is also a teacher and yet she is one of the persons who instigates that I be killed by her brothers so that they could inherit my lands.
10. That since I have educated all these people and they never assist me, they should be told to desist from interfering with my property.
11. The above statement is true to the best of my knowledge and belief.

3. The Petition is answered through the replying affidavit sworn by the 7th Respondent on **23rd March, 2017**. It states:

I, **TABITHA NKURU MUTIRIA** adult female of P. O. Box 122, Marimanti, in the Republic of Kenya, do hereby make oath and solemnly swear as follows:-

1. That I swear this affidavit on my own behalf and on behalf of my co-respondents herein who have given me their authority to swear on their own behalf as well.
2. That the Notice of Motion dated the 29.9.2016, together with the supporting affidavit have been read and explained to me by my advocate on record herein and I have understood the same.
3. That the petitioner's affidavit is full of falsehoods and is intended to hoodwink the court to granting orders that are completely undeserving.

4. That I got married to the petitioner in or about 1963 while he was a bachelor, living with his father in Thagichu, Tharaka Location in Kitui County.
5. That at that time, the petitioner had absolutely nothing in terms of properties.
6. That we started life from scratch together, worked on his father's parcels of land in Thagichu and elsewhere.
7. That while still in Thagichu, we were blessed with 4 of our children, namely (1) Zakariah Kilonzi, (2) Mary Kaithi, (3) Faith Gachoka and (4) John Mwariri.
8. That through farming, by tilling the land, and keeping of livestock, we were able to buy our first parcels of land at Mukothima, which are now known as parcel No. 330 and 338.
9. That we then moved to the said parcels of land NO. 330 and 338, which though given two separate reference numbers are one block of land, and we established our matrimonial home therein.
10. That all my other 6 children with the Petitioner were born on this particular parcel of land, and grew up therein.
11. That I, and the petitioner and my children, including the co-respondent (sic) worked very hard on the land, me being in full time supervision of all the work on the farm and literally breaking my back working on the land, and the co-respondents always assisting during the week ends and school holidays when they were not in school.
12. That we were able to purchase two other parcels of land being IRUNDUNI/875 and the other one at NTORONI, both of which are expansive.
13. That meanwhile, we started a business of buying and selling dry cereals and my husband was in-charge of the business, moving (sic) all the places while I was in charge of the farms.
14. That our marriage which was contracted under the Tharaka Customary Marriage was converted to a monogamous marriage through a ceremony conducted at Iriani Methodist Church.
15. That as we prospered, the Petitioner started being violent to me and battered me many times telling me that he no longer loved me and that he wanted to marry a second wife.
16. That indeed, the petitioner proceeded to marry a second wife with whom they got 3 children, but unfortunately died.
17. That the petitioner married a third wife Pauline Konja with whom they had 3 children.
18. That after he married the 3rd wife, the beatings intensified and he chased me together with the co-respondents from the matrimonial home at Mukothima/330 and ordered that we move to Irunduni/875.
19. That the land at Irunduni is essentially wasteland, and not suitable for growing crops and we had purchased it for livestock rearing
20. That due to the violence and death threats from the petitioner, I had no option, but to leave my matrimonial home to the 3rd wife and built some huts at Irunduni/875, where I settled.
21. That the Petitioner denied me all access to land parcel No. 330 and 338 for farming to grow crops to sustain my children.
22. That I and the co-respondents started farming at the land in Ntoroni which is arable and suitable for crops and we have now been in possession of the Ntoroni land for several years peacefully without interference from the petitioner.
23. That the petitioner has now embarked on the process of chasing me and the other Respondents from Irunduni/875 and the NTORONI land, swearing that he will not allow any one of us to live or work on any of his land.
24. That the Petitioner has framed many criminal cases against me and the other co-respondents in an attempt to make us surrender and leave the suit lands.
25. That the Petitioner has had the 1st Respondent charged in court severally and has incited strangers to file criminal complaints against me and there is a case pending in Marimanti Law Court, as number 743 of 2016.
26. That the Petitioner is also facing criminal charges at Marimanti Law Courts for assaulting me.
27. That I have an equal right to live, work and occupy the suit land as the Petitioner, as I am entitled to equal share of the properties.
28. That the other Respondents are the children of the Petitioner who grew up on these parcels of land (sic) do not know any other

land and the Petitioner's attempt to chase them from the land is harsh, unconscionable, cruel, unlawful and against all human traditions.

29. That since we have been in occupation of the land, for very many years, we have a right to be on the land and the Petitioner does not stand to suffer any loss, let alone irreparable loss.

30. That the Petitioner is in exclusive use and occupation of Mukothima/330 & 338, which measures over 20 acres, and which parcels of land are more productive.

31. That the Petitioner is discriminating against my children, who are the co-respondents herein while he allows the children of the other wives free access and use of his properties and pays fees for them, while he has abandoned my children.

32. That I verily believe, that the Petitioner is targeting the 1-6 Respondents because they have stood with me in difficulty times, live with me except 3rd and 4th Respondents, on IRUNDUNI/875 and extend to me financial assistance.

33. That the Petitioner has on several occasions demolished houses built on the land by the 1st Respondent.

34. That granting the orders sought will determine the whole petition and we shall all be evicted from the land, and become destitute.

35. That the application should be rejected as it has no merits.

36. That what I depone herein is true and within my knowledge except where otherwise stated.

4. The answer to the petition is in the following form:

ANSWER TO PETITION

1. The Respondents are adults of sound minds. Their address of service for the purpose of this suit shall be care of M/S MURANGO MWENDA & COMPANY, ADVOCATES, TEACHERS HOUSE, P. O. BOX 1163-60200, MERU, email:murangomwenda@yahoo.com

2. That the Respondents are in admission of paragraphs 1 and 2 of the petition.

3. The Respondents state that the 3 parcels of land set out in the petition comprises of family land that were acquired by their joint efforts, though they are registered in the name of the petitioner, who is merely a Trustee.

4. The 1st to 6th Respondents state that they have lived all their lives using, occupying and living on the properties set out therein and that they are entitled to use, occupy and live therein.

5. The 7th Respondent states that she got married to the Petitioner in or about 1963 under the Tharaka Customary Law, and the marriage was later converted to Monogamous marriage under the African Christian Marriage Act and therefore the only legal wife of the Petitioner.

6. The 7th Respondent states that all the 3 parcels of land were acquired with her effort and contribution within the marriage with the Petitioner and she has equal rights to the properties with the Petitioner.

7. The Respondents state that they are unaware of the alleged parcel of land at UCWENI and that their right to live, occupy, and use the two parcels of land is constitutional and is supported by law and tradition.

8. The Respondents denies (sic) ever violating any single of the Petitioner's rights under Article 40 (1) of the Constitution, the Land Act, or the Land Registration Act. The Petitioner has not set out any case for infringement of his rights by the Respondent and the orders sought are not merited.

9. The Respondents state that the whole petition does not disclose any issue that is constitutional, (sic) the Petition amounts to an abuse of the court process.

10. The Respondents further state that the Petition does not meet a constitutional threshold set out as a requirement and shall raise a preliminary objection to the same before the commencement of the hearing of the petition.

11. The Respondents state that it the petitioner who has unleashed untold violence on them, abused their constitutional rights, and has repeatedly destroyed their properties on the land, leading to several criminal cases in court.

REASONS WHEREFORE, the Respondents pray for the petition to be dismissed with costs.

DATED AT MERU THIS 22ND DAY OF MARCH, 2017

SIGNED:

FOR: MURANGO MWENDA & CO.

ADVOCATES FOR THE RESPONDENTS

5. On **8th February, 2017**, this court issued orders that apposite notice do issue to the parties to come to court for directions on **23rd February, 2017**. The notice was duly issued.

6. For unexplained reasons, the parties did not come to court on **23rd February, 2017**.

7. The court issued another order that the parties do come to court for directions on **9th March, 2017**.

8. On **9th March, 2017**, Mageto, holding brief for Mr. Kioga, for the Petitioner told the court that Mr. Kioga wondered why the suit had been brought to Chuka whereas the land was near Meru. He informed the court that Mr. Kioga felt that the matter was purely constitutional and should be heard by the Constitutional Court at Meru.

9. This court did not agree to transfer this suit to Meru. Doing so would evince a veneer of forum shopping. Section 13 of the Environment and Land Act grants this court original and appellate Jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and this jurisdiction does not preclude petitions concerning Environment and Land.

10. On the same day, the court was informed that Mr. Murango Mwenda, the respondents' advocate had only been instructed the previous day and in view of that fact he sought 14 days to respond to the petition. The court issued the following orders:

i) The respondents granted 14 days to respond to the petition and to file apposite papers/documents.

ii) Directions on **28.3.2017**

11. On **28th March, 2017**, the Petitioner's advocate did not come to court. Miss Kaaria holding brief for the respondents asked the court to give directions regarding filing of submissions. She undertook to court that the respondents would serve the orders issued by the court upon the Petitioner's advocate. The court issued the following orders:

(i) Petition to be heard by way of written submission with the Petitioner doing so within 30 days of today and the respondents to do so within 30 days after receiving the Petitioner's written submissions and should the Petitioner not file his submissions within the stipulated time, the defendants should nevertheless file and exchange their written submissions.

(ii) Directions on 18.7.2017

12. On **18th July, 2017**, Mr. Murango Mwenda told the court that he wanted oral evidence to be given in this suit. The court informed him that, ideally, a petition is heard through apposite pleadings and submissions. Mr. Mark Muriithi holding brief for Mr. Kioga for the Petitioner informed the court that Mr. Kioga had not filed his written submissions and that he requested to be given 30 days to do so. Mr. Mwenda asked the court to direct Mr. Kioga to file and exchange his written submissions within a specified time frame and that he wanted 30 days to file and exchange comprehensive responses.

The court issued the following orders:

(i) The respondents granted 30 days to file and exchange what they call comprehensive responses or response.

(ii) The petitioner to file and exchange his written submissions concerning the Petition within 30 days after receiving the respondents' responses/response.

(iii) Respondents to file and exchange their written submissions within 30 days after receiving the Petitioner's written submissions and should the petitioner not file and exchange written submissions as directed by the court within the stipulated time, the respondents should nevertheless file and exchange their written submissions.

(iv) Directions on 6.11.2017.

13. On **6th November, 2017**, Mr. Nyamu Nyaga, holding brief for Mr. Kioga for the Petitioner told the court that as Mr. Murango Mwenda, the respondents' advocate, has not filed his comprehensive responses to the Petition as he had intimated, Mr. Kioga had not filed his written submissions. Mr. Murango Mwenda changed tack and told the court that he had reconsidered his earlier decision and would now not file further responses. The court issued the following orders:

(i) Petitioner to file and exchange written submissions within 30 days and the respondents to file and exchange their submissions within 30 days after receipt of the Petitioner's written submissions.

(ii) Directions on 24.1.2018.

14. On **24th July, 2018**, Mr. Kipkurui Ngeno, holding brief for Mr. Murango Mwenda, the respondents' advocate told the court that Mr. Mwendwa could not file his written submissions which would be a response to the petitioner's written submissions because Mr. Kioga had not filed the Petitioner's written submissions.

15. Mr. Ngeno told the court that he had instructions from Mr. Murango Mwenda to move the court to dismiss the Petition on account of non-prosecution by the petitioner and award costs to the respondents.

16. The court gave the **20th of March, 2018** as the date it would deliver a ruling concerning directions in this matter.

17. I note that the petitioner has not been active in prosecuting this petition expeditiously. I do note that the petitioner's advocate has written a letter to this court's Deputy Registrar that he was going to India for medical reasons and on that account he seeks another mention date. Medical conditions are not intentional. For that reason the court will give him a last chance to file and exchange written submissions so that this Petition can be heard and determined expeditiously. The court issues the following orders:

(i) The Petitioner is granted 30 days from the date of this Ruling to file and exchange his written submissions.

(ii) The respondents are granted 30 days to file and exchange written submissions within 30 days after receipt of the Petitioner's written submissions.

(iii) Parties will take directions on **18th July, 2018**

18. It is so ordered.

Delivered in open court at Chuka this 20th day of March, 2018 in the presence of:

CA: Ndegwa

Murango Mwenda for the Respondent – present

Tabitha Nkuru – 7th Respondent - present

P. M. NJOROGE

JUDGE

3. To demonstrate that the petitioner was hell bent to delay the hearing and disposal of this petition, his advocate on 23rd March, 2018 filed a Notice of Appeal in the following terms:

TAKE NOTICE that the Petitioner being dissatisfied with the Decision /Judgment of the Honourable Justice P. M. Njoroge, J, given at Chuka on the 20th day of March, 2018 INTENDS to appeal against the whole of the said Decision/Judgment of the said Court.

4. I find it difficult to find what Decision/Judgment was being appealed against. The conclusion of the impugned ruling (op.cit) had merely directed the parties to file their submissions within stipulated time and to come to court for directions on 18th July, 2018.

5. This is an unfortunate case. Both the Petitioner and his advocate, Mr. M. M. Kioga, are both deceased. It is pellucid that the petitioner had sued his wife and his children. These are the people who should have been substituted for him in this petition, if substitution was necessary.

6. Although order 24 of the Civil Procedure Rules contemplates substitution of a deceased litigant to be done within one year of his death, I find that the circumstances of this Petition are sui generis. Since the Petitioner had sued his wife and children, who among them should be substituted to take his place? If this is done, will those substituted to take his place in this Petition assume the roles of both Petitioner and Respondents. This scenario would spawn a ludicrously indecipherable state of affairs. Indeed a veritably phasmagoric one!

7. I declare that this petition has died a natural judicial death. I also find that the members of the family of the deceased petitioner should canvass any matters touching upon his estate in a succession court in accordance with the Law of Succession Act.

8. I direct that this matter be marked as closed and that it be removed from the register of pending cases at the Chuka ELC Court.

9. I issue no order as to costs.

Delivered in open court at Chuka this 14th day of November, 2018 in the presence of:

CA: Ndegwa

Murango Mwenda for the Respondent

Joseph Mutiri Kithua, Petitioner – Deceased

P. M. NJORGE

JUDGE