



**Wyanyang v Lempong & 2 others (Environment and Land Constitutional
Petition 5 of 2021) [2024] KEELC 691 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 691 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 5 OF 2021
FO NYAGAKA, J
FEBRUARY 15, 2024**

BETWEEN

ADOMONYANG WYANYANG PETITIONER

AND

CHEPTUKECH LEMPONG 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF LANDS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The Petitioner brings the Petition dated and filed on 05/10/2021 against the Respondents, in which he prays for the following:
 - i. A declaration be and is hereby issued that the rights of the Petitioner have been violated, denied and/or threatened with eminent violation and threat;
 - ii. A permanent injunction restraining the 1st Respondent from trespassing into land registration number 564 Chepareria;
 - iii. A declaration be an is hereby issued that the Petitioner is the *bona fide* legal owner of all that parcel of land known as LR. No. 564 Chepareria;
 - iv. An order of judicial review in the nature of certiorari do issue to bring into this court and quash the judgment of the 2nd Respondent dated 07/02/2018;
 - v. An order of judicial review in the nature of *mandamus* do issue to restrain the transfer of half of the land parcel otherwise known as LR No. 564 to the 1st Respondent;
 - vi. General damages for violation of the Petitioner's constitutional rights and freedoms;



- vii. An order that the costs consequent upon this Petition be borne by the Respondents;
 - viii. Any other relief or orders that this Honorable Court shall deem just, fit and appropriate to grant in favor of the Petitioner.
2. The Petition is supported by the grounds on its face and the Petitioner's Supporting Affidavit sworn on 05/10/2021. In response thereto, the 1st Respondent filed his Replying Affidavit, together with annexures thereto, sworn on 12/11/2022 on 14/11/2022. The 2nd and 3rd Respondents filed a response to the Petition dated 11/11/2022 on 14/11/2022.
 3. In response to the 1st Respondent's Replying Affidavit, the Petitioner filed a Further Affidavit on 17/01/2023. It was sworn on 16/01/2023. He also filed a Reply in response to the 2nd and 3rd Respondent's Response dated 31/03/2023 on that day.

The Petitioner's Case

4. The Petitioner contended that he is the *bona fide* owner of all that parcel of land namely LR No. 564 Chepareria situated in West Pokot County. That he acquired it in 1972. He described the 1st Respondent as the caretaker of all that parcel of land adjacent to his namely LR No. 562 Chepareria; registered in the name of the 1st Respondent's sister who relocated to Ortum area.
5. Later in 2008, the Petitioner discovered that the 1st Respondent, fraudulently and illegally encroached on his parcel of land. He thereafter transferred the property into his name with the full knowledge that the same belonged to the Petitioner. On visiting the Kitale Land offices, he discovered further that the 1st Respondent had placed a restriction on the parcel of land.
6. The facts above stated prompted the Petitioner to seek legal redress. He lodged a complaint at the adjudication office. The adjudication officer ruled in his favor. Dissatisfied, the 1st Respondent appealed the said decision to the 2nd Respondent.
7. The Petitioner termed the said appeal proceedings, marked AW, as opaque, obscured and intended to humiliate the Petitioner. He lamented that in the course of the proceedings, the 1st Respondent was never cross-examined by the committee presiding over the said appeal. That conduct, in his view, amounted to bias as he was tainted to be wrong. That the decision is a threat to his human rights and a disregard of pertinent facts. For those reasons his right to fair trial and right to fair administrative action was violated. Furthermore, the decision curtailed his right to property as enshrined in Article 40 of the *Constitution*.
8. In its decision dated 07/02/2018, the 2nd Respondent directed that the suit property be divided equally between the Petitioner and the 1st Respondent. The Petitioner is aggrieved by that decision which in his view proffered no cogent reasons to justify the arrival of the award. He added that the Respondents stood to suffer no prejudice if the orders sought were granted. On the contrary, he stood to suffer prejudice in light of the 2nd Respondent's decision.
9. The Petitioner argued that this Court was vested with jurisdiction to oversee, supervise and cross-check the 2nd Respondent's actions with a view to ensure that they act within the law, not abuse office and act without oppression or discrimination in violation of the *Constitution*.
10. The Petitioner cited the provisions of Article 1 (1), 3 (1), 10 (1), 10 (2), 19 (3), 20 (1), 20 (2), 20 (3), 20 (4), 22 (1), 23 (1), 23 (3), 24 (1), 25 (c), 27 (1), 27 (4), 28, 35 (1), 40, 47 (1), 47 (2), 50, 60 (1), 64, 159 (1) and 258 (1) of the *Constitution*, Section 7 of the *Land Act*, Section 25 and 26 (1) of the *Land Registration Act* to justify the grant of the reliefs sought.



The 1st Respondent's Case

11. The 1st Respondent accused the Petitioner of forum shopping. Stating that the dispute had been a long chequered litigious matter, the 1st Respondent averred that when the Petitioner's claim before the adjudication officer was allowed, the 1st Respondent was aggrieved. He thus filed an appeal before the 2nd Respondent. In its decision dated 07/02/2018 annexed and marked as CL1, the 2nd Respondent ruled in his favor.
12. The 1st Respondent observed that the Petitioner did not challenge that decision by way of judicial review within the stipulated time frames. As such, by dint of Section 26 and 29 of the [Land Adjudication Act](#), the decision of the 2nd Respondent is final. In so observing, the proceedings herein are unprocedural and a nullity.
13. Following that decision, the Petitioner filed Kapenguria SPMCC ELC No. 7 of 2018 where he successfully obtained interim orders against the 1st Respondent. The Plaint and green card were annexed in support of this position and marked as CL3 and CL2 respectively. In response, the 1st Respondent filed a preliminary objection challenging the jurisdiction of the court. In its ruling delivered on 01/09/2021 marked as CL4, the court allowed the said preliminary objection. That decision has not been appealed.
14. The Petitioner has thus moved this court illegally and wantonly as a constitutional petition. In his view, this was a façade to reverse all the orders above listed. It is an appeal against the 2nd Respondent's decision. As such, the Petition was res-judicata and was for striking out.
15. According to the 1st Respondent, the Petition fell short of the principles enunciated in the locus classicus case of [Anarita Karimi Njeru vs. The Republic](#) [1979] eKLR and [Mumo Matemo vs. Trusted Society of Human Rights Alliance & 5 others](#) [2013] eKLR as it failed to raise any constitutional issues.
16. The 1st Respondent accused the Petitioner of failing to demonstrate illegality, material non-disclosure since the issues herein have been dealt with conclusively and for further failing to demonstrate humiliation, error or bias. He annexed copies of self-explanatory letters marked as CL5 and CL6, dated 09/11/2018 and 09/03/2018 respectively, in support of his response. He urged this court to dismiss the Petition with costs.

The 2nd and 3rd Respondents' Case

17. The 2nd and 3rd Respondents averred that the Petition was an abuse of the process of the court since no allegation pointed to a violation of the Petitioner's constitutional rights. In their view, the allegations were merely speculative, incoherent, superfluous, unsubstantiated and emotive; in particular, no evidence was adduced to demonstrate that Article 47 of the [Constitution](#) had been diminished.
18. They argued that the Petitioner adopted a selective approach in the interpretation of Section 26 and 29 of the [Land Adjudication Act](#). To that extent, his appeal against the decision of the 2nd Respondent lay in filing judicial review proceedings within the timelines set out therein. The present Petition was thus an afterthought; filed four (4) years after the impugned decision was delivered.
19. Looking at the proceedings before the 2nd Respondent, they avowed that the Petitioner duly participated in the proceedings without any observable difficulties. It was thus a fallacy to allude that the proceedings were carried out in an opaque and obscured manner. Furthermore, there was no evidence of bias or violation of the rules of natural justice and those allegations must thus be rejected.



20. The 2nd and 3rd Respondents continued that the Petitioner failed to establish an injustice during the various statutory stages, violation of the right to fair trial, property and fair administrative action and the manner in which the Respondents violated the Petitioner's constitutional rights. In fact, the appeal process was conducted regularly. As such, he was not deserving of the orders sought.
21. Finally, the Respondents submitted that the Petitioner failed to ascribe to the dictates of the celebrated cases of *Anarita Karimi Njeru vs. The Republic* [1979] eKLR and *Mumo Matemo vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and was thus for dismissal.

The Petitioner's Rejoinder

22. He rehashed the contents of his Petition. In paragraph six (6) of his Further Affidavit, he admitted that he was time barred from filing judicial review proceedings but such delay was occasioned by the 2nd Respondent when he failed to communicate its decision to him. He distinguished the suit in Kapenguria ELC No. 7 of 2018 from this one based on the fact that the reliefs sought were distinctive.
23. In his reply in response to the 2nd and 3rd Respondents' response, the Petitioner stated that he was not furnished with written reasons for the action taken by the 2nd Respondent. In the circumstances, that failure by the 2nd Respondent occasioned the Petitioner's delay in filing judicial review proceedings. The present Petition was thus justified.

Written Submissions

24. At the close of the hearing, parties filed and exchanged written submissions. The Plaintiffs filed his written submissions dated 15/11/2023 on 16/11/2023. He submitted that he was justified to approach this court by way of a Constitutional Petition on the strength of Article 162 (2) (b) of the *Constitution*, Section 13 of the *Environment and Land Court Act* and the decision of Mrima J. in HC Pet No. E081 of 2021; *AWG vs. DNK & another*. This is because his rights enshrined in Article 40 of the *Constitution* and Section 25 of the *Land Registration Act* had been violated.
25. Next, the Petitioner submitted that his right to fair trial under Article 50 of the *Constitution* had been breached because the 1st Respondent was not cross-examined to establish the veracity of his examination in-chief. Similarly, his 1st witness Limasia Lopetangura was not cross-examined; transgressing his right to fair administrative action as protected in Article 47 of the *Constitution*. He relied on the case of Muranga ELC Petition 3 of 2020; *Del Monte Kenya Limited vs. National Commission* and another in support of that argument. He prayed that the Petition be allowed as prayed.
26. The 1st Respondent filed his written submissions dated 04/10/2023 on 05/10/2023. He submitted that the Petition failed to meet the constitutional threshold for want of specificity and for failing to disclose with reasonable degree of precision, the manner in which the Respondents violated the Petitioner's rights. He cited several decisions in support of that proposition. In his view, the Petition was a red herring since the real issues in controversy were intended to appeal the 2nd Respondent's decision.
27. Continuing, the 1st Respondent submitted that the Petitioner failed to demonstrate a breach of his constitutional freedom. In his view, the substratum fell within the ambit of Section 26 and 29 of the *Land Adjudication Act*. The process therein was not adhered to by the Petitioner; he was forum shopping. He fortified his argument by citing *Mohamed & 2 others vs. Director of Public Prosecutions & 2 others; Mwapashua (Interested Party)* (Constitutional Petition E048 of 2021) [2022] KEHC 53 (KLR). Furthermore, the Petitioner failed to demonstrate how his rights to a fair trial, to property and fair administrative action were infringed. He thus urged this court to dismiss the Petition with costs.



28. The 2nd and 3rd Respondents filed their joint written submissions dated 17/11/2023 on 20/11/2023. Going by the dictates of Section 29 (1) (b) of the [Land Adjudication Act](#), they submitted that this court lacked the jurisdiction to entertain the subject matter.
29. The said Respondents then argued that the Petition failed to meet the threshold for judicial review tenets since the Petitioner was inviting this court to sit on appeal. That the Petitioner sought to challenge the merits of the decision and not the process. That there were not elements of biasness as put forward by the Petitioner. That he was afforded an opportunity to ventilate his case accordingly.
30. Finally, the 2nd and 3rd Respondents submitted that the Petition was devoid of merit since it failed to furnish adequate particulars of the allegations of violations of the [Constitution](#) and the manner they were violated. For those reasons, the 2nd and 3rd Respondents urged this court to dismiss the Petition with costs.

Analysis and Disposition

31. I have carefully considered the pleadings, examined the evidence together with the submissions of the rival parties and analyzed the law applicable. The Petitioner is aggrieved by the decision of the 2nd Respondent delivered on 07/02/2018 hence the present Petition. He has now filed the present Petition seeking redress.
32. Looking at the evidence and pleadings therein, I find that the following issues fall for determination:

I. Whether the Petition Herein Raises Constitutional Questions Violations?

33. The Court in [Anarita Karimi Njeru vs. R](#) [1976] - 80 KLR 1272 and restated by the Court of Appeal in [Mumo Matemu vs. Trusted Society of Human Rights Alliance & others](#) [2013] eKLR set the law as to what constitutes a Constitutional Petition. A party seeking redress by way of constitutional petition must set out with reasonable degree of precision the provisions which the proponent alleges to have been infringed and the manner of the alleged infringement.
34. Examining the present Petition, the Petitioner cited several Articles of the [Constitution](#) justifying the filing of the present Petition. In particular, he cited the 2nd Respondent for failing to uphold his right to a fair hearing under Article 50 of the [Constitution](#). In that retrospect, he accused the 2nd Respondent of conducting the appeal in an opaque manner calculated to favor the 1st Respondent. The strength of this observation was made from the fact that the 1st Respondent was never cross-examined during the appeal proceedings. The Petitioner further lamented that his right to property under Article 40 was infringed when the 2nd Respondent ruled that the suit property ought to be distributed equally between himself and the 1st Respondent. Finally, he decried that Article 47 was breached as the decision of the 2nd Respondent was marred with procedural unfairness, oppressiveness and abuse of power, bias and discrimination, disregard of pertinent facts and a threat to human rights.
35. It is apparent that in light of the above, the Petitioner has fulfilled the requirements calling for a petition such as the instant one to be brought in a Constitutional Petition framework. He cited the provisions of the [Constitution](#) that were violated and the manner of the alleged infringement.

II. Whether the Petition is proper?

36. Whilst the Petition herein raises constitutional questions, is the same proper before this court? Put differently, is this the correct forum for the Petitioner to ventilate his grievances as he so does?



37. According to the Respondents, the Petition herein is inviting this court to sit on appeal against the decision of the 2nd Respondent. They contended that the Petitioner's complaint was dissatisfied with the fact that the 2nd Respondent failed to cross-examine the 1st Respondent during the hearing of the appeal; essentially appealing against that decision. Furthermore, the 1st Respondent accused the Petitioner of forum shopping in light of the suit in Kapenguria ELC No. 7 of 2018. Finally, the Petitioner was accused of laches for failing to institute the said Petition sooner rather than later, computing that the Petition was filed four (4) years after the impugned decision had been delivered.
38. It is to be noted that upon perusal of the Petition, it is perceivable that the same does not oust or challenge the jurisdiction of the 2nd Respondent. The Petitioner challenges certain decisions which in his view violated his constitutional safeguards; in particular Article 40, 47 and 50 of the Constitution.
39. While any party is welcomed to file constitutional petitions, this court appreciates that not all constitutional petitions are necessitated going by the circumstances of the dispute. In other words, not all grievances should justify the filing of a constitutional petition. As held by the court in Justus Mugaa M'Impwi vs. District Land Adjudication & Settlement Officer, Tigania West/East District & Another [2018] eKLR
- “Constitutional jurisdiction must not be trivialized as by so doing, the value of the Constitution would be diminished if it is allowed to be used as a general substitute for the normal proceedings for invoking judicial and constitutional rights”.
40. The Land Adjudication Act, the statute of application in the present circumstances, is an Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto. It governs the manner and procedure of the adjudication process including instances where a party is dissatisfied with any decisions contemplated in the Act.
41. The Respondents referred this court to Section 26 and 29 of the Land Adjudication Act. Section 26 deals with complaints against entries made by the adjudication officer in the adjudication register. Section 29 deals with appeals against decisions made by an adjudication officer. Sub section 1 provides as follows:
- “any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by:
- a. delivering to the minister an appeal in writing specifying the grounds of appeal;
 - and
 - b. sending a copy of the appeal to the Director of Land Adjudication.
- and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.” (underline mine)
42. From the above provisions, it is evident that the said statute provides for avenues of dispute resolution. Secondly, the said processes are so governed as to militate against the intervention of a court. In other words, the said provision embodies the import of Article 159 (2) (c) of the Constitution towards resolution of disputes not necessarily through the Court process. This court has an imposed duty to



similarly uphold the same. This position was taken in the Court of Appeal in *Mutanga Tea & Coffee Company Ltd vs. Shikara Limited & Another* [2015] eKLR, where the court held as follows:

“We entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the *Constitution* or a statute, to resort to that mechanism first before purporting to involve the inherent jurisdiction of the High Court. The basis for that view is first that Article 159 (2) (c) of the *Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article 159 (2) (c) is not a closed catalogue. To the extent that the *Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the high court would not be promoting but rather, undermining a clear constitutional objective. A holistic and purposive reading of the *Constitution* would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165 (3) (a) of the *Constitution* in a way that will accommodate the alternative dispute resolution mechanisms”.

43. From the above, parties are required to strictly adhere to the law especially in matters of resolution of disputes. It is also noted that under Section 29, the findings of the Minister are final. So that any challenge as to the legality of the process would only and limpidly invite judicial review proceedings. This position was restated by the court in *Lepore Ole Maito vs. Letwat Kortom & 2 Others* [2016] eKLR as follows:

“The *Act* provides an appropriate mechanism for resolution of any disputes. The Minister is the apex in that dispute resolution mechanism and once an appeal is made to the Minister and determined under the provisions of Section 29 of the *Act*, such determination is deemed final and is not subject to any appeal. A party therefore aggrieved by the Minister’s decision can only challenge such determination by way of judicial review and not otherwise if he considers the Minister acted wrongly or exceeded his jurisdiction.”

44. The substance of the Petition is that the appeal proceedings, culminating to the decision dated 07/02/2018, as conducted by the 2nd Respondent, was opaque obscured and intended to humiliate the Petitioner. He observed that the 1st Respondent was never cross-examined by the committee presiding over the said appeal bringing into play the issue of bias. This erroneously led the 2nd Respondent to divide the suit property namely LR No. 564 Chepareria equally between the Petitioner and the 1st Respondent. in his view, no sufficient reasons were given as to justify the 2nd Respondent’s award.
45. In my very humble opinion, the substratum of the allegations preferred by the Petitioner are in the nature of an appeal. The Petitioner is merely dissatisfied with the procedure in terms of the absence of cross-examination and the decision to divide the property equally. First, there is no evidence on the record, as given in annexure AW, regarding the evidence of the parties before the Minister, the 2nd Respondent, to demonstrate that the Petitioner herein wished to exercise his right of cross-examination of the 1st Respondent in the said appeal but was denied the opportunity. If anything, what is shown is that the parties cross-examined the witnesses they elected to and the panel too cross-examined the witnesses they wished to.
46. My understanding of the analysis and opinion on the evidence, annexure AW, is that if a party in civil proceedings has the opportunity to exercise the right to test evidence by cross-examination elects not or fails to take advantage of the opportunity to do so he cannot blame the body by turning against



the decision on appeal or by review. Actually, this Court takes judicial notice of the fact there are numerous instances where matters of evidence are presented before courts and the adverse parties, in their wisdom, elect not to cross-examine witnesses presenting them, and that does not vitiate the proceedings. What is important is that a party is afforded the opportunity to test the evidence by cross-examination. As to what he does with the opportunity it is his/her choice.

47. Following the above analysis, I restate the law that under Section 107 of the *Evidence Act*, he who asserts has the burden of proving the fact unless the law removes and places it on another person. It was incumbent on the Petitioner to prove that the failure to cross-examine the witness on appeal before the 2nd Respondent was the act of the said Respondent and not the Petitioner's.
48. In my view, going by the allegations above, there is no presence of constitutional violations. The grievances did not warrant the filing of a Constitutional Petition in the manner dictated by the Petitioner. Moreover, if the Petitioner was aggrieved with the procedural steps or unreasonableness of the impugned decision he ought to have filed judicial review proceedings and not the present dispute as soon as was practical. Thus, I repeat that I see no constitutional violations as contemplated by the Petitioner.
49. As to whether the present dispute was *res judicata*, taking into account the suit in Kapenguria CM ELC No. 7 of 2018, the substantive law on *res judicata*, envisaged in Section 7 of the *Civil Procedure Act*, provides that the following conjunctive elements that must all be proved for the doctrine to apply:
 - a. The suit or issue was directly and substantially the same in a former suit;
 - b. The issue was between the same parties;
 - c. The same parties are litigating under the same title;
 - d. The suit or issue was heard in a court competent to try such subsequent suit or the suit and;
 - e. Such issue has been subsequently raised, and has been heard and finally decided by such court".
50. In this court's view, two (2) issues come to the fore; firstly, the proceedings were not determined on their merits since a preliminary objection terminated the proceedings. Secondly, the issue in the Kapenguria case concerned the jurisdiction of the District Commissioner to determine a dispute on 06/06/2017. For those reasons, the doctrine does not apply.
51. Finally, it is noted that the Petitioner admitted that he was time barred from filing judicial review proceedings but such delay was occasioned by the 2nd Respondent when he failed to communicate its decision to him. Furthermore, he was not furnished with written reasons for the action taken by the 2nd Respondent. In the circumstances, that failure by the 2nd Respondent occasioned the Petitioner's delay in filing judicial review proceedings. The Respondents did not say anything of substance in response.
52. I have carefully analyzed the decision once more, annexures AW and CL1 of the Petitioner's and 1st Respondent's Affidavits. The record therein shows that the proceedings before the Minister and the decision thereof were in the presence of the parties. It is clear that the Petitioner knew of the decision and its contents immediately it was given. Thus, the allegations by the Petitioner are neither here nor there.
53. The above admissions indeed point to the fact that the Petitioner was the author of his own misfortune. It is clear and beyond any form of peradventure that he was alive to the necessary processes towards ventilating his claim. Instead, he opted to accuse anyone but himself when the onus was on him to act with haste to ventilate his issues. The Petitioner is indeed guilty of laches. Equity aids the vigilant and not the indolent.



54. In the end, I am not persuaded that the present Petition dated 05/10/2021 is merited. In the circumstances, I order that the same be and it is hereby dismissed with costs to the Respondents.

55. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
15TH DAY OF FEBRUARY 2024.**

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE

