



Koyo & another v Halwenge (Sued as the Administrator of the Estate of Charles Halwenge Otieno – Deceased) & 2 others (Environment & Land Petition E003 of 2023) [2024] KEELC 1402 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1402 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND PETITION E003 OF 2023
SO OKONG'O, J
MARCH 14, 2024**

BETWEEN

BENTA AUMA KOYO 1ST PETITIONER

MAURICE OMONDI KOYO 2ND PETITIONER

AND

MARY VERONICAH HALWENGE (SUED AS THE ADMINISTRATOR OF THE ESTATE OF CHARLES HALWENGE OTIENO – DECEASED) 1ST RESPONDENT

CHIEF MAGISTRATE'S COURT, KISUMU 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. By a petition dated 23rd May 2023, the Petitioners sought the following reliefs against the Respondents;
 - i. A declaration that the petitioners' right to a fair hearing was infringed by the 2nd Respondent;
 - ii. A declaration that the trial process and the resultant decision of the 2nd Respondent were neither fair nor constitutional;
 - iii. Judicial review order of certiorari does issue to quash the proceedings conducted by and the judgment and decree passed by the 2nd Respondent on 24th October 2019 and the subsequent ruling of 19th April 2023; and
 - iv. Costs of the petition.



The Petitioners' case

2. The 1st Petitioner is the widow of Leonardus Koyo Ogola, deceased (hereinafter referred to only as “the deceased”) while the 2nd Petitioner is the son of the deceased. The 1st Respondent is the widow and administrator of the estate of Charles Halwenge Otieno, deceased (hereinafter referred to as “Halwenge”). At all material times, the deceased was the registered owner of all that parcel of land known as Title No. Kisumu/Konya/2919 (hereinafter referred to as “the suit property”). The 1st Respondent claimed that the deceased sold the suit property to Halwenge in 1993 and that the Petitioners were occupying the suit property illegally. The Petitioners claimed that they were in lawful occupation of the suit property which according to them belonged to the deceased.
3. The 1st Respondent filed a suit against the Petitioners at the Chief Magistrate’s Court at Kisumu namely, Kisumu CMC ELC No. 43 of 2019 (hereinafter referred to only as “the lower court”) seeking among others, an order of eviction of the Petitioners from the suit property and demolition of the structures they had put up thereon. The Petitioners claimed that they filed a defence in the lower court in which they contended that the deceased never sold the suit property to Halwenge or anyone else. The lower court heard the 1st Respondent’s suit against the Petitioners and delivered a judgment on 24th October 2019 in favour of the 1st Respondent. The lower court ordered that the Petitioners be evicted from the suit property. The Petitioners were summoned to appear before the lower court on 24th April 2023 to show cause why they should not be evicted from the suit property. On that day, the court gave them 45 days to move out of the suit property in default of which they be evicted therefrom.
4. The Petitioners were dissatisfied with the lower court’s judgment and the manner in which the proceedings before the court were conducted. In its judgment, the lower court considered irrelevant matters while ignoring relevant matters. The lower court ignored the Petitioners’ contention that the deceased did not sell the suit property to Halwenge and that the documents produced by the 1st Respondent in court in proof of her case including the purported agreement of sale had several inconsistencies and did not support the alleged sale. In arriving at its decision that the 1st Respondent was entitled to possession of the suit property, the lower court did not consider all the evidence that was placed before it. Having ignored all the relevant evidence before it, particularly the evidence showing that there was no sale agreement between the deceased and Halwenge, the whole trial and decision of the lower court was unfair and violated the Petitioners’ constitutional right to a fair hearing under Article 50 of *the Constitution*.

The 1st Respondent’s case

5. The petition was opposed by the 1st Respondent through a replying affidavit sworn on 13th June 2023. The 1st Respondent admitted that she filed the lower court suit seeking the eviction of the Petitioners from the suit property. The 1st Respondent averred that the lower court suit was not defended by the Petitioners despite service and that judgment was entered in her favour on 24th October 2019. The 1st Respondent averred that the Petitioners filed a suit before this court in 2019 while the lower court suit was going on claiming the suit property by adverse possession which suit was dismissed by the court on 29th July 2019. The 1st Respondent averred that the Petitioners filed an application in the lower court seeking to review the judgment that was entered against them on 24th October 2019 which application was dismissed by the lower court on 9th June 2022. The 1st Respondent averred that the Petitioners applied for a stay of the lower court judgment on 13th July 2022 which application was once again dismissed by the lower court on 26th August 2022.



6. The 1st Respondent averred that on 19th April 2023, the lower court gave the Petitioners 45 days to vacate the suit property failure to which they be evicted therefrom. The 1st Respondent averred that it was after that order that the Petitioners decided to bring the present petition. The 1st Respondent averred that the petition was an abuse of the court process. The 1st Respondent averred that if the Petitioners were aggrieved by the lower court judgment, they should have appealed against the same. The 1st Respondent averred that the petition before the court was a disguised appeal. The 1st Respondent annexed several documents to her affidavit in support of the averments therein.

Submissions

7. On 4th October 2023, the court directed that the petition be heard through affidavit evidence and written submissions and gave timelines within which the parties were to file their respective submissions. The Petitioners did not file submissions in support of the petition. The 1st Respondent filed her submissions dated 27th October 2023. The other Respondents did not participate in the hearing of the petition and neither filed a response to the petition nor submissions. The 1st Respondent submitted that there were no constitutional issues raised in the Petitioners' petition warranting adjudication by the court. The 1st Respondent submitted that the issues raised by the Petitioners had been heard and determined between the Petitioners and the 1st Respondent with finality by a court of competent jurisdiction. The 1st Respondent submitted that the grievances that the Petitioners had against the lower court judgment could only be ventilated in an appeal filed against the said judgment but not in a constitutional petition.

Analysis and determination

8. I have considered the petition together with the supporting affidavit. I have also considered the replying affidavit filed by the 1st Respondent in opposition to the application. Finally, I have considered the submissions by the 1st Respondent. Article 22(1) of *the Constitution* provides as follows:
9. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
10. Article 23(3) which deals with remedies for violation of or threat to fundamental rights or freedoms provides as follows:
11. In any proceedings brought under Article 22, a court may grant appropriate relief, including—
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.
12. The Petitioners contend that the Respondents violated their constitutional right to a fair hearing. The Petitioners had the burden of establishing that their right to a fair hearing guaranteed under Article 50 of *the Constitution* had been denied, violated or infringed by the Respondents. I am not satisfied that the Petitioners have discharged this burden. It is not in dispute that the Petitioners and the 1st



Respondent had a dispute over the ownership of the suit property. It is not in dispute that the dispute was taken to the lower court for determination and that the lower court heard the matter and rendered a judgment on 24th October 2019. It is not in dispute that the Petitioners unsuccessfully tried to set aside the said judgment through an application for review. It is also not in dispute that the Petitioners had a right to appeal to this court against the lower court judgment and ruling on their application for review and that no appeal was filed.

13. In *Uhuru Muigai Kenyatta v. Nairobi Star Publications Ltd.* [2013] eKLR the court stated as follows:

“...I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy...My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG vs S.K. Dutambala Cr. Appeal No.37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

14. In *Leonida Aloo Odhiambo v. Attorney General & another* [2020] eKLR the court stated as follows:

“Further, it is an established practice that where a matter can be disposed of without recourse to *the Constitution, the Constitution* should not be invoked at all. The court will pronounce on the constitutionality of an action only when it is necessary for the decision of the case to do so and that if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

15. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the Supreme Court stated that:

“(256) The appellants in this case are seeking to invoke the “principle of avoidance” also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu, 1995 (3) SA 867 (CC)* the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)*).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright infringement claim and it was not properly laid before that court as a constitutional issue.”

16. The thread running through all the cited cases is that a court will not determine a dispute brought as a constitutional issue where the same can be determined through other processes provided for in



law. On the material before me, I am unable to see any constitutional issue in the complaints that the Petitioners have put forward against the Respondents. I can only see a land dispute. As I have stated, there was a civil suit in the lower court between the parties namely, Kisumu CMC ELC No. 43 of 2019 in which the issues raised herein as constitutional issues were raised and determined by that court. I am not persuaded that the jurisdiction of this court as a constitutional court has been properly invoked. The *Environment and Land Court Act* 2011 and the Civil Procedure Rules provide a remedy to the Petitioners against the lower court judgment and ruling complained of. The Petitioners had a right of appeal which they have not exhausted. An erroneous or wrong judgment of a lower court in a civil dispute does not attract a constitutional petition as a remedy since the judgment can be reversed or varied on appeal.

Conclusion

17. In the final analysis and for the foregoing reasons, it is my finding that the petition before me does not raise valid constitutional issues and that the same has no merit. The petition is dismissed with costs to the 1st Respondent.

DATED AND DELIVERED AT KISUMU ON THIS 14TH DAY OF MARCH 2024

S.OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

N/A for the Petitioners

Mr. Mwesigwa for the 1st Respondent

N/A for the 2nd and 3rd Respondents

Ms. J.Omondi-Court Assistant

