Mugendi v Japheth & 3 others (Civil Appeal 65 of 2020)
[2022] KECA 574 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 574 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 65 OF 2020

DK MUSINGA, RN NAMBUYE & F SICHALE, JJA

APRIL 28, 2022

BETWEEN

OBADIAH MURUJA MUGENDI ..... APPELLANT

AND

CHARLES KABITI JAPHETH ..... 1ST RESPONDENT

MERU SOUTH/MAARA LANDS ADJUDICATION OFFICER .... 2ND RESPONDENT

DISTRICT LAND REGISTRAR MERU SOUTH ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

(An appeal from the decision and judgment of the Environment and Land Court (P. M. Njoroge, J.) dated 29th May, 2019 in Chuka ELC Constitutional Petition No. 3 of 2018)

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya in the Environment and Land Court (ELC) at Chuka in Chuka ELC Petition No. 03 of 2018 dated and delivered by P. M. Njoroge, J. on 29th May, 2019.

2. The background to the appeal is that the appellant filed in the ELC Court at Chuka, ELC Petition Case No. 03 of 2018; dated 16th August, 2018 against the 1st, 2nd, 3rd and 4th respondents respectively. The petition was premised on Chapter 4V(sic), the Bill of Rights of *the Constitution* of Kenya, 2010, In the matter of the alleged contravention of Articles 20, 21, 22, 23, 40 and 47 of *the Constitution* of Kenya, 2010. The substratum of the petition was parcel No. 1636 Muthambi/ Kandungu/adjudication section comprising 1.22Hectares, currently registered in the name of the 1st respondent under the provisions of the *Land Registration Act* No. 3 of 2012 (the suit property).

3. The appellant's complaint before the ELC was that he was allotted parcel number Muthambi/Kandungu/136 (the original suit property) comprising 7.35acres during the land adjudication process undertaken in the area starting 1962 and concluding in 1966. He sold off a total of 3.5acres to various persons named in the petition, leaving 3.85acres to his credit. It was while in the process of awaiting registration of the original suit property in his favour that the 1st respondent accompanied by officials of the 2nd respondent invaded the original suit property and hived off three (3) acres, subsequently registered in the 1st respondent's names as land parcel number Muthambi/Kandungu/1636 (the 2nd suit property). He raised complaints with the office of the 2nd respondent, seeking clarification on how he came to be deprived of the acreage forming the second suit property.

4. He was allegedly informed that records pertaining to both the original and second suit properties were missing, a position confirmed subsequently vide their letter to the Provincial Land Tribunal Ref No. LNDA/VIII/74 dated 24th January, 2011 in which the 2nd respondent explicitly admitted that according to records held at their end, parcel no. 1636 had no details showing its origin, there was a fake objection No. 705, there were no proceedings showing how Fredrick Mwenda Naincu who hitherto was unknown to the appellant got the second suit parcel allegedly subsequently sold to the 1st respondent. The appellant attributed the above impugned action to fraud, dishonesty and collusion whose particulars were given as: the 2nd respondent delineating the appellant's parcel and causing it to be registered in the name of the 1st respondent without the involvement or acquiescence of the appellant contrary to principles of natural justice that require that a person should not be condemned unheard; depriving the appellant of his property without following the due process under the *Land Adjudication Act* as well as the *Land Consolidation Act*.

5. It was also the appellant's position that his rights to fair administrative action, equal protection and benefit of the law and to own property were infringed. The appellant therefore sought from the ELC a declaration that the suit property was arbitrarily divested from him and vested in the 1st respondent, a declaration that his rights under Articles 27, 40 and 47 had been infringed; an order cancelling the registration of the register of title of LR Muthambi/Kandungu/1636 in the name of the 1st respondent and substituting these with those of the appellant as an owner with provision for costs of the petition.

6. The petition was supported by appellant's supporting affidavit, an undated witness statement, witness statements of Domisiano Ndeke Nyaga and Nausio Mbae Stanley, basically reiterating the content of the historical background to the litigation already set out above.

7. The 1st respondent filed a witness statement stating that he was a stranger to both the appellant and his (appellant's) claims against him (1st respondent). All he knew about the dispute before the ELC was that he was the registered proprietor of the second suit property, having lawfully purchased the same in the year 2001 from one Fredrick Mwenda Naincu who was then deceased and thereafter lived peacefully thereon until on 30th December, 2008 when his house was burnt down by unknown persons. He came to know the appellant in 2009 when the appellant unsuccessfully sued him before Muthambi Division Land Disputes Tribunal vide Cause No. 12 of 2009 claiming ownership of the suit property and seeking his (1st respondent) eviction.

8. In 2010, he received summons to attend Eastern Province Lands Dispute Tribunal, Embu, in Appeal Case No. 88 of 2010 in which the decision of Muthambi Division Land Disputes tribunal was affirmed. In 2013, the appellant filed Civil Case no. 109 of 2014 in the Senior Principal Magistrate's Court at Chuka, subsequently withdrawn on 6th April, 2017 before it was heard. On 29th August, 2018, he was served with the petition. His position was that he was not party to any fraud and or collusion, as he was an innocent buyer having purchased the second suit property from Fredrick Mwenda Naincu at a purchase price of Kshs.300,000.00, settled thereon, and had lived there and

carried out various developments as more particularly set out in his statement. Also that no claims were laid by the appellant, either against him or Naincu during the life time of Naincu, who passed on in 2006. He therefore prayed for the petition to be dismissed with costs to him.

9. The 2nd, 3rd and 4th respondents filed grounds of opposition to the appellant's petition dated 3rd October, 2018, namely, that the appellant had made no allegations of any infringement or violation of the petitioner's rights by the 2nd – 4th respondents respectively; the petitioner had failed to plead with specificity the Articles of *the Constitution* that the 2nd to 4th respondents had allegedly infringed or any particulars of such infringement as required for any case to meet the constitutional threshold of a constitutional petition; the constitutional petition as laid was therefore bad in law, an otherwise abuse of the due process of the law and prayed for the petition to be dismissed with costs.

10. The petition was canvassed through written submissions filed by the appellant and the 1st respondent. The trial Judge in a very brief judgment analyzed the record as laid before him and identified only two issues for determination namely, whether the appellant had satisfied the court that his constitutional rights had been infringed; and secondly, whether the petitioner's prayers should be granted. Considering these in light of the rival position before the court, the judge made observations, inter alia, that the adjudication process took place way back in 1960, 53 years ago; no explanation had been given as to why the appellant was coming to court belatedly; agreed with the grounds of opposition proffered by the 2nd, 3rd and 4th respondents jointly that the appellant had made no specific allegations of infringement or violation of his rights by the 2nd, 3rd and 4th respondents. Neither had he pleaded with any specificity or at all the Articles of *the Constitution* that the 2nd, 3rd and 4th respondents had infringed and on that account the Judge ruled that the petition was bad both in form and in law and dismissed it with costs.

11. It was also the Judge's observation that the appellant had filed Chuka Principal Magistrate's Civil Suit No. 109 of 2014 and inexplicably three (3) years later withdrew it on 6th April, 2017, the witness statements filed by the appellant, and his witnesses only complained about the adjudication process. No constitutional issues were raised therein hence the Judge's finding that there was nothing unconstitutional about the adjudication and consolidation processes which according to the Judge are anchored upon the provisions of the *Land Adjudication Act* Cap 284 Laws of Kenya and the *Land Consolidation Act* Cap 283 Laws of Kenya. It was also the Judge's finding that there was sufficient demonstration on the record that parties participated in the dispute resolution processes provided for by the adjudication, and consolidation laws which were ruled against the appellant. The appellant filed an appeal before the Eastern Land Disputes Tribunal at Embu which was dismissed on 18th July, 2011. The record was silent as to whether the appellant appealed to the High Court against the decision of Eastern Province Land Disputes Tribunal within the sixty (60) days stipulated in the Act and if he did what the outcome was.

12. On the totality of the above brief assessment, observations and reasoning on the rival position before him, the Judge found no merit in the petition and accordingly dismissed, it triggering this appeal, in which the appellant has raised eleven (11) grounds of appeal. These were subsequently rephrased as seven (7) issues in the appellant's written submissions dated 28th November, 2021, namely, whether: the appellant transferred 3 acres to any other person; the appellant was cultivating or lending part of his parcel of land to other tenants; parcel No. Muthambi/Kandungu/1636, comprising 3 acres was curved out of land parcel number Kathumbi/Kandungu/136 and if not, what the original number from which parcel No. Kathumbi/Kandungu/1636 was extracted was; the 1st respondent with the assistance of the 2nd and 3rd respondents bought a piece of land measuring 3 acres from a Mr. Fredrick Mwende Naincu who never owned the disputed piece of land; and whether the boundaries were similar to the boundaries of the appellant; the 3rd respondent registered the parcel No. Kathumbi/

Kandungu/636 in the names of the 1st respondent despite the fact that the said parcel had been unlawfully obtained; the time limit that the 1st respondent had stayed in the appellant's land and the developments made thereon while the dispute was ongoing could be considered as sufficient justification for the commission of a fraud against the appellant; costs for using the appellant's land for many years could be considered as costs in the cause contrary to law and lastly, the trial Judge erroneously dismissed the petition against the weight of evidence on the record.

13. The appeal came for plenary hearing before us on 9th December, 2021. When called out, the appellant and the 1st respondent both appearing in person were in attendance. There was no appearance for the 2nd, 3rd and 4th respondents, who had been served electronically with the hearing notice by the Deputy Registrar of this Court on Monday, November 29, 2021 at 2.37pm. The court being satisfied that the 2nd, 3rd and 4th respondents had due notice of the hearing date, allowed the appellant and the1st respondent to prosecute the appeal. The appeal was canvassed virtually in the presence of the appellant and the 1st respondent through written submissions that were fully adopted by the appellant and the 1st respondent without oral highlighting.

14. Supporting the appeal, the appellant submits that the second suit property, currently registered in the 1st respondent's name, was curved out of the original suit property adjudicated in his favour by the 2nd respondent and registered in the 1st respondent's name with the assistance of the 3rd respondent. He made efforts to recover the original suit property before various forums inclusive of the Land Disputes Tribunals. The 2nd respondent when tasked by the tribunal to produce evidence on how the second suit property came to be curved out of the original suit property not only produced a letter in court but also admitted that all records relating to how the second suit property was created were all fraudulent and that there were no records confirming ownership of the second suit property. He therefore asserts that in his opinion, once there is demonstration of existence of a confession by the 2nd respondent whose office was responsible for creating what he termed a mess, there was no other evidence to be called for by him to prove existence of a fraudulent deal. He contends that he tendered to the trial court sufficient evidence to demonstrate how he purchased his land in 1962 which was never considered by the trial court when arriving at the impugned decision. He confirmed the 1st appellant's assertion that he had been to various forums seeking vindication of the wrongs committed against him by the respondents jointly and secretly in vain because of the illegal activities attributed to civil servants, which according to him amounted to a violation of his constitutional rights enshrined in Chapter 4, Article 40(1), (3) of *the Constitution* that every person has the right to acquire land anywhere in Kenya and should not be deprived of the same just because he was living in a different sub-county and bought land in a different sub-county.

15. On the length of time taken for him to seek vindication, it is his position that it is not true as misconceived by the trial Judge that he took long to seek vindication for the alleged breach of his proprietary rights. The correct position according to him is that he has been litigating over this issue in various forums as more ably set out by the 1st respondent in his submissions. He also asserts that the period of limitation cannot be invoked and applied as the trial Judge did in instances where property has been unlawfully divested from an innocent party to a wrongful party as is the case in the instant appeal.

16. Also that it was erroneous for the trial Judge to use the 1st respondent's statement and the 2nd, 3rd and 4th respondents' grounds of opposition to vitiate his claim in the absence of any submissions from the 4th respondent. It was also unconstitutional for the Judge to dismiss the petition on the grounds of a technicality and against the weight of the evidence on the record, which according to him (appellant) demonstrated sufficiently that the 1st respondent purchased the piece of land from the seller, who

never owned any piece of land and whose name was only used by the 2nd respondent to facilitate a corrupt deal between the 1st and 2nd respondent to the detriment of the appellant's proprietary rights.

17. In response to the appellant's submissions, the 1st respondent simply rehashed the content of his witness statement already set out above and which we find prudent not to replicate and on the basis of which he asserted that the appeal lacked merit as issues raised herein are the very issues the appellant has unsuccessfully litigated against him in five (5) various litigation forums as more particularly set out above. There is therefore no truth in his claim which amounts to an abuse of the court processes and should be dismissed.

18. This is a first appeal. Our mandate as a first appellate court is as stipulated explicitly in Rule 29(1) of this Court's Rules namely, to reappraise, re-evaluate and reanalyze the record, consider it in light of the rival submissions before us and draw out own conclusions thereon and give reasons either way. The predecessor of this Court delineated the parameters for the exercise of this mandate in numerous of its decisions. We take it from *Selle and another vs. Associated Motor Boat Company Limited & 2 others* [1968] EA 123 in which the predecessor of this Court delineated this mandate in these terms:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to allow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probability materially to estimate the evidence or if the impression based on the demeanor of the witness is inconsistent with the evidence in the case generally."

19. We have revisited the record, evaluated and analyzed it on our own in light of both our mandate as a first appellate court as set out above and the rival submissions of the appellant and the 1st respondent respectively. It is our position that the litigation giving rise to this appeal being anchored on constitutional provisions, the only issue that falls for our consideration is one, namely:

    1) Whether or not the Superior Court erred both in fact and in law in holding that the appellant's petition lacked merit based on the ground that:

        i. The appellant made no specific allegation of infringement and violation of his rights by the 2nd, 3rd and 4th respondents.

        ii. The appellant's witness statement raised no constitutional issues; and

    iii. That the appellant filed his case in court over five (5) decades or alternatively fifty-three (53) years since the adjudication process took place.

20. We fully adopt the record as assessed above as the basis for the determination of the above issue without rehashing any aspect of it and only highlighting aspects of the same where it is necessary for us to do so.

21. It is common ground that the appellant's complaint was anchored on the constitutional provisions set out in the heading of the petition. We therefore find no error in the Judge's finding that the core consideration before the trial court and now this court on appeal was determination, firstly as to whether the constitutional petition was properly laid before the Judge as a constitutional petition and secondly, whether it was meritorious. The participating parties on appeal were both lay people. None

addressed the court on constitutional law principles that guide the court in the exercise of its mandate in an appeal of this nature. It is therefore our duty to discern these principles on our own and apply them to the rival positions herein and decide either way.

22. The approach we take in resolving this issue is that taken by this Court in the case of *Anarita Karimi Njeru vs. Republic* [1979 - 1980] KLR 1272 in which this Court enunciated a principle that has now became trite as follows:

> "If a person is seeking redress, from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to the case) that he should set out with a reasonable degree of precision that of which the complaint, the provision said to be infringed, and the manner in which they are alleged to be infringed."

23. When similarly confronted in the *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, this Court had this to say:

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> "(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.
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> (42) ..... the principle of Anarita Karimi Njeru [supra] underscores the importance of defining the dispute to be decided by the court. ..... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru [supra that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:
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> > "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."
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> The Court went further to give examples as follows:

(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

24. We have applied the above threshold to the rival positionS herein as presented by the appellant and the 1st respondent. Our take thereon is that indeed the heading of the petition reads that the petition is brought in the matter of Chapter 4V(sic) of the Bill of Rights of *the Constitution* of Kenya, 2010 and In the matter of alleged contravention of fundamental rights and freedoms under Article 20, 21, 22, 25, 40 and 47 of *the Constitution* of Kenya, 2010. We have likewise revisited the body of the petition and find that as already highlighted above, all that the appellant as the petitioner did was to set out the factual history of how he went through the process of land consolidation and adjudication resolved in his favour, whereby land parcel number LR No. Kathumbi/Kandungu/ 136 comprising 7.35acres was adjudicated in his favour. He was awaiting registration of the said parcel in his favour when it transpired that three acres of the said parcel had been hived off and registered in the 1st respondent's names without his knowledge, consent and or participation.

25. Turning to the complaint, what the appellant pleaded against the 1st and 2nd respondents were not breaches of his constitutional rights anchored on the Articles of *the Constitution* specified in the heading of the petition but particulars of fraud and dishonesty on the part of the 1st and 2nd respondents. No specific particulars were given in the said petition as to how the alleged particulars of fraud and dishonesty amounted to breaches of constitutional rights enshrined in the Articles of *the Constitution* cited in the heading of the petition. It is also explicit from the record that the petition is silent as to how the 3rd and 4th respondents infringed the appellant's rights enshrined in the Articles of *the Constitution* cited in the heading of the petition. The trial Judge cannot therefore be faulted for upholding their objection that the petition was bad in law as laid before the ELC in so far as it had failed to plead with specificity how the 2nd, 3rd and 4th respondents had infringed on the appellant's rights enshrined in the cited Articles.

26. The appellant took issue with the 2nd, 3rd and 4th respondents' failure to file submissions in support of their grounds of opposition both at the trial and on appeal. We appreciate the correctness of the above appellant's observations. It is however our position that the onus was on him to prove his petition. It is only after he had sufficiently demonstrated that the 2nd, 3rd and 4th respondents' grounds of opposition had been displaced, that he would have sought an explanation from the said respondents. In the absence of such proof no adverse inference could be drawn against those respondents for their failure to file submissions. The onus was on the appellant to prove his petition even in the absence of any rejoinder to that effect from the affected respondents.

27. It is also our observation that the appellant's complaints are premised on the adjudication process and not on any constitutional violations.

28. In light of the totality of the above, it matters not that the 2nd respondent had admitted in its letter ref No. ND/VIII/74 dated 24th January, 2011 that there were malpractices in the transactions done in its office resulting in the birth of land parcel number LR No. Kathumbi/ Kandungu/1636 registered in

favour of the 1st respondent. The trial Judge cannot therefore be faulted for discounting the factual base relied upon by the appellant in support of his petition.

29. Turning to the witness statement, as already alluded to above all that the appellant set out in his witness statement as supported by the witness statements of his witnesses was the factual background to the consolidation and adjudication process. There were no specifics of how the cited Articles of *the Constitution* of Kenya, 2010 were infringed. In light of the above reasoning, we also find and hold that there was no basis for faulting the Judge on the conclusion he reached.

30. On the length of time taken to present the petition, there are two other relevant guiding principles we have discerned from the court's exposition in the Anarita Karimi case [supra] namely, that constitutional questions must be raised reasonably that is, at the earliest practicable moment and secondly, that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make assertions of the right before a tribunal having jurisdiction to determine it.

31. The appellant's complaint spans five (5) decades as correctly observed by the trial Judge. This is borne out by the contents of the factual base on the appellant's supporting documents that the adjudication process in the area started in 1962 and closed in 1966. There is however silence as to what steps he took in making follow ups on the adjudication process to secure registration of the original suit property in his name. The Judge cannot therefore in the circumstances be faulted for concluding that the appellant took too long to seek a constitutional intervention to redress his complaints which were basically land consolidation and adjudication process based, well governed by the regime of law applicable to those processes and had no constitutional law provision underpinnings.

32. The upshot of the totality of the above assessment and reasoning is that we find no merit in this appeal. It is accordingly dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR