



**Adan v County Government of Mandera & 2 others (Environment & Land
Petition E005 of 2022) [2024] KEELC 3328 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT & LAND PETITION E005 OF 2022
JM MUTUNGI, J
APRIL 23, 2024
IN THE MATTER OF ARTICLES 10,21,22,23,28,40,47
& 60 OF THE CONSTITUTION OF KENYA
IN THE MATTER OF CONSTITUTIONAL RIGHT TO PROPERTY
IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT 2015
IN THE MATTER OF MANDERA COUNTY GOVERNMENT**

BETWEEN

ADAN YARROW ADAN PETITIONER

AND

THE COUNTY GOVERNMENT OF MANDERA 1ST RESPONDENT

MANDERA COUNTY CHIEF OFFICER FOR LAND 2ND RESPONDENT

KENYA MEDICAL TRAINING COLLEGE- MANDERA 3RD RESPONDENT

JUDGMENT

1. The Petitioner vide a Petition dated 16/5/2022 amended on 02.02.2023 filed this suit through the firm of Heyi & Associates Advocates seeking the following orders:
 - i. A declaration that the petitioner is the rightful owner of all that parcel of land known as plot No. 36 situate at New Shafshafey area within Mandera town and registered at the Mandera County department of lands, housing and physical planning in the name of Adan Yarrow Adan.
 - ii. A declaration that the 1st Respondent violated the petitioner's constitutional right to property by forcefully and unlawfully evicting him from his parcel of land without any compensation.



- iii. A declaration that the 1st respondent violated the petitioner's constitutional right to fair administrative action by failing to notify the petitioner on the county's intended adverse actions against the petitioner as well as for its failure to afford the petitioner an opportunity to be heard before eviction from and subsequent usurpation of their land.
- iv. An Order for compensation of the petitioner for his land which was compulsorily unprocedurally acquired by the county government of Mandera without compensation to the Petitioner.
- v. General damages for suffering and harm occasioned by the county government to the petitioner.
- vi. Cost of the suit be borne by the 1st respondent.
- vii. Any other remedy that the honourable court may deem just to grant.

The Petitioner's Case

2. The Petitioner's case is anchored on the grounds set out in the petition and further amplified by the content contained in the affidavit of Adan Yarrow Adan, the Petitioner herein, sworn on 16.05.2022. The Petitioner averred that he together with other members of his family, owned a parcel of land measuring about 1.5 acres within the area known as New ShafShafey area within Mandera town and that they exercised actual physical possession over the said land through seasonal farming and/or keeping livestock.
3. The Petitioner swore that the said parcel of land was previously registered with the defunct Mandera Town Council on 18.02.2010 as Plot No. 36 New Shafshafey in his name. He thus annexed a copy of receipt of registration and payment of land rent to the said Town Council. He stated that following the advent of the County Governments, he continued paying land rent to the County Government of Mandera as evidenced by the annexed copies of land rent payment receipts to the said County Government for the years 2015 and 2016.
4. That the County Government of Mandera registered the subject parcel of land in the Petitioner's name on 08.06.2017 and a certificate of ownership No. 000610 was issued to him. Further he paid land rent of Kes. 500/- for the years 2017,2018, 2019 and 2020 to the County Government of Mandera via the automated payment code which he averred specifically belonged to the subject parcel of land in contention.
5. The Petitioner further stated that the certificate of ownership document issued to him by the 1st respondent notably lacked crucial details such as acreage of the parcel of land and that the certificate of ownership indicated that the land was subject to survey which survey has not been carried out to date. Sometime in late 2017, or thereabout, the 1st respondent through its County Askaris and/or local Police started evicting people from the vast area around the suit land claiming that the land in the area was earmarked for a county project. The Petitioner deposed that despite his plea and negotiation with the 1st respondent's officials, he was eventually evicted from the suit land.
6. The Petitioner contended that the said eviction was without notice and led to the loss of land that was rightfully his and despite making attempts to recover the same, his efforts have been in vain as the 2nd respondent argued that the said suit land was non-existent and that he did not possess any genuine documents to support such claims. The Petitioner further argued that the County Government issued him with the ownership certificate and never at any time informed him his documents had any issue. That the 1st respondent initiated the building of the KMTC Mandera and the completion was nearly



complete. Additionally, the county government of Mandera has absolutely refused, ignored and/or neglected to compensate him despite having taken away his property unlawfully.

The 1st and 2nd Respondents case

7. The 1st and 2nd respondents filed an Amended Replying Affidavit sworn on 26.06.2023 deponed by Ismail Omar Ibrahim, in place of Bare Mohamed Shabure who had sworn the initial Replying Affidavit dated 24.10.2022. In the Replying Affidavit, the deponent averred that neither the Petitioner nor any member of his family have been in possession of the suit property and that the said piece of land had previously been earmarked and reserved for construction of the Medical Training College by the defunct Town Council of Mandera in the year 2011.
8. The 1st and 2nd Respondents contended that the petitioner had not been issued with any certificate of ownership in respect to the suit land and that the certificate of ownership No. 000610 was in respect to unsurveyed plot measuring 50ft by 100ft which was a totally different parcel of land altogether. That the alleged registration documents annexed by the petitioner related to the unsurveyed plot that was located in an informal settlement. The 1st and 2nd Respondents averred that the documents exhibited by the Petitioner were forged and could not vest the Petitioner with any rights over the land. The Respondents further contended the County Government was constitutionally mandated to utilize the Public Land for the benefit of the residents of Mandera and in this regard, the Petitioner had no basis to question the Construction of Kenya Medical Training College, Mandera Campus.
9. The Respondents additionally contended that the petition herein did not raise any constitutional issue warranting determination by this court and urged that the petition be dismissed with costs to the Respondents.
10. The petitioner filed a supplementary affidavit sworn on 27.07.2023 in a response to the respondents' amended replying affidavit wherein he deposed that, the 1st and 2nd respondents did not serve upon him their replying affidavit sworn on 22.10.2022. Further, the Petitioner averred that the amended replying affidavit was incurably defective and ought to be struck out as the law did not contemplate an affidavit to be amended once already sworn and filed in Court. The Petitioner thus reiterated the contents of his petition urging that the same be allowed as prayed.
11. The Court on 28th June 2023 directed the parties to canvass the petition by way of written submissions. The Petitioner's Counsel filed submissions dated 29th July 2023 on behalf of the Petitioner. The Respondents did not file any submissions.
12. Submissions by the Petitioner

The Petitioner in his submissions reiterated he was the proprietor of Plot No. 36 New Shafshafey area within Mandera Town. The Petitioner submitted that the Respondents violated his constitutional rights by appropriating his said property without following due process. He asserted that he had satisfied the threshold for a Constitutional Petition as established in the Case of *Anarita Karimi Njeru v Republic* (1976 -1980) KLR 1272 as relates to the requirement that a Constitution Petition ought to be pleaded with a reasonable degree of precision. The Petitioner asserted that the Respondents in violation of the Respondent's rights of ownership of the said Plot No. 36 New Shafshafey forcefully evicted and ejected him without giving any notice and/or affording him a hearing. The Petitioner contended that the Respondents were in violation notably of Articles 10, 21, 40, 47 and 50 of the [Constitution](#).
13. The Petitioner submitted the 1st and 2nd Respondents claim that the land that the Petitioner had been allocated was not available for allocation to the Petitioner as it had been earmarked for the construction



of “KMTC Mandera” was not established by the Respondents. He argued the 1st and 2nd Respondents did not provide any proof that the suit land had been reserved for construction of “KMTC Mandera” as alleged. The Petitioner reiterated that he held and had exhibited ownership documents for the Plot No. 36 New Shafshafey area notably a certificate of Land Ownership No. 000610 issued on 8th June 2017. The Petitioner additionally stated he had been paying land/rent and had exhibited payment receipts issued by the County Government.

14. 1st and 2nd Respondents Response

The 1st and 2nd Respondents in their Replying Affidavit raised questions regarding the authenticity of the ownership documents that the Petitioner had exhibited to support his ownership claim of the suit property. Evidently therefore, the ownership of the disputed plot claimed by the Petitioner and/or its physical location on the ground was in issue. It is of note that neither the Petitioner nor the 1st and 2nd Respondents exhibited a survey plan and/or a sketch plan to illustrate the location of the disputed plot. The Petitioner claims the plot he was allocated measured 1.5 Acres and was located where the 1st and 2nd Respondent had permitted the “KMTC Mandera” to be constructed. For their part, the 1st and 2nd Respondents maintained the plot allocated to the Petitioner was 50ft by 100ft and was located in an informal settlement area and that the portion where the Petitioner claimed his plot was located had been reserved for Medical Training College in 2011 by the defunct Mandera County Council. The certificate of ownership dated 8/6/2017 exhibited by the Petitioner does not indicate the acreage of Plot No. 36 and indicated that the measurement would be subject to survey. The certificate did not attach any sketch plan to identify the plot and/or show where it was located. There was further no evidence of application by the Petitioner for plot allocation and there was also no resolution of the relevant committee of the County Government to support the allotment of the Plot to the Petitioner.

Analysis and Determination:-

15. I have outlined issues touching on ownership of the disputed property to illustrate that what was really in issue in the present petition was the ownership of the plot claimed by the Petitioner and not really the violation of any constitutional rights. In order for the Petitioner to claim violation of ownership rights, the ownership of the disputed property required to be determined. The Petitioner in the instant petition under prayer (1) seeks to be declared as the rightful owner of land parcel Plot No. 36 New Shafshafey area within Mandera Town. This is the same plot that the 1st and 2nd Respondents assert was within the area that had been reserved for construction of KMTC Mandera in 2011 and could not therefore have been available for allocation to the Petitioner. The construction of KMTC Mandera reportedly has now been completed.

16. In a matter such as the present matter where ownership of the disputed plot is contested by the parties, of necessity viva voce evidence should be adduced so that parties have the opportunity to interrogate by way of cross examination of the witnesses the evidence they tender either by way of documents and/or orally. Not every dispute and/or breach of a right is suited to be tried as a constitutional petition. Constitutional process ought not to be invoked where there exists a statutory civil process under which the dispute can be resolved. In the case of *Kenya Agricultural and Livestock Research Organization (KARLO) v Edison Sonje Taura & 3 others* (2021) eKLR, the Court while expressing concern regarding the increasing numbers of litigation initiated by way of Constitution petitions stated thus:-

“---- it has been said time without number that the *Constitution* Procedure process should not be subjected to abuse, where persons file all sorts of Mundane Civil disputes under the Constitutional Procedure process.”



The Court of Appeal in the Case of *Gabriel Mutava & 2 Others v Managing Director, Kenya Ports Authority* (2016) eKLR commenting on the efficacy of Constitutional petitions stated thus:-

“Constitutional litigation is a serious matter that should not be sacrificed on the alter of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underspinned forums for the resolution of such disputes.”

17. In the instant petition it is clear the Petitioner has predicated his case on the basis that he was the lawful allottee and owner of plot No. 36 New Shafshafey in Mandera. As I have demonstrated earlier in this Judgment the ownership of this plot and its location on the ground is disputed. The 1st and 2nd Respondent claim that the spot where the Petitioner claims the plot was located, had been reserved for KMTC Mandera and further contend the documents, the Petitioner proffered as proof of ownership were forgeries. The Petitioners claim is for declaration that he was the owner of the plot in dispute and for compensation as envisaged under Article 40(3) of the *Constitution* since the 1st and 2nd Respondent actions of appropriating the plot for the construction of KMTC Mandera was synonymous to exercising the right of compulsory acquisition though in the present case no prompt compensation for the plot was paid to the Petitioner. The 1st and 2nd Respondent took the position that the plot was comprised in the area that had already been reserved for construction of the Kenya Medical Training College, Mandera and hence no compulsory acquisition would arise.
18. The Petitioner in his Supplementary Affidavit and in his submissions has taken issue with the 1st and 2nd Respondents amended Affidavit that basically was a response to the Amended Petition. I have looked at the initial petition and the Amended Petition and it is evident, the Petitioner amended the Petition to add the 3rd Respondent, the KMTC –Mandera Campus. I have equally looked at the 1st and 2nd Respondents Amended Replying Affidavit, and the only evident amendment was the change of the Officer’s name from Bare Mohamed Shabure to Ismail Omar Ibrahim. The content of the initial Replying Affidavit remained unchanged, Bare Mohammed Shabure swore the Replying Affidavit on 24/10/2022 as the Chief Officer Ministry of Lands, Housing and Physical Planning, Mandera County. On 26th June, 2023 Ismail Omar Ibrahim was the Office holder of the Office, that the Petitioner had named as the 2nd Respondent. In my view there was no amendment to the content of the Replying Affidavit, but merely a substitution of the name of the office holder. I therefore do not consider that there was an amendment that could invalidate the Replying Affidavit.
19. Having considered the pleadings by the parties, it is my view that the Constitutional jurisdiction of the Court was not properly invoked as the dispute between the parties was clearly a civil dispute which was best suited to be handled in the ordinary Civil Court. The issue of determination of ownership of the disputed plot required evidence to be taken from the parties which could not be properly taken in these proceedings. In the premises I hold the petition lacks merit and was brought in abuse of the Court process. I dismiss the same but order that each party will bear their own costs of the petition.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 23RD DAY OF APRIL 2024.

J. M. MUTUNGI

ELC - JUDGE

