



REPUBLIC OF KENYA



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**Murungi v Attorney General & 2 others (Environment and Land Constitutional
Petition E007 of 2023) [2024] KEELC 4343 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4343 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E007 OF 2023

CK NZILI, J

MAY 22, 2024

BETWEEN

ISAAH MURUNGI PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

**DEPUTY COUNTY COMMISSIONER – IGEMBE CENTRAL 2ND
RESPONDENT**

MARTIN GITONGA MUTHEE 3RD RESPONDENT

JUDGMENT

1. The petitioner has sued the respondents for breach of his constitutional right to private property in the manner the 2nd respondent heard and determined a Minister's Appeal No. 167 of 2013 in respect of Parcels No. 1274 and 9641 Athiru Ruujine/Ndoleli. The facts, as pleaded in the petition dated 11.12.2023, are that the petitioner has been in exclusive possession and occupation of Parcel No. 9641 Athiru Ruujine/Ndoleli registered under his name and which registration was confirmed at committee and arbitration board stages. In contrast, Parcel No. 1274 belonged to and was occupied by the 3rd respondent.
2. The petitioner averred that the 3rd respondent filed a minister appeal against him that was heard by the 2nd respondent on 28th July and 4.8.2021. It was averred that after a delay in delivering the decision, the petitioner sent a letter dated 2.11.2023 inquiring the date of the delivery only for the 2nd respondent to forward the decision via email, allegedly delivered on 22.2.2022.
3. The petitioner averred the decision, omitted all his evidence and written submissions, and instead relied solely on the evidence presented by the 3rd respondent, which is a sign of bias and partiality. The petitioner averred that the delay to deliver the decision, though duly signed for almost two years was a clear testimony of partiality and bias.



4. As a consequence, the petitioner averred that he was deprived of an asset without being accorded a fair hearing in the circumstances, showing that the 2nd respondent was neither independent nor impartial in making the decision. He termed the decision as illegal and unconstitutional. The petition is anchored on Articles 10, 19, 20, 22 (1), 23(1), 40, 47 (2) and 50 of the Constitution.
5. The petitioner prays for a declaration that the 2nd respondent's omission to consider his evidence and delaying the decision for almost two years was actuated by malice and purposed to defeat the court's intervention, rendering the same illegal, unconstitutional and violative of his right to a fair hearing, the right to property and certiorari, quashing the decision and order for retrial of the appeal.
6. In support of the petition, Isaiah Murungi swore an affidavit dated 11.12.2023 rehearsing the contents of the petition and attaching copies of a confirmation letter from the District Land Adjudication and Settlement Officer (DLASO) dated 14.2.2013, copies of committee and arbitration board proceedings, copies of pleadings in Meru ELC No. 204 of 2012 which was later transferred to Maua Chief Magistrates Court as ELC No. 11 of 2017, letter dated 6.11.2023 to the 2nd respondent and the Minister's decision dated 22.2.2022 marked as annexures LM 1-6, respectively.
7. The 1st & 2nd respondents opposed the petition through a replying affidavit sworn by Hassan Ali Bule, the deputy County Commissioner of Igembe Central Sub-County, dated 15.2.2024. It was averred that the petition does not meet the constitutional threshold. It lacks precision, clarity, and specificity, and the petitioner was accorded a fair hearing to present his case evidence, and cross-examine witness.
8. Further, the 1st – 2nd respondents denied the alleged bias prejudice and averred that all the evidence on record and issues in dispute were examined and considered, leading to the conclusion that the 3rd respondent had substantiated his case against the petitioner in accordance with the Land Adjudication Act (Cap 284). The 1st & 2nd respondents averred that parties were duly informed of the hearing schedule and the subsequent ruling, and it was the petitioner's responsibility to request a copy of the decision, and in this petition, he has failed to demonstrate any follow-up that he made to acquire or obtain a copy.
9. The 1st & 2nd respondents averred that no evidence had been adduced to show that the decision was unconstitutional and illegal, meaning that the petition was not only an afterthought but also an attempt to appeal against the 2nd respondent's decision, which is final under Section 29 of the Land Adjudication Act.
10. The 3rd respondent opposed the petition through a replying affidavit sworn by Martin Gitonga Mathare on 6.2.2024 for raising no constitutional issues or violation, for if the petitioner has any genuine grievance, the remedy lies elsewhere. He termed the petitioner as an abuse of the court process and lacking merits since, as per proceedings of the appeal attached as annexure MGM "2" dated 23.2.2023 the petitioner was accorded a fair hearing.
11. The 3rd respondent averred that the petitioner was guilty of indolence and laxity in applying for the proceedings and ruling, given that parties were notified of the delivery and the letter dated 6.11.2023, was written with the petition in mind. The 3rd respondent termed the petition as yet another delaying tactic, for he has refused to vacate from the land despite warnings from the land adjudication officer and a court order issued on 27.11.2012. The 3rd respondent attached copies of the letters dated 18.9.1998, 17.12.1997, 18.1.2012 and the court order as annexure MGM "3". The 3rd respondent averred a retrial would be unnecessary since litigation in the manner commenced in 1997 going by a letter dated 22.11.1999 attached as MGM "4" and receipts and receipts dated 15.11.2011 and 18.11.2011 as annexure marked MGM "5".



12. With leave of court, parties agreed to canvass the petition through written submissions that were to be filed by 6.4.2024.
13. The issues calling for my determination are:
 - i. If the petition has met the threshold of a constitutional petition.
 - ii. If the petition failed to exhaust internal dispute mechanism.
 - iii. If the issues raised in the petition call for the intervention of a constitutional court.
 - iv. If the petitioner has proved a breach of his constitutional right to a fair hearing and protection from deprivation of property without a fair hearing.
 - v. Whether the petitioner is entitled to the reliefs sought
 - vi. What is the order to costs?
14. A party seeking constitutional reliefs on an alleged breach of constitutional rights and freedoms is required to comply with Articles 20,21, 22, 23, 258, 259, and 260 of the constitutional as read together with Rules 4, 5, 8, 9, 10, 11 & 14 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules 2013 (Mutunga Rules) by disclosing the facts relied upon rights violated, nature of injury caused, capacity the petition is filed details regarding any civil or criminal case over the matter, signature and the reliefs sought and support through affidavit or documents.
15. In this petition, the petitioner described the parties, set out the facts relied upon, gave details of the injury or damage, specified the issues of law, and indicated the reliefs sought. Further and in line with Rule 11 of the Mutunga Rules, the petitioner has sworn on oath the facts and attached documents in support of the petition.
16. In *Anarita Karimi Njeru vs Republic* (1979) KLR, the court said a petitioner must set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to have been infringed. In *Mumo Matemu vs Trusted Society of Human Rights Alliance* (2013) eKLR, the court said that due process substantive justice and the exercise of jurisdiction were functions of precise legal and factual claims and that precision was not coterminous with exactitude, but helped in defining the issues in litigation and adjudication. See *Nasra Ibrahim Ibren vs IEBC & others* (2018) eKLR.
17. In this petition the petitioner substantially set out the particulars such that the respondents were able to know the fundamental points at issue and the basis of the grievance so that the respondents appropriately responded to them without seeking better particulars. See *CCK & others vs. Royal Media Services Ltd & others* (2014) eKLR.
18. The next issue is whether the petition is prematurely or inordinately filed after the petitioner failed or neglected to exhaust the internal dispute mechanism set out in the *Land Adjudication Act*. The respondents take the view that the petition is an abuse of the court process since the remedy for the grievances raised, if any lie elsewhere, was, therefore, a disguised appeal against the Minister's decision, which under Section 29 of the *Land Adjudication act* (Cap 284) was final. A party aggrieved by a minister's decision has to challenge the decision within six months of its delivery.
19. In *Speaker of National Assembly vs. Karume* (1992) KLR 425, the court observed that where there was a straightforward procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. In *Republic vs Musanka Ole Runkes*



- Tarakwa & others *ex parte* Joseph Lesalol Lekitio & others (2015) eKLR, Munyao J held that there would be no bar to the institution of judicial review proceedings to question how the process of land adjudication was being undertaken.
20. In *Republic vs National Environmental Management Authority ex parte Sound Equipment Ltd* (2011), eKLR, the court observed that where an alternative remedy exists, it was only in exceptional circumstances that an order of judicial review could be granted. The court has to consider the suitability of the alternative remedy forum, the public interest involved, the polycentricity of the issue if it could serve the constitutional values, the lack of adequate audience in the forum, and the unconstitutionality of the process. See *Republic vs IEBC ex parte NASA Kenya & 7 others* (2017) eKLR, *Night Rose Cosmetics (1972) Ltd vs Nairobi County Government & others* (2018) eKLR, *Martin Nyaga Wambora & others vs Speaker of the Senate & others* (2014) eKLR, *Geoffrey Muthinja Kabiru and others vs Samuel Munga Henry & others* (2015) eKLR and *Moffat Kamau & others vs Aelous (K) Ltd & others*.
 21. In this petition, the Minister's appeal is alleged to have been decided on 22.2.2022. The annexure marked LM "6" is not dated, though stamped. A copy attached by the 3rd respondent as MGM "2" is dated 23.2.2023. The petitioner alleged that he was not notified of the delivery date while the 3rd respondent insists that parties were given a notice to attend the delivery of the decision. The 1st and 2nd respondents have averred in paragraph 9 of the replying affidavit that parties were aware of the ruling date. Unfortunately, Michael Kioni, whose signature appears in the decision is not the deponent to the affidavit but one Hassan Ali Bule. One of the grievances raised by the petition is that he was denied an opportunity to challenge the decision within the statutory period, for he was denied an opportunity to be present at its delivery and a copy thereof to prefer a review.
 22. The constitutional reliefs sought in the petition and the circumstances in which the petitioner found himself, in my view, justify the petitioner in approaching this court. See *Rental Healthcare (EP 2) Ltd & another vs Ministry of Health & others* (2015) eKLR and *Mutanga Tea & Coffee Co. Ltd vs Shikara Ltd & another* (2015) eKLR.
 23. The next issue is whether the petitioner has proved deprivation of an asset without being afforded a fair hearing. The petitioner relied on annexure IM "6" the proceedings before the 2nd respondent dated 28.7.2021. The proceedings are transparently clear that the petitioner was given a chance to cross-examine the 3rd respondent, who was represented by his father, a holder of a power of attorney. Further, it shows that the petitioner was granted an opportunity to testify in opposition to the appeal and was cross-examined by the 3rd respondent. Additionally, it shows that the hearing was adjourned for 4.8.2021 for the calling of witnesses.
 24. In *Msagha vs Chief Justice & 7 others* (2006) 2KLR 553, the court observed that the ingredients of fairness or natural justice entail allowing a person an adequate opportunity to present his case. No one ought to be a judge in his case. The decision maker must be unbiased in according to the hearing and making the decision and the decision must be based upon logical proof or evidential material.
 25. Article 50 (1) of *the Constitution* provides that every person has the right to have any dispute that the application of law can resolve, decided in a fair and public hearing, before a court or an appropriate independent and impartial tribunal. Section 4 (3) (b) of the *Fair Administrative Action Act* provides that a person likely to be affected by a decision should be granted an opportunity to be heard and to make representations in that regard.
 26. In *Kenya Revenue Authority & others vs Darasa Investments Ltd* (2018), eKLR, the court held that the need to take into account relevant considerations and ignore irrelevant facts in decision-making has



- a close nexus with the need to act reasonably. The court cited *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation* (1948) 1KB 223, that a person entrusted with a discretion must direct himself properly in law to consider the matters he is supposed or bound to consider and exclude irrelevant matters; otherwise, he will be said to have acted unreasonably.
27. In *Karani vs Judicial Service Commission* (Petition 3 of 2021 (2022) KESC 37 (KLR) 8th July 2022 (Judgment), the court observed that the principle of *Nemo iudex in causa sua* was an entrenched right under Article 50 (1) of *the Constitution* and that under section 112 of the *Evidence Act*, the burden of proof shifts especially when any fact was within the knowledge of any party to those proceedings and in this case how the mistake to deliver a judgment a day earlier than indicated was within the appellant's knowledge and control.
 28. In *Githiga & others vs Kiru Tea Factory Co. Ltd (Petition No. 13 of 2019)* (2023) KESC 41 (KLR) (16th June 2023) (Judgment), the issue was whether the court of appeal deliberately ignored the purposes of the appellant thereby condemning them unheard on contempt of court. It was claimed that the Court of Appeal had ignored referring to the appellant's responses. The court held that due to the quasi-criminal nature of contempt proceedings and the gravity of the consequences, courts must adhere to the principles of natural justice, procedural fairness and the right to a fair hearing. Regarding Article 50 (2) of *the Constitution*, the court said that the right to a fair hearing imposed a duty on the court to guarantee parties to contempt proceedings, procedural justice by evaluating all the evidence brought forth by the parties, depending on the nature of the matters in issue, without bias, following due process, hearing the testimonies, granting a right to controvert, ensuring proof of any material fact, treating parties fairly, acting effectively and effectively in the administration of justice. The court termed the right to a fair hearing as a non-derogable right.
 29. Applying the preceding case law, the petitioner casts aspersions on the manner in which the Minister heard and determined the appeal. He says that his evidence and submissions were omitted, and the only evidence that was considered was that of the 3rd respondent, meaning there was bias and partiality on the part of the 2nd respondent. Further, the petitioner says that the delay of two years to render the decision, although signed, demonstrates a lack of independence and impartiality when making the decision.
 30. The burden of proof lies on the petitioner to prove the pleaded facts, show lack of impartiality, presence of bias, and lack of consideration of his evidence. In *Timotheo Makenge vs Manunga Ngochi* (1979) eKLR, the court said a Minister's appeal could be quashed if made in excess of jurisdiction if it had an error of law or breached the rule of natural justice or had been procured by fraud, collusion, or perjury. The court said that the Minister is not duty bound to follow the procedure laid out for the hearing of civil suits for his work is to determine the appeal and make such order as he thinks just. It said that the minister was the final arbiter to the extent of ascertaining interests and rights in trust land, after a complete and thorough inquiry. It said further that this jurisdiction allowed him to go either right or wrong.
 31. The proceedings herein show that the petitioner was accorded a right to present his defense, call witnesses, and present documents in support.
 32. The contest between the parties to the appeal was whether the 3rd respondent was justified in occupying the suit land. The appellant's evidence was that the land had been sold to him by the petitioner's father in 1984-1985, as per an agreement displayed before the Minister said to have been written and signed by the petitioner on behalf of his father through a lawyer. The petitioner was given a chance to controvert that testimony by way of cross-examination.



33. The findings and the verdict of the minister are clear that the 2nd respondent was guided by the party's evidence, facts, and the law.
34. Evidence of a real likelihood of bias and partiality has not been availed before this court. It is not enough to allege without proof. See Metropolitan Properties Co. FGC Ltd vs. Lannon & others (1969) 1 QB 577, AG vs Anyang Nyongo and others (2008) 3 KLR, Hon. Kalpana Rawal vs JSC & another Supreme Court Civil Application No. 11 of 2016. The Office Bearers of Mtogwe Beach Management unit and others vs Kenya Ports Authority & 2 others (Judicial Review Misc Application E005 of 2021) (2022) KEHC 11600 (KLR) Constitutional and Judicial Review (28th July 2022) (Ruling).
35. The upshot is that I find the petition lacking merits. It is dismissed with no order costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 22ND DAY OF MAY, 2024

In presence of

C.A Kananu

Mr. Arithi for Kaumbi for the petitioner

Miss Mbaikyatta for 1st & 2nd respondent

Gacheru for the 3rd respondent

HON. C K NZILI

JUDGE

