



**Tiampati v Attorney General; Kimathi (Interested Party) (Environment & Land
Petition E001 of 2021) [2024] KEELC 3890 (KLR) (20 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3890 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND PETITION E001 OF 2021
MN GICHERU, J
MAY 20, 2024
IN THE MATTER OF ARTICLE 19, 22, 23, 40, 47, 50 AND 64 OF THE
CONSTITUTION OF KENYA
IN THE MATTER OF CONTRAVENTION OF RIGHT TO PROPERTY
IN THE MATTER OF SECTION 26, 79 AND 80 OF THE LAND REGISTRATION ACT**

BETWEEN

SAMUEL LERIONKA TIAMPATI APPLICANT

AND

THE HONOURABLE ATTORNEY GENERAL RESPONDENT

AND

JOHNSON KIMATHI INTERESTED PARTY

RULING

1. This ruling is on the notice of motion dated 9/2/2022. The motion which is by the petitioner is brought under rules 19, 23 and 24(1) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules 2013](#) and seeks the following order.
 4. That pending the hearing and determination of this suit, a conservatory order do issue, restraining the 1st respondent from making any new entry in the register of all that parcel of land known as Kajiado-Kipeto/2044, suit land.
2. The motion is based on 15 grounds, a supporting affidavit dated 9/2/2022 which has 5 annexures. The gist of the above material is as follows.



Firstly, the petitioner is the registered owner of the suit land since 27/6/2011 having bought the same from George Ngure Kariuki.

Secondly, since purchase of the suit land the petitioner has enjoyed quiet possession of the same and he rears sheep thereon.

Thirdly, around 29/1/2022 the petitioner learnt that some agents of the interested party entered the suit land to survey and subdivided it.

Fourthly, a search at the second respondent's office revealed shocking irregularities which took place whereby the green card had been altered to read that the interested party was the registered owner of the suit land.

Fifthly, the 1st respondent did not offer a written explanation on how the irregularity occurred prompting the applicant to report the matter to the DCI headquarters along Kiambu Road.

Finally it is the above circumstances that made the filing of this suit necessary as the 1st respondent has no power under the law to cancel the petitioner's title and his actions amount to expropriation of the petitioner's property without compensation and due process. This is why the petitioner seeks the above order.

3. The motion is opposed by the respondents and the Hon. Attorney General has filed five grounds of opposition dated 5/4/2023 which are as follows.

Firstly, the petition has failed to establish the particular provision of the statutes that the 1st respondent violated.

Secondly, apart from citing various Articles of the Constitution, the petitioner has not adduced evidence on how the said provisions were violated.

Thirdly, the petitioner has not proved that he conducted proper and due diligence on the suit land and it would be unfair to allow the order sought when that burden of proof is not discharged.

Finally there is no evidence to support the claim as a whole and the entire petition ought to be dismissed with costs.

4. The interested party has filed an affidavit which is undated but it was filed on 22/2/2022. He replies as follows.

Firstly, he is the registered proprietor of the suit land since 10/8/2021.

Secondly, he purchased the suit land from one Paul Mutemi for Kshs. 5 million.

Thirdly, prior to purchasing the land, he did due diligence and confirmed that the said Paul Mutemi was the registered owner thereof.

Finally, he is an innocent purchaser for value without notice of any fraud whatsoever that may have been perpetrated by others before him.

5. Counsel for the parties were to file written submissions by 31/3/2024 but even by 30/4/2024, no such submissions had been filed. I have written this ruling without the benefit of such submissions.

6. I have carefully considered the motion in its entirety including the affidavits, grounds in support and in opposition as well as the annexures. I find that two issues arise in the petition and in the motion.

- i. Whether the motion as presented makes out a prima facie case with a probability of success.
- ii. Whether a petition is the proper method through which to commence a suit such as this.



7. On the first issue, I find that the applicant has not made out a prima facie case with a probability of success. In his own affidavit, he admits that according to the register of the suit land, it is not him but someone else who is the registered owner. The copy of the register that the petitioner has annexed as SLT – 4 has entries 4 and 5 cancelled and the word “FRAUD” endorsed against them.

Secondly, the petitioner has not annexed even a single picture to show his occupation of the suit land. It is not therefore possible to evaluate whether the applicant will suffer substantial loss that cannot be adequately compensated by an award of damages. It was upon the applicant to establish these two ingredients and he has failed to do so. I therefore need not consider the third ingredients of balance of convenience as per the case of *Giella v Cassman Brown*.

8. Regarding the second issue, I find that this suit should not have been commenced by way of a petition. The suit involves allegations of fraud against the petitioner by the respondents and third party and vice versa. These allegations of fraud are best resolved in a suit commenced by way of a plaint where the parties will file evidence and prove their cases through *viva voce* evidence which will be subjected to intense cross examination to test its credibility and veracity.

In the case of *Hon. Uhuru Muigai v Nairobi Star Publications Limited* Petitioner No 187 of 2012 (2013) eKLR it was held that:-

It is important to recognize that even if a case does raise a constitutional matter, the assessment of whether a case should be heard by this court (Constitutional) rests instead on the additional requirement that access to this court must be in the interest of justice and not every matter will raise a constitutional issue worthy of attention”.

I find that had this suit been commenced vide a plaint, the issues in dispute would have been defined more precisely by elaborate pleadings giving particulars of fraud, witness statements and documents including photographs of structures and livestock on the land.

For the above stated reasons, I dismiss the notice of motion dated 9/2/2022. I also strike out the petition for the same reasons. On costs, I find that each party should bear its own because the petitioner may still bring this claim in another form.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 20TH DAY OF MAY 2024.

M.N. GICHERU

JUDGE

