



REPUBLIC OF KENYA



**Koboo & 3 others v Suan Holdings Ltd & 5 others (Environment & Land
Petition 8 of 2020) [2024] KEELC 4072 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4072 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND PETITION 8 OF 2020

CK NZILI, J

MAY 15, 2024

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLES 22, 23 AND 258 OF THE CONSTITUTION OF
KENYA (2010)**

AND

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLE 27, 40
AND 64 OF THE CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF THE PROTECTION OF FUNDAMENTAL RIGHTS
TO PROPERTY KNOWN AS TITLE NO. NTIMA/IGOKI/1149**

BETWEEN

ALI ABDURAHAMAN KOBOO 1ST PETITIONER
SULTAN ABDURAHMAN 2ND PETITIONER
YASSIN ABDURAHMAN 3RD PETITIONER
MOHAMED ABDURAHMAN 4TH PETITIONER

AND

SUAN HOLDINGS LTD 1ST RESPONDENT
AUTOMATIC KENYA LTD 2ND RESPONDENT
LAND REGISTRAR MERU COUNTY 3RD RESPONDENT
CHIEF LAND REGISTRAR 4TH RESPONDENT
THE DIRECTOR OF SURVEYS 5TH RESPONDENT



JUDGMENT

1. By a petition amended on 27.3.2023, the petitioners, as the legal and or rightful owners of L.R No. Ntima/Igoki/1149 sued the respondents for infringement of their constitutional right to protection of private property.
2. The complaint is that the 1st & 2nd respondents, unprocedurally, illegally, and through a corrupt scheme, became registered as proprietors of title No. Meru/Municipality Block II/270, thereby illegally converting and trespassing into the suit property.
3. The petitioners averred that the 1st & 2nd respondents colluded and connived with the 3rd & 4th respondents to deprive them of their property by purporting to amalgamate or swallow L.R No. Ntima/Igoki/1149 as if it was part of or the whole of title L.R No. Meru Municipality/Block II/270, hence extinguishing it by unprocedurally preparing two different survey maps and or registry index map(s) contrary to Articles 1, 2, 3, 10, 23, 27, 40 & 64 of the Constitution.
4. The petitioners prayed for a declaration that they have a legitimate claim to L.R Ntima/Igoki/1149, protected under the Constitution; mandatory injunction compelling the respondents to re-survey, beacon, and demarcate the land to maintain its original size and as distinct from title No. Meru Municipality/Block/II/270 in the alternative, a mandatory injunction compelling the 3rd, 4th & 5th respondents to rectify the land register and registry index map or survey plans for the two parcels of land and maintain L.R No. Ntima/Igoki/1149, on to original size and locality; conservatory order stopping the respondents from charging, encroaching, trespassing, transferring, subdividing, developing, constructing, or in any way dealing with the suit land and compensation for trespass and encroachment. The amended petition was accompanied by a supporting affidavit sworn by Yassin Abdulrahman on 11.1.2020 and a list of documents dated 23.11.2022.
5. Briefly, the petitioners averred that he was a son and administrator of the estate of Abdulrahman Bin Abdalla, the registered owner of L.R Ntima/Igoki/1149 measuring 0.202 ha, which his late father never sold to anybody or transferred to either the county or national government. The petitioners averred that by L.R No. 1263 of 13.5.1977, the government notified the general public of its intention to acquire some land in Meru, but the suit land was not among the identified parcels of land.
6. The petitioner averred that the 3rd & 4th respondents colluded with the 1st respondent to create title L.R No. Meru Municipality Block II/270 as if it had swallowed and or extinguished by L.R No. Igoki/Ntima/1149. He averred that he only discovered the fraud or illegality in 2019, after a surveyor was denied entry thereon by the 1st & 2nd respondents going by a survey report and the registration index map showing that a second title Block/II/270 covering his land, hence illegally and irregularly dispossessing or depriving him of his land contrary to Articles 40 & 64 of the Constitution.
7. The 3rd – 6th respondents opposed the petition through the replying affidavits worn by G.M Njoroge and Mwit Njue on 22.11.2022 and 26.9.2023, respectively. The 3rd – 6th respondents averred that contrary to the petitioner's assertion, title L.R No. Meru Municipality (Block II/270 was created by amalgamation no such amalgamation was registered. The 3rd – 6th respondent averred that the white card (land register) for the suit land was opened on 3.1.1991, upon registration of title L.R No. Ntima/Igoki/1149, which is a separate and distinct parcel measuring 0.202 ha and registered in the names of



- the beneficiaries as per a confirmed grant filed by the petitioner annexed as G.M.N. 1, a certified copy of the green card.
8. The 3rd – 6th respondents averred that title L.R No. Meru Municipality Block II/270 was equally a distinct parcel of land measuring 0.5182 ha, owned by the 1st respondent as per a certified copy of green card attached as annexure G.M.N "2".
 9. The 3rd – 6th respondents, therefore, termed the assertions by the petitioner as inaccurate. The 1st respondent opposed the petition vide a replying affidavit dated 9.3.2021 sworn by Susan Kanyua Gitonga. The 1st respondent averred it was the owner of Meru Municipality Block II/270, a leasehold measuring approximately 0.5182 ha with effect from 20.5.2013 as per a copy of a white card marked S.H. "1", which it purchased for value from the estate of Cecilia Mwendwa Ntara going by a sale agreement dated 24.4.2013, attached as annexure S.H."2". Further, the 1st respondent averred that before purchasing the land, it undertook due diligence and confirmed the ownership status of the land in the official record, its size, and its location on the ground.
 10. The 1st respondent averred that the suit land was, at the time of the purchase, being used by the beneficiaries of the estate, and he eventually took vacant possession immediately after the purchase. It was averred that the suit property had also been charged with Barclays Bank of (K) Ltd and that part of the purchase price went into clearing the outstanding loan with the said bank, before the property was discharged and transferred to it.
 11. The 1st respondent averred that there was nothing both in the record and on the ground to show or suggest that the petitioner had any claim on the said property; hence, it was a bonafide purchaser for value without notice of such a claim, if any. The 1st respondent also averred that from the white card, it was clear that the said property was registered as a leasehold in favor of the 2nd respondent as early as 3.1.1991 and that if the petitioner had any legitimate claim, he would have raised the claim then or so soon after that but not after 30 years.
 12. Similarly, the 1st respondent averred that it was not a party to the surveying and registration of Meru Municipality Block II/270 in 1991, long before it purchased the land; hence, the alleged breach of the petition's constitutional right was untenable and that the petitioner has no right of ingress or egress on that property. The 2nd respondent did not oppose the petition.
 13. Following directions, parties opted to canvass the petition by way of viva voce evidence based on affidavits already filed. At the trial, Yassin Abdulrahman testified as PW 1 and adopted his supporting affidavits to the amended petition dated 11.6.2020 and as his evidence in chief and produced a grant for letters of administration dated 16.12.2012 as P. Exh No. (1), copy of the title for L.R Ntima/Igoki/1149 and its green card as P. Exh No. (2) & (3) Gazette Notice No. 1263 of 13.5.1997 as P. Exh No. (4), official search as P. Exh No. (5), land rates demand dated 15.11.2012 as P. Exh No. (6) and (7) an official search dated 31.10.2022 as P. Exh No. (8) white card for Meru Municipality Block II/270 as P. Exh No. (9), a registry index map as P. Exh No. (10), copy of land surveyors dated 30.9.2019 as P. Exh (12) and the map for the block as P. Exh No. (13).
 14. The petitioner said that he sued the 1st respondent for trespass to his land which information was relayed to him by a tenant and through the land surveyor report. In the response by the 1st respondent, the petitioner told the court that the 1st respondent seemed to have bought less land than what was on the white card and that no certificate of lease was attached to the white card.
 15. In cross-examination by the 1st respondent, PW 1 told the court that a motor garage currently occupied the suit land but did not know its owner, nor were the tenants or owners indicated in the land surveyor's report. The petitioner blamed the 1st respondent for collusion with the land registrar to acquire his



- land, which came under the name of his late father in 1970, unlike the late entries in favor of the 1st respondent in 2013. PW 1 denied the assertions by the 3rd – 6th respondents that the two plots were separate and distinct, given that on the ground, they were the same plot.
16. None of the respondents attended court or gave evidence in support of their replying affidavit; hence, the court marked their defense as closed and ordered the parties to put in written submissions by 1.3.2024.
 17. The 1st respondent filed written submissions in compliance with the directives of 1.2.2024, dated 28.2.2024, isolating three issues for determination. It was submitted that the petition was fatally defective and an abuse of the court process since the petitioners should have sought the statutory remedies through an ordinary suit. Reliance was placed on *Bus Services Ltd & others vs Attorney General & 2 others* (2005) eKLR, *Uhuru Muigai Kenyatta vs Nairobi Star Publication Ltd* (2013) eKLR.
 18. The 1st respondent submitted that the petitioner(s) was based on unverified, inaccurate, unsubstantiated allegations and did not disclose any reasonable cause of action against the respondents. It was submitted further that the petitioner failed to discharge the burden of proof under Sections 107 & 108 of the *Evidence Act*, that the 1st respondent's land covers his land more so given P. Exh No. 11 did not state that there was encroachment or overlap of L.R No. Ntima/Igoki/1149 and Meru Municipality Block II/270.
 19. The 1st respondent submitted that his replying affidavit remained unchallenged and that the petitioner(s) have never reported the alleged illegal acts of the respondents or shown proof of the creation of Meru Municipality Block II/270 from L.R No. Ntima/Igoki/1149 on any trespass thereof. In the absence of evidence from the land registrar or land survey, the 1st respondent submitted that the petitioner's evidence was misplaced. Reliance was placed on the *Chief Land Registrar and others vs Nathan Tirop Koech & others* (2018) eKLR.
 20. Additionally, the 1st respondent submitted that the petitioner was unable to demonstrate how his constitutional rights were denied, violated, and or infringed to warrant the reliefs sought. Reliance was placed on *Esther Kiutha M'Mbui vs Stephen Muriuki ARachi & others* (2022) eKLR.
 21. Instead of filing written submissions, the petitioner filed a notice of discontinuance and withdrawal of a suit under Order 25 Rules 1 & 2 of the Civil Procedure Rules dated 6.3.2024. There is no evidence that the same was served upon the respondents. Be that as it may, the procedure of withdrawing or discontinuing a petition is governed by Rule 27 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 (Mutunga Rules)).
 22. The reasons for the withdrawal must be stated. The court has the discretion to allow or decline the withdrawal or discontinuance as held in *Mui Coal Basin Local Community & 15 others vs Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR and *Harry John Paul Arigi and others vs Board of K.P.A & others* (2016) eKLR. From the record, the attempt to withdraw or discontinue the petition came after the deadline to file written submissions had passed. Unfortunately, the 1st respondent had already placed on record written submissions and raised critical questions on whether the petition met the constitutional threshold, if it ought to have gone through the ordinary manner of filing suits and whether the allegations therein had been substantiated.
 23. To my mind, the notice of withdrawal, though irregular, came too late and without disclosed reasons. The court declines to allow any withdrawal or discontinuation and proceeds to determine the petition on its merits. See *Erick Omeny vs. C.S Ministry of Industrialization Trade Enterprises Department* (2020) eKLR.



24. A constitutional petition has to meet the principles set in the Mutunga Rules and Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR principles by disclosing the party's constitutional rights and freedoms infringed, violated or threatened manner and nature of the infringement or threats or breach with specific evidence of breach, loss or damage, previous or pending suits over the matter and the reliefs sought.
25. A constitutional petition must also be pleaded with specificity and particularity so that the opposite party knows what is at issue and is due for trial. In this petition, my finding is that it has substantially complied and statutory procedural requirements under Rule 10 of the Mutunga Rules.
26. The next issue is whether it discloses a constitutional question or issue. In Esther Kiutha M'Mbui vs Stephen Muriuki Arachi & 2 others (2022) eKLR (supra), the court alluded to matters that can be resolved in the ordinary suit as falling outside the purview of a constitutional petition.
27. A constitutional question or issue is one calling for an answer from *the Constitution* but not a statute. In Feisal Hassan & others vs Public Service Board of Marsabit County & another (2016) eKLR, the court observed that filing of a constitutional petition on matters that did not raise pure constitutional issues and which matters properly belonged to other competent courts was inappropriate. See Hussein Khalid & others vs. A.G. & others (2019) eKLR. The petitioner(s) herein allege that the land was illegally, unprocedural and unlawfully amalgamated, surveyed, and registered in the name of the 1st respondent as if it was title No. Meru Municipality Block II/270. The evidence to substantiate such allegations in P. Exh No. 13, a survey report dated 30.9.2019. It was prepared by F.W Mwangi who described himself as an approved assistant. It has its inherent reservations that the maker was denied access to the land. He only estimated the measurements and attached a sketch map, which is not to scale. The maker was not called to produce it. It is not based on any land survey maps. A constitutional breach must be substantiated by credible, reliable, and tangible evidence to mark their allegations without more cannot suffice. See R.M vs A.G & others (2010) eKLR. It is not enough to say that the suit has not been defended. The burden is always on a petitioner to substantiate the allegations in the petition by way of evidence. The 3rd - 6th respondents have cast doubts on the allegations that there were amalgamations of the two plots. The copy of the records attached shows that the two plots are separate and distinct. See Jamlick Muchangi Miano vs AG & others (2017) eKLR.
28. There is evidence from the 3rd - 6th respondents that the title to the 1st respondent's land was registered in 1991. No evidence was tendered on when the petitioner(s) discovered the alleged unprocedural, fraudulent or illegal acts and, if so, what action he took soon thereafter. The 1st respondent has alleged there has been an inordinate delay of 30 years, which has not been explained. In Chief Land Registrar vs Nathan Tirop (supra), the court said that there were no time limitations in a constitutional petition, but there may be cases when the delay was inordinate and likely to become unreasonable.
29. In this petition, there were alternative avenues the petitioner(s) should have employed to redress their grievances under the *Land Registration Act* and the *Survey Act*. They did not subject themselves to those forums before filing the petition. The delay of 30 years is inordinate and not explained. Furthermore, there is insufficient evidence to counter the records and evidence produced by the 3rd - 6th respondents, that there was no amalgamation or superimposition of the petitioner's parcel of land with that of the 1st respondent. No beacon certificates were availed before the court. No land surveyors or land registrar's report in terms of Sections 14 - 21 of the *Land Registration Act* were availed to show any encroachment trespass or overlaps of the two parcels of land on the ground vis a vis the records held by the 3rd - 6th respondents.



30. The upshot is that I find that the petition is both incompetent, premature, and lacking merits. The same is dismissed with costs to the 1st respondent.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 15TH DAY OF MAY, 2024**

In presence of

C.A Kananu

Nelima for the petitioner

HON. C K NZILI

JUDGE

