



Mativa & 2 others v Registered Trustees, Catholic Diocese of Machakos & 6 others (Environment & Land Petition E005 of 2021) [2024] KEELC 4851 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION E005 OF 2021**

TW MURIGI, J

JUNE 13, 2024

BETWEEN

**DR BONIFACE MUTUNGA MATIVA 1ST PETITIONER
DR ABEDNEGO KIWIA MAVUTHU 2ND PETITIONER
MR PETER MAKOANI KINYANZUI 3RD PETITIONER**

AND

**THE REGISTERED TRUSTEES, CATHOLIC DIOCESE OF
MACHAKOS 1ST RESPONDENT
THE NATIONAL LAND COMMISSION OF KENYA 2ND RESPONDENT
THE NATIONAL EDUCATION BOARD 3RD RESPONDENT
MAKUENI COUNTY EDUCATION BOARD 4TH RESPONDENT
THE ATTORNEY GENERAL OF KENYA 5TH RESPONDENT
ITAAVA PRIMARY SCHOOL 6TH RESPONDENT
THE COUNTY LAND REGISTRAR MAKUENI 7TH RESPONDENT**

JUDGMENT

1. By an amended Petition dated 22nd June 2021, the Petitioners herein seek the following orders:-
 1. A Declaration that the occupation, claim of ownership, use and enjoyment of the one hectare of land parcel No. Nzau/Kikumini/595 or any part thereof belonging to Itaava Primary school by the Catholic Diocese of Machakos through its constituent church is a violation of Article 1, 2, 10, 27, 28, 53, 62 and 73 and should therefore be declared as null and void.



2. A Mandatory injunction do issue commanding the 1st Respondent to demolish and or remove all the constructed structures, houses and fences on Nzai/Kikumini/595 and to clear all debris therefrom failure to which the ownership, use and enjoyment of the same do revert to Itaava Primary School.
3. A Permanent injunction to issue restraining the 1st Respondent either by themselves, agents, employees, servants or whomsoever from trespassing, alienating, sub-dividing, beaoning, fencing, transferring, surveying and or in any way dealing with land parcel Nzai/Kikumini/595.

The Petitioners Case

2. The Petition is premised on the following grounds:-
 - a. That public land is vested in the National Government and cannot be alienated without following the due process of the law. That the alienation of public land belonging to Itaava Primary school for private use by the 1st Respondent is illegal and unconstitutional.
 - b. That the grabbing/alienation of public land belonging to Itaava Primary School has violated the right to education for the children of Itaava village since the school cannot accommodate any more pupil population. That the effect of grabbing land belonging to Itaava Primary School will affect the right to education for the current and future generation.
 - c. That with the introduction of free and compulsory primary education, Itaava Primary School cannot accommodate any more pupils due to lack of space to put up new classrooms.
 - d. That the classrooms are overcrowded and the pupil/teacher ratio is no longer observed due to lack of space.
 - e. That access to the school has been compromised by the erection of a perimeter wall around the grabbed land and pupils have to use a longer route to access the school.
 - f. That the playing grounds are overcrowded beyond expectation thereby impairing physical exercise which is part of the learning process.
 - g. That weak and children living with disabilities have been left unattended due to the increased pupil population.
3. On the basis of the above, the Petitioners contended that the children of Itaava Primary School will have to cover long and tiring distances to access education in the neighbouring schools while children living with disabilities will be forced to drop out from school. The Petitioners further contended that the 2nd -7th Respondents have grossly violated the national values and principles of governance by failing to protect the school land.
4. The Petition is also supported by the affidavit of Dr. Boniface Mutunga Mativa sworn on his own behalf and on behalf of his co-Petitioners. The Petitioners averred that as alumni of Itaava Primary School, they have undertaken several activities geared towards promoting the development of the school and the community at large. The deponent averred that they have encountered challenges in their bid to expand the School's infrastructure due to shortage of land which has been fraudulently alienated by the 1st Respondent in collusion with the former school management.



5. He further averred that Itaava Primary School was started in the year 1957 and that upon its formation, Makueni County Council set aside 3.8 hectares comprised in L.R. No. Nzaui/Kikumini/595 for the school which was duly registered as the proprietor thereof.
6. That in the 1970s, the 1st Respondent was granted permission by the School Committee to use some of its classrooms for its pastoral activities.
7. However, in the mid-1980s, the Ministry of Education prohibited the use of school facilities for any other purpose and as a consequence, the 1st Respondent was forced to worship under a tree within the school compound.
8. He went on to state that in the 1990s, the church established a semi-permanent church within the suit property and eventually constructed a permanent church in the year 2010.
9. That in an effort to legitimise their occupation and ownership over the suit property, the 1st Respondent in collusion with the 4th and 5th Respondents commenced the process of sub-dividing the school land under the watch of the other Respondents who are the custodians of public land.
10. He further averred that arising from the increased enrolment in Itaava Primary School, their expansion programme has experienced serious difficulties due to the unavailability of land. He further averred that the school management committee was planning to reduce the playing ground so as to accommodate more classrooms which will seriously affect the physical education of the children and lead to overcrowding.
11. He opined that unless something is done urgently, some of the pupils of Itaava Primary School will be forced to seek education in the neighbouring schools which will affect the quality of their learning as they will be forced to walk long distances while children living with disabilities will be forced to drop out from school.
12. According to the Petitioners, if the acts and omissions of the Respondents towards grabbing Itaava Primary School land are not nipped in the bud, the adverse effects will affect the current and future generation. He urged the court to allow the Petition as prayed.

The 1st Respondent's Response

13. The 1st Respondent opposed the Petition through the replying affidavit of Fr. Francis Kioko Ngunyo, the Diocesan Education Secretary, Catholic Diocese of Machakos sworn on 7th November 2023. He averred that there has been a consistent relationship between the Catholic Diocese of Machakos and Itaava schools since the year 1956.
14. That according to the House Journals of Catholic Mission Mbitini dated 1st July, 1955 - 10th May, 1968 recorded by the Holy Ghost Missionaries, the Church preceded the establishment of the 6th Respondent and Itaava Secondary School. He argued that there is a possibility that the church was involved in acquiring the land used in the establishment of Itaava schools.
15. He further averred that Itaava Primary School was founded in the year 1956 by the Catholic Church and was then referred to as Itaava HGM (Holy Ghost Mission) Primary School while St. Mary's Itaava Secondary School was hived from Itaava Primary School. He stated that both schools are sponsored by the Catholic Dioceses of Machakos.
16. He averred that it was common practice that whenever missionaries sponsored or initiated a school, they would build a church within the school land for pastoral care or evangelization by the local



community. He gave a historical background of how the Catholic Church was involved in establishing Itaava Primary school from the House Journals of the Catholic Missions.

17. That prior to the establishment of Itaava Primary School, a grass thatched church was used by the school as the nursery school. He went on to state that the Petitioners cannot claim that the church occupies one hectare of the total acreage of the suit property because there was no demarcation of the land occupied by church and the school during the demarcation period in the year 1976/1977.
18. According to the 1st Respondent, the Petitioners are motivated by private and political interest in filing this Petition.
19. The 1st Respondent argued that the Petitioners have no obligation to determine the extent of violation of the rights of the children of Itaava vis a vis the acreage of the school since they have not annexed an audit report on the school to show the population of the pupils and the infrastructure of the school as against the unoccupied land so as to assist the court to determine whether the space occupied by the church violates the rights of the children.
20. The deponent contended that the Petitioners have not adduced any evidence to show that weak and children living with disabilities have been left unattended due to the increased population in the school.
21. The deponent further contended that the mandatory order sought by the Petitioners is untenable as it seeks an unenforceable order. According to the 1st Respondent, the suit property has not been subdivided and as such the land occupied by the church is inseparable from the land occupied by the School. The deponent asserted that the 1st Respondent is not a trespasser on the suit property as its activities are inseparable from the activities of the 6th Respondent.
22. He argued that the 1st Respondent has made significant contribution towards the spiritual development of the school by organizing capacity building workshops targeting teachers, students and the administration.
23. In urging the court to dismiss the Petition, the 1st Respondent contended that the Petitioners have not set out the complaint with reasonable precision, the provision alleged to have been infringed and the manner it is alleged to have been infringed.

The 3rd - 7th Respondents Case

24. The Petition was opposed by the 3rd - 7th Respondents through the grounds of opposition dated 22nd July, 2022 on the following grounds:-
 1. That the Petition has failed the principle outlined in the case of Mumo Matemo Vs Trusted Society of Human Rights Alliance & 5 Others where the court held that a person who moves the court for judicial redress in public interest cases must act in bona fide and where a person acts for personal gain or political motivation the court should not allow to be seized at the instance of such a person.
 2. That the Petition has failed the test established under Article 22(2) of *the Constitution* since the Petitioners are acting for private interest as opposed to public interest. The particulars of private interest were listed as follows:-
 - a. That the 1st Petitioner contested for the Chair of the Board of Management of the 6th Respondent and won the position as against the proposed Chair by the 1st Respondent.



- b. That being aggrieved with the outcome of the elections, the 1st Respondent lodged a complaint with the 4th Respondent which decided that the 6th Respondent being a Catholic sponsored school should appoint the Chairperson of the Board of Management.
 - c. That aggrieved by the decision of the 4th Respondent, the 1st Petitioner appealed to the Education Appeals Tribunal which upheld the decision by the 4th Respondent.
 - d. That being aggrieved by the decision by the Tribunal, the 1st Petitioner appealed to the High Court which appeal is still pending.
 - e. That the Petitioner contested for the position of the Chair of the Board of Management on 10th August 2019 by which time the church was still subsisting.
 - f. That the 2nd Petitioner has been the Chair of the Board of St Mary's Itaava Secondary School from 2009 to 2019 and has always been aware of the existence of the church and never deemed it necessary to raise any Constitutional issue related to the church
 - g. That the 3rd Petitioner is a member of St Mary Itaava Secondary School and was aware of the existence of the church.
 - h. That the Petitioners schooled at the 6th Respondent school for their primary education and were aware of the place of the Catholic church to the school.
3. That the Petition has failed the principle established in the case of Anarita Karimi Njeru vs The Republic by failing to set out with reasonable degree of precision the act complained of, the provision said to be infringed and the manner in which they are alleged to be infringed.
 4. That the Petition is not specific on the land in question.

4th Respondent's Response

25. The 4th Respondent opposed the Petition through the replying affidavit of Gachungi J. Murithi, the County Director of Education Makueni County sworn on 6th April, 2022.
26. The deponent averred that the Petitioners were motivated by private and political interest in filing the Petition herein for the reason that the 1st Petitioner contested for the position of the Chair of the Board of Management of St Mary Itaava Secondary School held on 10/8/2019 and won against the 1st Respondent. That being aggrieved, the 1st Respondent lodged a complaint with the 4th Respondent which decided that the 1st Respondent should appoint the Chairperson of the Board of Management since the school is sponsored by the Catholic Church. That being aggrieved by the decision, the 1st Petitioner appealed to the Education Appeals Tribunal which upheld the decision of the 4th Respondent. That being aggrieved, the 1st Petitioner appealed against the decision in High Court Civil Appeal Case No. E027 of 2020 which is pending for hearing and determination.
27. He further averred that the 2nd Petitioner was the Chair of the Board of Management from 2009 to 2019 while the 3rd Petitioner was at one time a member of the Board of Itaava Secondary School. The deponent contended that the Petitioners schooled at Itaava Primary School and were aware of the existence of the church in the school.
28. He averred that the primary Certificate of Registration for Itaava Primary School was issued based on misrepresentation of facts for the reason that part 7(i) of the application for registration had been indicated as catholic but the same was erased to read CEB.



29. That vide an investigation report for Itaava Primary School held on 4th November, 2021, it was resolved that the certificate of registration for Itaava Primary School should be corrected to reflect the Catholic Church as the sponsor of the school instead of CEB. That in a meeting held on 5th November 2021, the County Education Board revoked the certificate of registration dated 13th February, 2019 and issued a new certificate of registration dated 8th November, 2021 which indicated the sponsor of the school as catholic.
30. He went on to state that vide a select Alumni/stakeholder meeting for Itaava Primary School held on 7th March 2017, the Secretary of the meeting the 1st Petitioner herein, signed the minutes and confirmed that the Catholic Church was the sponsor of the school.
31. The deponent relied on the provisions of Section 27 of the [Basic Education Act](#) to submit on the role of the 1st Respondent as the sponsor of Itaava Primary School.
32. He argued that the Petitioners have no obligation to determine the extent of violation of the rights of Itaava Primary School vis a vis the acreage of the school since they have not annexed an audit report of the school detailing the population of the pupils as against the unoccupied land so as to assist the court to determine whether the space occupied by the Church violates the rights of the children.
33. He further averred that the Petitioners have no obligation to claim that weak and children living with disabilities have been left unattended due to the increased population in the absence of any tangible evidence. He asserted that under Section 59(m) of the [Basic Education Act](#) the presence of the church within the school compound is reasonable as it serves the school and the community at large.
34. He denied the allegations that the school playing grounds were overcrowded, that the school land had been subdivided or that the 1st Respondent had assumed ownership over the suit property. According to the deponent, the fence purported to have been erected by the 1st Respondent was erected by the secondary school for security purposes.
35. Lastly, it was averred that the Church has been in existence on the suit property even before the school was established. The deponent asserted that the Petitioners have all along been aware of the existence of the church within the school and urged the court to dismiss the Petition.

The Petitioners Response

36. The Petitioners filed a supplementary affidavit on 27th September 2022 in response to the 1st Respondent's replying affidavit. The deponent contended that he has no private interest in the public land and that they are only seeking justice for the local community and other stakeholders. He further averred that they have no political ambitions as they are not seeking for any public office.
37. He admitted that he has a case with 1st and 4th Respondents pending before the High court but denied the allegations that the 3rd Petitioner sat in the board of St Mary Itaava Secondary School.
38. According to him, the relationship between the church and the school has been one of imposition rather than one based on merit, legality and consent of the community. He argued that there was no evidence to show that the church founded or initiated the construction of the school on public land.
39. He contended that the attempts by the Respondents to erase and alter the historical facts by changing the school's registration certificate is an illegality which they intend to stop in the present Petition. He denied the allegations that the church preceded the school and asserted that it was built in the 1980s. He went on to state that the church cannot validate its claim on the suit property as it has no title documents and that the principle of adverse possession is not applicable.



40. In response to the 3rd-7th Respondents grounds of opposition, the 1st Petitioner averred that he has never contested for the position of Chairman nor sat in the Board of Management of the 6th Respondent. The deponent argued that St Mary's Itaava Secondary School is a separate entity from Itaava Primary School and that it is not in issue in the proceedings herein. According to the deponent, the Respondents have not offered any explanation as to why the 1st Respondent should be allowed to convert public property for private use.
41. He asserted that the 2nd Petitioner has every right to participate in the management of St Mary's Itaava Secondary School since it was established through public initiative and not by the 1st Respondent.
42. He insisted that the 3rd Respondent has never been a member of the Board of St Mary's Itaava Secondary School.
43. The Petitioners filed a supplementary affidavit on 27th September 2022 in response to the 4th Respondent's replying affidavit. The deponent reiterated that they have no private interest in the suit property nor political interest as they are not seeking any public office.
44. The deponent argued that the investigative report conducted by the 1st and 4th Respondents was devoid of public participation as it excluded the local community and other stakeholders.
45. That following the filing of this case and the one before the Education Tribunal, the 4th Respondent irregularly altered the registration certificates of the two schools so as to support the 1st Respondent in their quest to legitimise their sponsorship of the schools and their illegal occupation of school land.
46. According to him, the 1st and 4th Respondents actively participated in the subdivision of the school land leading to a proposal to have the ownership shared between primary school, secondary school and the 1st Respondent.
47. According to the Petitioners, the [Basic Education Act](#) does not authorise the CEB to allocate and grant ownership of public land to churches. The Petitioners asserted that the 4th Respondent has no power to allocate public land to the 1st Respondent since the mandate is vested in the National Land Commission.
48. The parties were directed to canvass the Petition by way of written submissions.

The Petitioners' Submissions

49. The Petitioners' submissions were filed on 27th September, 2022.
50. On their behalf, Counsel gave a historical background of the establishment and management of public schools in Kenya with special reference to Itaava Primary School.
51. Counsel submitted that Itaava Primary School was established in the year 1957 to cater for the educational needs of Itaava community. That upon attainment of independence, the defunct Makueni County Council reserved and surveyed the suit property measuring 3.8 hectares in favour of Itaava Primary School.
52. Counsel raised a preliminary objection on the competence of the Attorney General to represent a private person. Vide its ruling delivered on 25th October 2023, the court held that the Attorney General has no capacity to represent a private person. The affidavit drawn and filed by the Attorney General on behalf of the 1st Respondent was declared null and void and expunged from the record.
53. Counsel identified the following issues for the court's determination:-



- a) Capacity Of The Petitioners To Institute This Petition Under Article 22(2) Of *The Constitution*
54. Counsel submitted that the 1st and 4th Respondents raised the competence of the instant Petition on the grounds that the Petitioners have not acted bona fide in accordance with the test set out in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others. Nairobi CA No. 290 of 2012
55. The basis of this argument is that the 1st Petitioner instituted High Court Civil Appeal No. E207 of 2020 which involves the issue of sponsorship of St. Marys Itaava Secondary School by the 1st Respondent. Counsel argued that St. Marys Itaava Secondary School has its own Board of Management and is distinct from Itaava Primary School. Counsel further submitted that the 1st and 4th Respondents did not enjoin St Marys Itaava Secondary School as a party to the proceedings and as such the court cannot make any finding touching on the school since it not a party to the proceedings. Counsel contended that the 1st and 4th Respondents did not discharge the burden of proof to demonstrate that the Petitioners are not acting bona fides.
56. Counsel asserted that the Petitioners have surpassed the criteria set out in the case of Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others(Supra).

Whether The Petition Has Been Set Out With Reasonable Degree Of Precision, The Complaint, The Provision Infringed And The Manner Of The Infringment

57. Counsel submitted that the main issue for determination is centred on the following issues:-
- i. Who is the owner of land parcel Nzau/Kikumini/595?
 - ii. What category of land is it under Chapter 5 of *the Constitution*?
 - iii. Is the 1st Respondent rightfully entitled to occupy, use and acquire ownership to all or any portion of land parcel Nzau/Kikumini/595?
 - iv. Is the complaint by the Petitioners justified?
58. Counsel submitted that the certificate of official search and certificate of registration clearly shows that the suit property exclusively belongs to Itaava Primary School. Counsel further submitted that the school's land falls under the category of public land and as such, it cannot be alienated without following the due process of the law. Counsel argued that any conversion of public school land to private land is unconstitutional, null and void.
59. Counsel submitted that the 1st Respondent is not justified to occupy or acquire title to the suit property even if it is the sponsor of St. Mary Itaava Secondary School.
60. Counsel argued that the letter dated 22nd June, 2021 addressed to the Land Registrar Makeni County clearly demonstrates the 1st and 4th Respondents intention to subdivide the land into three portions.
61. Counsel submitted that the Petitioners have met the threshold set out in the case of Anarita Karimi Njeru Vs Republic and Mumo Matemu Vs Trusted Society of Human Rights Alliance and Rule 10 of the Mutunga Rules as they have demonstrated with precision the nature of the complaint and the provisions of the law infringed.
62. Counsel submitted that the Respondents being trustees of public land have breached the trust bestowed upon them by *the Constitution* by failing to protect the school land. To buttress this point, Counsel relied on the letter dated 22/06/2021 and on the case of Murithi & 2 Others (for Mbari



ya Murathimi Clan) vs Attorney General & 5 Others (2006) 1KLR 443. Counsel argued that the threatened alienation of Itaava Primary School land by the Respondents is a clear affront to the National Values and Principles of Governance set out in *the Constitution*.

63. Counsel further submitted that the Respondents have abdicated the public trust bestowed upon them by failing to observe the doctrine of what is necessary in a democratic society.
64. Counsel submitted that the presence of the church in public school land does not justify the doctrine of what is necessary in a democratic society since the church is independent of the school and it is not part of the board of management.
65. Counsel contended that the presence of the church in the school is simply to advance its own doctrines and private interests as opposed to public good. Counsel argued that the society is multi religious and therefore religious pluralism should be encouraged.
66. To buttress this point Counsel relied on the following cases:-
 - i. Kenya Medical Supplies Agency (KEMSA) vs Mavji Kanyi Hirani & 8 Others (2008) eKLR.
 - ii. European court of human rights in the case of Folgero vs Norway (GC) 15472/02.
67. Counsel submitted that the 2nd - 7th Respondents have failed the leadership and integrity test outlined in Article 73 of *the Constitution* since they have failed to protect Itaava Primary School from the illegal invasion and alienation by the 1st Respondent.

The impact of grabbing public school land and its effect to right to education.

68. Counsel submitted that every child has a right to education. Counsel contended that the right to education is anchored in *the Constitution*, Statutes and International Conventions.
69. Counsel submitted that any threat to acquire public school land is a threat to the right to education and must be thwarted.
70. Counsel submitted that the Respondents communicated their intention to acquire land belonging to Itaava Primary School through the S.M.C meeting held on 25th October, 2013 where it was resolved that the land should be subdivided into three portions in favour of Itaava Primary School, the church and St. Mary Secondary School.
71. Counsel further submitted that the action of subdividing the school land would pose a threat to the right to education for the children of Itaava Primary School and that the cumulative effect would be on the availability and quality of education.
72. Counsel argued that these effects will have a great impact on the right to education and that the only remedy is to expand the school's infrastructure to meet the demand. In urging the court to allow the Petition, Counsel urged the court to take judicial notice that a child's best interest is paramount in every matter concerning a child. To buttress his submissions, Counsel relied on the authorities annexed to the Petitioners submissions.

The 1st Respondent's Submissions

73. The 1st Respondent's submissions were filed on 15th May 2024.
74. On its behalf, Counsel identified the following issues for the court's determination:-
 - a. Whether the Petition passes the test as outlined under Article 22(2) of *the Constitution*.



- b. Whether the occupation, claim of ownership, use and enjoyment of the one hectare of land parcel No. Nzai/Kikumini/595 or any part thereof belonging to Itaava primary School by the 1st Respondent through its constituent church is in violation of Articles 1, 2, 10, 27, 28, 53, 62 and 73 of *the Constitution* and whether the Petition fails the principle established in the case of Anarita Karimi Njeru versus The Republic (1976-1980) KLR 1272.
- c. Whether prayer No. 2 of the amended Petition is tenable owing to the fact that the Petitioners seek the court to command the 1st Respondent to demolish all structures, houses and fences on Nzai/Kikumini/595 and to clear all debris.

Counsel relied on the contents of the 1st Respondent's replying affidavit in support of his submissions. None of the authorities cited by Counsel were availed for the court's perusal.

The 3rd -7th Respondents Submissions

75. The 3rd - 7th Respondents submissions were filed on 25th November, 2022.
76. Learned State Counsel identified the following issues for the court's determination:-
 - i. Whether the Petition passes the test as outlined under Article 22(2) of *the Constitution*.
 - ii. Whether the occupation, claim of ownership, use and enjoyment of one hectare of land parcel No. Nzai/Kikumini/595 or any part thereof belonging to Itaava Primary School by the 1st Respondent through its constituent church is a violation of Articles 1, 2, 10, 27, 28, 53, 62 and 73 of *the Constitution* and whether the petition fails the principle of established in the case of Anarita Karimi Njeru versus the Republic KLR 1272.
 - iii. Whether prayer No. 2 of the amended petition is tenable owing to the fact that the petitioners seek the court to command the 1st respondent to demolish all constructed structures, houses and fences on Nzai/Kikumini/595 and to clear all debris.
 - iv. Whether a permanent injunction should be issued restraining the 1st Respondent from trespassing, alienating, subdividing, beaconing, fencing, transferring, surveying and or in any way dealing with land parcel No. Nzai/kikumini.595.
 - v. Whether there are any orders sought against the 2nd-7th Respondents.
77. Learned State Counsel reiterated the contents of the 4th Respondent's replying affidavit and the grounds of opposition in support of his submissions. None of the authorities cited by Counsel were availed for the court's perusal.

Analysis And Determination

78. Having considered the pleadings, the respective affidavits and the rival submission, the following issues arise for determination:
 - i. Whether the occupation of the suit property by the 1st Respondent violates the right to education for the children of Itaava village.
 - ii. Whether the Petitioners are entitled to the orders sought.



Whether The Occupation Of The Suit Property By The 1st Respondent Violates The Right To Education For The Children Of Itaava Village

79. The Petition herein is based on the claim that the 1st Respondent has grabbed public school land belonging to Itaava Primary School. The Petitioners contended that under *the Constitution*, public land vests in and is held by the National Government in trust for the people of Kenya and as such, it cannot be disposed or converted to private land except in accordance with the law.
80. The Petitioners are challenging the occupation of one hectare comprised in the suit property by the 1st Respondent's constituent church on the grounds that it violates the right to education for the children of Itaava village where Itaava Primary School is situated. The basis of this argument is that arising from the introduction of free and compulsory education, Itaava Primary School cannot accommodate any more pupils due to lack of space. The Petitioners contended that due to lack of space, the classrooms are overcrowded which in turn has affected the teacher /pupil ratio observance. In addition, the Petitioners contended that weak and children living with disabilities have been left unattended due to overcrowded classrooms.
81. That arising therefrom, some children from Itaava Primary School will forced to walk for long distances to neighbouring schools in quest for education while children living with disabilities will be forced to drop out from school. The Petitioners further contended that access to the school has been compromised due to the perimeter wall that has been erected around the grabbed land.
82. That as alumni of Itaava Primary School, they have encountered difficulties in their quest to expand the school infrastructure due to the unavailability of land. The Petitioners contended that the 1st Respondent is not justified in occupying the suit property.
83. It was submitted that any threat to acquire public school land is a threat to the right to education. The Petitioners argued that the presence of the church violates the right to education for children of Itaava village and Itaava Primary School children as the school has no space to expand its infrastructure.
84. On their part, the Respondents contended that the church has been in occupation of the suit property prior to the establishment of Itaava Primary School. It was their contention that the Petitioners have no obligation to determine the extent of violation of the rights of the children of Itaava Primary School vis-a-vis the acreage of the school. The basis of this argument is that the Petitioners they have not annexed an audit report to show the population and infrastructure of the school as against the unoccupied land so as to assist the court to determine whether the space occupied by the church violates the rights of the children.
85. It was their contention that the Petitioners were acting in private interest and out of political motivation. They further contended that the Petitioners as alumni of Itaava Primary School have all along been aware of the presence of the church within the school.
86. The right to education is enshrined in *the Constitution* of Kenya 2010. Article 53(b) of *the Constitution* provides as follows:-
- “ Every has a right to free and compulsory education.”
87. The Universal Declaration on Human Rights embraces education as a basic human right. Other key international instruments ratified by Kenya recognising and protecting the right to education include United Nations Convention on the Rights of the Child, Africa Charter on Human and People's Rights and the African Charter on the Rights and Welfare of the Child.



88. Section 7 of the Children’s Act provides for every child’s entitlement to education as follows:-
1. Every child shall be entitled to education the provision of which shall be the responsibility of the government and the parents.
 2. Every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of United Nations Convention on the Right of the Child.
89. The Basis Education Act governs basic education in Kenya. In its preamble, it states that it is an act of parliament to give effect to Article 53 of *the Constitution* and all other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes.
90. The Petitioners averred that Itaava Primary School is the registered proprietor of the suit property. In this regard the Petitioners produced a copy of the certificate of official in respect of the suit property.
91. According to the certificate of official search dated 31st January 2019, the suit property measuring 3.8 hectares is reserved for Itaava County School.
92. According to the Petitioners, Itaava Primary School was established in the year 1957 to cater for the educational needs for the people of Itaava village. The Petitioners contended that no evidence was adduced to show that the school was established by the catholic church. According to the Petitioners, the 4th Respondent irregularly altered the certificate of registration for both schools so as to support the 1st Respondent in their quest to legitimise sponsorship of the schools and in its illegal occupation of public land. The Petitioners argued that the changes were made secretly by the 1st and 4th Respondents without any public participation.
93. The 1st Respondent gave a historical background on the establishment of Itaava Primary School. According to the 1st Respondent, the school was established in the year 1956 by the Holy Ghost Fathers and was then known as Itaava Holy Ghost Mission Primary School.
94. On its part, the 4th Respondent contended that the church preceded the school. It was argued that the certificate of registration produced by the Petitioners was issued on the basis of misrepresentation of facts since in part 7 of the application, the name of the sponsor had been indicated as catholic but was erased to read CEB. That vide an investigative report held on 4/11/2021, it was resolved that the certificate should be corrected and consequently vide the County Education Board meeting held on 5/12/2021, the certificate of registration dated 13/2/2019 was revoked and a new certificate of registration was issued on 8/11/2021.
95. The Petitioners produced the certificate of registration dated 13/02/2019 in support of their case while the 4th Respondent produced the certificate of registration dated 8/11/2021.
96. It is not in dispute that the certificate of registration for Itaava Primary School dated 13/02/2019 was revoked and a new certificate issued indicating catholic as the sponsor of the school.
97. The Petitioners did not tender any evidence to show that the 4th Respondent altered the certificate of registration for Itaava Primary School. Similarly, no evidence was tendered to show that the Petitioners appealed against the decision. The Petitioners having failed to appeal against the 4th Respondent decision are estopped from disputing the legality of the certificate of registration issued on 18/11/2021.



98. It is not in dispute that the 1st Respondent constituent church is located within the suit property. According to the certificate of registration dated 8/11/2021, Itaava Primary School falls under the category of public schools and as such it is governed by the [Basic Education Act](#). The certificate of registration shows that Itaava Primary School is sponsored by the 1st Respondent. Section 27 of the [Basic Education Act](#) outlines the role of the sponsor as follows:-
1. To participate and make recommendations of review of syllabus, curriculum, books and other teaching aids;
 2. Representation in the School Management Committee and Board of Management;
 3. To provide supervisory services in matters regarding spiritual development in schools including the appointment of chaplains at their own expense;
 4. Maintenance of spiritual development while safeguarding the denominations or religious adherence of others;
 5. To offer financial and infrastructural support.
99. The Petitioners contended that the presence of the church in the school is meant to advance its own doctrines and private interest as opposed to public good. The Petitioners argued that it goes against democracy to have only one denomination in school.
100. The Respondents on the other hand submitted that the role of a sponsor is to provide spiritual guidance to the school while adhering to the denomination of others. To buttress this point, reliance was placed on Section 27(ii) of the [Basic Education Act](#) which allows the sponsor of the school to maintain spiritual development while safeguarding the denomination of others.
101. Under Section 59(m) of the [Basic Education Act](#), the Board of Management of a basic education institution can allow reasonable use of the facilities of the institution for community, social or other lawful purposes subject to such reasonable and equitable conditions as it may determine including the charging of fees. It is therefore not out of the ordinary for the 6th Respondent to allow the 1st Respondent's constituent church to occupy and use the suit property.
102. Although the Petitioners contended that the presence of the church in the suit property is geared towards advancing its doctrines and private interests, the Petitioners did not adduce any evidence to show that the 1st Respondent through its constituent church has induced, imposed and/or coerced the children of Itaava Primary School or Itaava village to subscribe to the catholic doctrines.
103. The Petitioners argued that the occupation of the church in the school premises was hindering the expansion of the school's infrastructure to the detriment of the right to education for children in Itaava village. According to the certificate of official search, the suit property measures 3.8 acres in size. As correctly submitted by the Respondents, the Petitioners did not produce an audit report to show the population and infrastructure of the school as against the unoccupied land so as to assist the court to determine whether the space occupied by the church violates the right of the children. Section 79(1)(c) and 2 of the [Basic Education Act](#) provides that the County Education Board shall establish a databank for all pupils and students and that the register shall be open to the public in normal working hours. As correctly submitted by the Respondents, the Petitioners did not avail any data to show the number of students in Itaava Primary School vis a vis the infrastructure that is available. In the absence of the audit report and data, the court is unable to determine whether the classes and playing are overcrowded or whether the teacher-pupil ratio is being observed.



104. The Petitioners contended that weak children and children living with disabilities are left unattended due to the increased population. No evidence was adduced in support of the said allegations.
105. From the evidence adduced by the partes herein, the 1st Respondent has always been in occupation of the suit property. It is not clear at what point the 1st Respondent's occupation of the suit property posed a challenge towards the expansion of the school's infrastructure or became a threat to the right to education for the children of Itaava village.
106. The Petitioners contended that their plans to expand the school's infrastructure were hindered due to the 1st Respondent's occupation of the suit property. They did not demonstrate with reasonable precision the plans that they had undertaken to expand the school's infrastructure or the difficulties that they had encountered in implementing the same. The Petitioners did not adduce any evidence to show how the presence of the church violates the right to education for the children of Itaava Primary School and Itaava village at large.
107. I find that the Petitioners have not demonstrated with reasonable precision how the 1st Respondent's occupation of the suit property has violated the right to education for children of Itaava Primary School and by extension Itaava village.

Whether The Petitioners Are Entitled To The Orders Sought

108. It is trite law that the Petitioners must specifically and precisely demonstrate evidence of the alleged Constitutional violations.
109. In the case of *Anarita Karimi Njeru v Republic* [1979] KLR 154 the court set out the substantive test to be applied when making a finding whether the alleged violation formed the basis of the Petitioners complaint as follows: -
- “We would, however, again stress that 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 his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
110. The Supreme Court in *Communications Commission for Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR aptly held as follows: -
- “Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic* [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”
111. In the instant Petition, the Petitioners alleged that the 1st Respondent in collusion with the 4th and 5th Respondents commenced the process of subdividing the land belonging to Itaava Primary School in order to have the 1st Respondent issued with a title deed. The Petitioners argued that Itaava Primary School land falls under the category of public land and can only be alienated in accordance with the law.



The Petitioners contended that the Respondents communicated their intention through the S.M.C meeting held on 25/10/2013. The Petitioners produced the letter dated 30/01/2019 which states as follows in part:-

“In the S.M.C meeting held on 25th October 2013, the committee resolved to surrender their land to St Mary’s Itaava Secondary and Catholic Church.....So we request your office to send a surveyor to subdivide the land for the three institutions.”

112. According to the Petitioners, the letter clearly demonstrates the 1st, 4th and 5th Respondents intention to subdivide the school’s land into three portions in favour of Itaava Primary School, Itaava Secondary School and the Church. They contended that any threat to acquire the school land is a threat to the right to education.
113. In this regard the Petitioners sought for a mandatory injunction against the 1st Respondent directing it to demolish or remove all the constructed structures, houses and fences on the suit property. The Petitioners also sought for a permanent injunction restraining the 1st Respondent from trespassing, alienating, subdividing or in any other way dealing with the suit property. On their part, the Respondents denied the allegations that they had subdivided the suit property and insisted that the land occupied by the church is inseparable from the land occupied by the school. The Respondents asserted the 1st Respondent being a sponsor of the school cannot be termed as a trespasser and that its activities cannot be separated from the activities of the school.
114. The Petitioners alleged that the 1st Respondent is claiming ownership over 1 hectare of the suit property. The allegations of subdivision and claim of ownership over the suit property can only be proved by way of evidence. A proper cross-examination of witnesses and forensic examination of the documents would commend itself for a fair determination of the dispute herein. A Constitutional Petition is not the best forum for testing such contentious evidence.
115. The record shows that no orders were sought against the 2-7 Respondents. Apart from stating that the 2nd -7th Respondents violated the provisions of Article 73 of *the Constitution*, the Petitioners did not demonstrate with reasonable precision the manner in which they violated the said provision. In the end, I find that the Petitioners have failed to prove any infringement or contravention of *the Constitution*.
116. The upshot of the foregoing is that the Petition herein is devoid of merit and the same is dismissed with no orders as to costs

.....

HON. T. MURIGI

JUDGE

JUDGMENT DELIVERED, DATED AND SIGNED VIA MICROSOFT TEAMS THIS 13TH DAY OF JUNE 2024.

In the presence of

Court assistant Kwemboi

Kalwa for the Petitioners

Ms. Kyalo holding brief for Munyasya for the 1st Respondent.

