



REPUBLIC OF KENYA



**Odiwuor & 2 others v Arunga & 3 others (Environment & Land Petition  
12 of 2021) [2024] KEELC 4494 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4494 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND PETITION 12 OF 2021**

**GMA ONGONDO, J**

**JUNE 5, 2024**

**BETWEEN**

**LILIAN ACHIENG ODIWUOR ..... 1<sup>ST</sup> PETITIONER**

**BEATRICE ATIENO OCHIENG ..... 2<sup>ND</sup> PETITIONER**

**ISAIAH AGWENGE ODERA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**ROBERT ARUNGA ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE KIDENDA ..... 2<sup>ND</sup> RESPONDENT**

**RACHUONYO DISTRICT ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. By a petition dated 18<sup>th</sup> September 2017 duly lodged herein on 19<sup>th</sup> September 2017, the petitioners through the firm of O.P Ngoge and Associates Advocates are seeking the orders thus;
  - a. A declaration that the Registrar of Lands and the then local chief subverted the alleged fundamental Human Rights of the Petitioners and the fundamental Human Rights of other local residents of Koderia Karabach who were (and still are) in active occupation of the parcels of land in contention, during the period of land adjudication, by arbitrarily by-passing them and registering Derrick Nyaoro Choto (an outsider and hereinafter referred to as Choto) as the first registered proprietor of the parcels of land known as (i) West Kasipul/Koderia Karabach/679 (ii) West Kasipul/Koderia Karabach/715 (iii) West Kasipul/Koderia Karabach/774 (iv) West Kasipul/Koderia Karabach/917 and (v) West Kasipul/Koderia-Karabach/765 (the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> suit parcels of land respectively herein).



- b. An order of certiorari to issue to bring to this Honourable court for the purposes of quashing the decision of the Registrar of Lands dated 10<sup>th</sup> may 1979 registering Choto as the first registered proprietor of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> suit parcels of land.
  - c. An order of certiorari to issue to bring to this Honourable court for the purposes of quashing the subsequent decisions of the Registrar of lands made pursuant to the grant of letters of Administration intestate issued by the High Court in Nairobi Succession Cause No HC 1096 of 1992 registering Beldina Were Nyaoro as the second registered proprietor of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> suit parcels of land.
  - d. An order of prohibition to issue to block and completely restrain the Registrar of lands from registering any of the beneficiaries of the estate of the late Choto and/or any of the beneficiaries of the estate of the late Beldina Were Nyaoro as the registered proprietor(s) of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> suit parcels of land.
  - e. Orders of mandamus be issued to compel the Registrar of lands to Register Mr. Isaac Maurice Kibuye Odede as the valid and bona-fide registered proprietor of the 5<sup>th</sup> suit parcel of land.
  - f. Orders of mandamus be issued to compel the Registrar of Lands to Register Beatrice Atieno Ochieng as the valid and bona-fide registered proprietor of the 2<sup>nd</sup> and 3<sup>rd</sup> suit parcels of land.
  - g. Orders of mandamus be issued to compel the Registrar of Lands to register Isaiah Agwenge Odera as the valid and bona-fide Registered proprietor of the 4<sup>th</sup> suit parcel of land.
  - h. General and exemplary damages.
  - i. Costs of the suit and interest thereon.
  - j. Any other or further orders which the Honourable court deems fit and just to grant in the circumstances of this petition.
2. The gravamen of the petition is that the petitioners were disinherited, discriminated against and bypassed during land adjudication process thereby, leading to the registration of Choto as the first registered proprietor of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> suit parcels of land.
  3. The 1st and 2nd respondents through Messrs Odondi Awino and Company Advocates opposed the petition by ten grounds of opposition dated 18<sup>th</sup> October 2018 namely;
    - a. No cause of action has been disclosed against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
    - b. The petition herein is unconstitutional, couched in unsavoury words calling the respondents “outsiders” meaning that they are foreigners, madowadowa, and that they should not dwell and/or live in Rachuonyo.
    - c. Accordingly, the “natives” have been incited against the family of the deceased and has made their lives miserable by refusing them to till and cultivate parcels of land that they had been cultivating since 1967 or thereabout merely because they are outsiders.
    - d. The Petitioner named herein were sellers of various parcels of land and the deceased named herein Choto was a buyer for value.
    - e. The 1<sup>st</sup> petitioner Isaac Maurice Kibuye Musa Odede recently and without any colour of right erected a home for his 2<sup>nd</sup> wife in one of the suit parcels of land.



- f. The allegations of fraud or secret dealings are baseless and goes against documented sale agreements signed by some of the Petitioners and/or their departed relatives.
  - g. The petitioners' rights have not been infringed as alleged or at all.
  - h. The registration of Choto as proprietor of the suit parcels was not arbitrary, fraudulent or secretive as alleged.
  - i. The entire suit is frivolous, vexatious and an abuse of the process of this honourable court.
4. Vide a further affidavit sworn on 13<sup>th</sup> November 2019, the 1<sup>st</sup> petitioner deponed that the suit parcels of land ceased to be trust land when Choto was illegally and fraudulently registered as the 1<sup>st</sup> registered owner thereof. That such registration was done based on illegal sale agreements. That prior to the registration, the suit parcels of land were trust land and therefore, not capable of being alienated.
  5. In her further affidavit sworn on 13<sup>th</sup> November 2019, the 2<sup>nd</sup> petitioner averred that the initial 1<sup>st</sup> petitioner, Isaac Maurice Kibuye Musa Odede, and five others, were forced by the Area Chief to sign illegal sale agreements purporting to transfer the suit parcels of land to Choto, without first obtaining spousal consent. That the petitioners are in occupation of the suit parcels of land.
  6. The 3<sup>rd</sup> petitioner's further affidavit sworn on 13<sup>th</sup> November 2019 emphasized that registration of Choto as the first proprietor of the suit parcels of land was done based on illegal sale agreements.
  7. The 3<sup>rd</sup> and 4<sup>th</sup> respondents did not file replying affidavits in opposition to this petition. They are represented by Learned Counsel, Mr. Felix Kajo.
  8. Initially, the petition was lodged at Homa Bay High Court before being transferred to Kisii Environment and Land Court on 19<sup>th</sup> December 2018. Further, on 12<sup>th</sup> June 2019, the petition was transferred to Migori Environment and Land Court. Furthermore, on 20<sup>th</sup> September 2021, the petition was transferred to this court upon its establishment, for hearing and determination.
  9. On 24<sup>th</sup> November 2021, parties were encouraged to embrace Alternative Dispute Resolution mechanisms in regard to the matter as provided for under Articles 60(1)(g) and 159 (2) (c) of *the Constitution* of Kenya. The petitioners' counsel informed the court that the alternative mechanisms failed to work herein.
  10. Hearing of the petition and application of even date was by way of written submissions pursuant to the court's directions given on 19<sup>th</sup> December 2019 and restated on 24<sup>th</sup> November 2021.
  11. The 1<sup>st</sup> Petitioner was joined to the petition in lieu of Isaac Maurice Kibuye Odede (deceased) by a ruling delivered herein on 18<sup>th</sup> October 2023.
  12. The petitioners' counsel filed submissions dated 15<sup>th</sup> November 2021 and identified four issues for determination inter alia; whether the sale agreements relating to the suit parcels of land and produced by the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein are valid, lawful and enforceable; whether the petitioners are entitled to the reliefs sought in this petition and whether one Tom Joseph Mboya had locus standi to institute Oyugis Misc. Civil Case No. 63 of 2018 against the petitioners. Briefly, counsel submitted inter alia, that at the time of institution of this petition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had not been issued with a certificate of confirmation of grant to the Estate of Beldina Were Nyaoro (deceased) who was the administratrix of the Estate of Choto.
  13. Also, counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' contention that Choto was a buyer for value was not supported by way of evidence. That the sale agreements which the 3<sup>rd</sup> respondent relied on to



- effect the registration were illegal. Reliance was placed on the case of Willy Kimtai Kitilit-vs-Michael Kibet (2018) eKLR and David Sirona Tukai-vs-Francis Arap Muge & 2 others (2014) eKLR, among others, to buttress the submissions.
14. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' counsel filed submissions dated 11<sup>th</sup> January 2022 on 20<sup>th</sup> January 2022 and relied on the principle of avoidance, stating that the petitioners failed to utilize other remedies which are available to them. That the instant suit involves breach of contractual provisions between buyers and sellers and no Constitutional dispute has been pleaded herein. That in any event, Choto was a purchaser for value in a transaction between a willing seller and buyer.
  15. Further, counsel was of the view that no consent was obtained from the Land Adjudication Officer prior to institution of this petition. Counsel cited various authorities, including the Supreme Court of Kenya decision in Communications Commission of Kenya & 5 others -vs- Royal Media Services Limited & 5 others [2014] eKLR, to fortify the submissions.
  16. The petitioners' counsel filed further submissions dated 31<sup>st</sup> January 2022 in reply to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' submissions dated 11<sup>th</sup> January 2022. The court takes the same into account in this petition.
  17. The 3<sup>rd</sup> and 4<sup>th</sup> respondents' counsel filed submissions dated 11<sup>th</sup> March 2024. The same are noted in entirety and oppose the petition.
  18. By further submissions dated 20<sup>th</sup> March 2024 in response to the 3<sup>rd</sup> and 4<sup>th</sup> respondents' written submissions dated 11<sup>th</sup> March 2024, learned counsel for the petitioners reiterated the contents of the further affidavit of the 3<sup>rd</sup> petitioner and stated there was no Notification of completion of Adjudication Register duly published in the official Kenya Gazette under section 26 of the *Land Adjudication Act*. That thus, the Chief Land Registrar lacked jurisdiction to act on adverse Adjudication Register. That an official publication is defined under Section 69 of the *Interpretation and General Provisions Act* Chapter 2 of the Laws of Kenya. That Sections 26, 29, 30 and 31 of the *Land Adjudication Act*, Chapter 284 of the Laws of Kenya are inconsistent with Articles 22, 23, 35, 40 (2) and 48 of *the Constitution* of Kenya, 2010 by ousting the original and appellate jurisdiction of this court to hear and determine all cases such as the instant one relating to ownership, use, occupation and title to any land and failing to make a clear provision for publication of the Legal Notices issued under Section 26 of the same Act.
  19. Counsel asserted that the petitioners have a valid legal right to have the adjudication registers by which Choto was unlawfully given 1<sup>st</sup> registration, invalidated. To fortify the submissions, counsel, relied on, inter alia, the Supreme Court of Kenya decision in the case of Dina Management Ltd-vs-The County Government of Mombasa & 5 others (2023) KLR that if the process that was followed prior to issuance of the title did not comply with the law, then such title could not be held indefeasible. That the prayers in the petition be allowed.
  20. In his oral highlights, Mr. P. Ngonge, learned counsel for the petitioners referred to the petition and the petitioners' further submissions dated 20<sup>th</sup> March 2024 in support of the petition. Counsel submitted in part that the petitioners were denied an opportunity to access the adjudication record, among other things.
  21. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' counsel, Mr. Ezra Awino, submitted by relying on the submissions dated 11<sup>th</sup> January 2022 in entirety. He submitted that the petition is time barred and no leave of the court was obtained before filing it.



22. The 3<sup>rd</sup> and 4<sup>th</sup> respondents' counsel, Mr. Felix Kajo, relied on their submissions dated 11<sup>th</sup> March 2024 and the replying affidavit sworn on 4<sup>th</sup> March 2024 by Hellen Kharemwa, the 3<sup>rd</sup> respondent. He did submit that adjudication was in favour of Choto. That the petition took long to be filed hence, it be dismissed with costs.
23. In the foregone, it is the duty of this court to determine whether the petitioners have proved their claim against the respondents to entitle them to the remedies sought in this petition.
24. It must be noted that this court has the mandate over the instant petition which revolves around the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> suit parcels of land and further to Article 162 (2) (b) of *the Constitution* of Kenya 2010 and Section 13 (3) of the *Environment and Land Court Act*, 2015 (2011); see also Republic-vs-Karisa Chengo & 2 others (2017) eKLR.
25. It is trite law that constitutional violations or infringements must be pleaded with a reasonable degree of precision; see Anarita Karimi Njeru -vs- The Republic (1976-1980) KLR 1272.
26. Moreover, in the case of Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR, the Court of Appeal stated;
- “...However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements...No particulars were enumerated...”
27. Notably, the instant petition was initiated under Articles 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 40, 43, 47, 48, 50, 159 and 258 of *the Constitution*. However, it provided little particulars as to the allegations and the manner of the alleged infringements. Thus, it is my considered view that this petition does not satisfy the particularity and precision threshold required of constitutional petitions as held in Mumo Matemu and Anarita Karimi Njeru cases (supra).
28. This court is cognizant of the provisions under Article 40(1) of Constitution which provides as follows:
- Protection of right to property
- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
- (b) in any part of Kenya.
29. Article 27 (5) of *the Constitution* prohibits discrimination against any person on various grounds, including ethnic or social origin.
30. It is established law that where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court. That is my considered view in the present petition; see Abraham Kaisha Kanziku -vs- Governor of Central Bank & others (2006) eKLR and Godfrey Paul Okutoyi & others -vs- Habil Olaka & Another (2018) eKLR.
31. Thus, the doctrine of constitutional avoidance precludes this court from entertaining the instant petition as observed in Communication Commission of Kenya case (supra). In Sports and Recreation Commission -vs- Sagittarius Wrestling Club and Anor. 2001 (2) ZLR 501 (S), Ebrahim JA stated thus:
- “...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative



provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights...”

32. The petitioners admitted that they failed to exhaust the remedies under Section 26 of the [Land Adjudication Act](#). That their failure was due to non-publication of a Notice for lodging objections in the Kenya Gazette.
33. Be that as it may, I note that the petitioners failed to obtain consent of the land Adjudication Officer prior to lodging this petition as stipulated under Section 30(1) of the [Land Adjudication Act](#), Chapter 284 Laws of Kenya. In the case of Bhaijee & another -vs- Nondi & another [2022] KECA 119 (KLR), the Court of Appeal stated that Section 30 of the [Land Adjudication Act](#) (supra) requires consent to be given before institution of civil proceedings concerning an interest in land in an adjudication section. Such consent is a condition precedent to a valid suit concerning disputes of land in an adjudication section. No doubt, Section 30 affects the power and jurisdiction of courts to hear and determine such disputes.
34. Regarding the petitioners’ assertion that one Tom Joseph Mboya lacks locus standi to institute and prosecute the suit in Oyugis Misc. Civil Case No. 63 of 2018, it is my considered view that the same is misplaced. That the proper forum upon which the issue ought to be ventilated is the Senior Principal Magistrate’s Court in Oyugis.
35. Curiously, in his submissions dated 15<sup>th</sup> November 2021, the petitioners’ counsel submitted that at the time of institution of the instant petition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had not been issued with a certificate of confirmation of grant to the Estate of Beldina Were Nyaoro (deceased) who was the administratrix of the Estate of Choto. So, is learned counsel admitting that the petitioners instituted a petition against persons who have no capacity to enter appearance and defend the petition?
36. Any suit against the estate of a deceased person is brought by or against the legal representative of the estate. Section 2 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya defines the term ‘legal representative’ as “a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.
37. The petitioners alleged that Choto acquired the suit parcels of land fraudulently. In Black’s Law Dictionary 10<sup>th</sup> Edition at page 775, the term “Fraud” means;

“A knowing misrepresentation or knowing concealment of material fact made to induce another to act to his or her detriment”
38. It is well settled that fraud and misrepresentation as grounds of impeaching a certificate of title, be distinctly pleaded and proved; see *Kuria Kiarie and 2 others-vs-Sammy Magera* (2018) eKLR.
39. A party can present documentary or oral evidence to establish allegations of fraud. It is not enough to infer fraud from the facts of the as noted in the case *Kinyanjui Kamau-vs-George Kamau* (2015) eKLR. Fraud was not distinctly pleaded on the face of this petition. There was no sufficient material availed to prove that there was fraud on the part of Choto and in the acquisition of the suit parcels of land as stated in *Kiarie and Kamau* cases (supra).
- 4.. The petitioners lamented that the initial 1<sup>st</sup> petitioner, Isaac Maurice Kibuye Musa Odede, and five others, were forced by the Area Chief to sign illegal sale agreements purporting to transfer the suit parcels of land to Choto, without first obtaining spousal consent. It is important to note that the [Matrimonial Property Act](#), 2013 which requires one to obtain spousal consent when alienating an



estate or interest in any matrimonial property, whether by way of sale, gift, lease, mortgage or otherwise, came into commencement on 16<sup>th</sup> January, 2014. The same does not apply retrospectively.

41. Besides, spousal rights over matrimonial property are no longer an overriding interest under Section 28 of the *Land Registration Act*, 2016 (2012). Further, no evidence of duress was availed herein in support of that assertion.
42. Moreover, I concur with the respondents' submissions that there has been unexplained inordinate delay in mounting this petition. Indeed, the cause of action herein arose in 1970s yet the instant petition was instituted in 2017. As noted in *Calvin Ouma Magare & 18 others v Director of Public Prosecutions & 4 others* [2022] eKLR, courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.
43. In *James Kanyiita Nderitu -vs- Attorney General & Another*, Nairobi Petition No. 180 of 2011, the court held that:

“... although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of *the constitution* is entitled to consider whether there has been inordinate delay in lodging the claim...”
44. In the present petition, no explanation has been given for the inordinate delay as noted in paragraph 42 hereinabove.
45. In the foregone, I am of the considered view that the present claim has not met the threshold of a constitutional petition. Therefore, the petitioners are not entitled to the remedies sought in the petition.
46. Afortiori, this petition lacks merit and it is hereby dismissed with no order as to costs.
47. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 5<sup>TH</sup> DAY OF JUNE, 2024.**

**G M A ONGONDO**

**JUDGE**

**Present**

1. Mr. O. P. Ngoge, Learned Counsel for the petitioners
2. Mr. E. O. Awino, Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents
3. Petitioners
4. Respondents
5. Mutiva and Obunga, Court Assistants

