



**Rotich v Masikonde & another (Environment & Land Petition
E003 of 2022) [2024] KEELC 4592 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4592 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND PETITION E003 OF 2022
CG MBOGO, J
JUNE 5, 2024
IN THE MATTER OF ARTICLES 1,2,3,10,19,27,28(3)
(B),29,40(1), (2) & (3), 47, 48,159 (1), (2) (A), (B) & (E),
165 (A), (B) & 258 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF CONTRAVENTION FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE
20,21,22,27,28,29(D) 31 (B),41 (1),(2) ANND (3),47 & 48
OF THE CONSTITUTION**

BETWEEN

ISAAC KIPCHUMBA ROTICH PETITIONER

AND

LETULAL OLE MASIKONDE 1ST RESPONDENT

NAROK COUNTY GOVERNMENT 2ND RESPONDENT

JUDGMENT

1. The petitioner herein filed a petition dated 4th March, 2022 seeking the following orders: -
 - a. An order of an injunction to issue restraining the defendants by themselves, their servants, agents and/or employees from plucking the plaintiff's tea, preventing the plaintiff from accessing his farm, re-surveying the land, formalizing its illegal re-survey, selling, alienating or in any other way interfering with the plaintiff's land measuring ten (10) acres or thereabouts comprised in all that parcel of land at Ilpolton and particularly described in letter of allotment



issued by the Commissioner of Lands dated 23rd October, 2000 as Unsurveyed Agricultural land-Transmara (ILPOLTON) Ref No 17640/111 measuring 40.2 Hectares or thereabouts.

- b. The plaintiff further prays that the 1st and 2nd defendants be compelled to formally excise ten (10) acres in favour of the plaintiff, approve all the processes and have title deed issued in favour of the plaintiff.
 - c. The plaintiff further claims against the defendants' full disclosure of the earnings since April, 2021 and pay the plaintiff in full.
 - d. Costs of this suit.
2. The gist of the petition is that at all material times, the petitioner is the owner of a tea farm at Ilpoton in Transmara measuring 10 acres excised in his favour by the 1st respondent through a written agreement entered into on 28th July, 2004. The petitioner stated that he took possession and he has invested heavily in tea planting and management on the farm. He contended that in mid-April, 2021, the 2nd respondent forcefully entered into his land and plucked his tea and delivered the produce in its own name denying the petitioner his livelihood and has further commenced illegal re-survey of the land.
 3. The petitioner further stated that he has learnt that the respondents have colluded to have the land sold to the 2nd respondent at an undisclosed purchase to his detriment, and to defeat his interest on the land. He stated that the acts or commissions by the respondents infringes on his rights to fair administrative action contemplated in Article 47 of the Constitution and the Fair Administrative Actions Act and the right to a participatory, transparent and accountable exercise of power as per the provisions of Articles 10 and 174 of the Constitution.
 4. The petitioner contended that his right to a quiet, peaceful and unrestricted use of his property has been violated contrary to the provisions of Article 27, 40 and 10 of the Constitution.
 5. The petition was supported by the affidavit of the petitioner sworn on even date. In his supporting affidavit, the petitioner deposed to the averments contained herein above and there is no need to rehash the same.
 6. The 2nd respondent filed a replying affidavit sworn on 4th July, 2023 by Hon. Mayiani Tuya. The 2nd respondent while denying the contents of the petition deposed that the provisions of the law cited are admitted save only to clarify that they do not apply to facts forming the petition. The 2nd respondent deposed that it harvested its own tea which was grown way back in the year 2003, long before the alleged acquisition of an interest by the petitioner. He further deposed that the allegations by the petitioner are false, and made with the intention of misleading this honourable court since it has never colluded with the 1st respondent to defraud anyone of their property.
 7. The 2nd respondent deposed that the alleged violations are denied, and that if there has been an illegal sale between the respondent, then the petitioner ought to produce evidence to that end. Further, it was deposed that the 2nd respondent has been managing the tea farm and the tea harvested was hard earned amidst high costs.
 8. This court directed that the petition be canvassed by way of written submissions. The petitioner did not file his written submissions. The 2nd respondent filed its written submissions dated 6th October, 2023 where it raised four issues for determination as listed below: -
 1. Who is the registered proprietor of the suit property?



2. Whether the 1st respondent had capacity to sell ten (10) acres of the suit property to the petitioner.
 3. Whether the petitioner is entitled to the reliefs sought.
 4. Who bears the costs of this petition?
9. On the first issue, the 2nd respondent submitted that if the petitioner is to be believed that the 1st respondent was allocated 100 acres in a letter of allotment as alleged, an allotment letter does not confer an interest in land, and it is barely nothing more than an offer where an allottee has the obligations to fulfil the conditions set therein within the prescribed timelines. The 2nd respondent relied on the case of *CMC Aviation Limited v Crusair Limited* (No.1) 1897 KLR 103.
10. The 2nd respondent further submitted that there was no certificate of lease in the name of the 1st respondent to prove to this court that indeed he had been allocated the 100 acres. Reliance was placed in the cases of *Stephen Mburu & 4 others v Comat Merchants Limited & another* [2012] eKLR, *Joseph Arap Ng'ok v Justice Moiyo Ole Keiwua* [1997] eKLR, *Lillian Waitthera Gachubi v David Shikuku Mzee* [2005] eKLR and *Philma Farm Produce & Supplies & 4 others v The Attorney General & 6 others* [2012] eKLR.
11. The 2nd respondent further submitted that if indeed the 1st respondent had been allocated unsurveyed agricultural land in the year 2000, it was imperative for him to enjoin the National Lands Commission as a party to the petition which he failed to do. The 2nd Respondent submitted that the registered proprietor of the suit property was the late H.E Daniel Toroitich Arap Moi and the lease was registered on 27th January, 1982. Reliance was placed in the case of *Willy Kipsongok Morogo v Albert K. Morogo* [2017] eKLR.
12. On the second issue, the 2nd respondent submitted that it was imperative for the petitioner to conduct due diligence to confirm whether the 1st respondent had capacity to sell the 10 acres, and who only seemed to rely on a purported letter of allotment issued to the 1st respondent, giving ownership to the said 1st respondent which was not produced in his pleadings before court. To buttress on this submission, the 2nd respondent relied on the case of *Antony Ted Andrew Hoareau v Mary Muthoni Wanjohi* [2018] eKLR.
13. On the third and fourth issues, the 2nd respondent submitted that there was no proof of ownership tendered either through a title document, and as such the prayers sought by the petitioner are incapable of being granted by this court. Further, the 2nd respondent went on to submit that the petitioner slept on his right and failed to undertake a simple search to authenticate that indeed the 1st respondent was the registered owner of parcel number Olenguruone/ Kiptagich/ Ilpolton/ 4 measuring 100 acres or thereabouts. The 2nd respondent submitted that the petitioner is not entitled to the orders sought and that the petition should be dismissed with costs.
14. I have considered the petition, the replying affidavit filed by the 2nd respondent as well as its written submissions. I am of the considered view that the issues for determination are as follows: -
- i. Whether the petitioner's rights over the suit property have been violated or infringed.
 - ii. Whether the instant petition raises a constitutional question for determination by this court.
 - iii. Whether the petitioner is entitled to the orders sought.



15. Article 40 of the Constitution of Kenya 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.
2. Parliament shall not enact a law that permits the State or any person—
 - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - i. requires prompt payment in full, of just compensation to the person; and
 - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.
4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
5. The State shall support, promote and protect the intellectual property rights of the people of Kenya.
6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

16. In dealing with the first issue, the petitioner contended that he is the owner of 10 acres of land within Ilpolton, Transmara where he has been engaged in tea planting. The petitioner laid claim over the said property on the strength of an agreement dated 28th July, 2004 between himself and the 1st respondent. I have perused the documents relied on by the petitioner which are contained in his application as opposed to the petition. The petitioner annexed a copy of an agreement dated 28th July, 2004 which I note had been entered pursuant to a desire to amicably settle the Civil Suit filed at the High court in Nakuru vide Civil Case No 164 of 2003 out of court. There is no evidence indicating ownership of the suit property by the 1st respondent in order to pass any interests or rights to the petitioner. Without any



title document, it is difficult to prove ownership of land and in this case, the petitioner cannot claim that his rights to property have been violated or infringed.

17. In addressing the second issue, the key is to determine whether the petition forces the court to consider the constitutional rights arising from the circumstances of the case. In this regard the court in the case of *Council of County Governors v Lake Basin Development Authority & 6 others* [2017] eKLR observed as follows:

“30. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & others v MEC for Education and Training, Eastern Cape & others*[35] in which Justice O’Regan recalling the constitutional court’s observations in *S v Boesak* [36] notes that:–“the *Constitution* provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the *Constitution* itself: If regard is had to the provisions of the *Constitution*, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the *Constitution*, as well as issues concerning the status, powers and functions of an organ of state....., the interpretation, application and upholding of the *Constitution* are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the bill of rights. If regard is had to this and to the wide scope and application of the bill of rights, and to the other detailed provisions of the *Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the constitutional court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”[37]31.Put simply, the following are examples of constituting constitutional issues; the constitutionality of provisions within an Act of parliament; the interpretation of legislation, and the application of legislation.[38] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights, values, principles and purposes. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organise an analysis of the nature of constitutional matters arising from the cases before the court.”

18. As I have understood the above cited authority, not all claims that cite constitutional provisions necessarily amount to constitutional claims. A look at the petition and the prayers sought revolve around issues which can be resolved through an ordinary suit. In view of that, it is my considered opinion that the issues as framed by the petitioner do not raise a constitutional issue or question. Instead, he is laying claim over ownership of a portion of land whose owner he has not established. The petition does not raise a constitutional claim for consideration by this court.

19. The court’s finding is that the petitioner has failed to discharge his burden of proof in support of his claim in the petition. The petition dated 4th March, 2022 lacks merit and the same is hereby dismissed. I make no orders as to costs. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 5TH DAY OF JUNE, 2024.

HON. MBOGO C.G.



JUDGE

05/06/2024.

In the presence of: -

Mr. Meyoki Pere – C. A

