



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiura v Attorney General & 2 others (Environment & Land Petition  
6 of 2021) [2024] KEELC 6202 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6202 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 6 OF 2021  
SM KIBUNJA, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**BETH WANJIKU KIURA ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, KWALE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Beth Wanjiku Kiura, the petitioner, moved the court through the petition dated 10th February 2021, and filed on 18<sup>th</sup> February 2021, against the three named respondents, invoking Articles 22(1), 27 (1), 40, 47, 48, 50, and 258 of *the Constitution* of Kenya, 2010 seeking for the following reliefs:
  - a. “A Declaratory Order do and hereby be issued that the Petitioner’s right to equality before the law and equal protection of the law as guaranteed under Article 27 (1) of *the Constitution* has been infringed as a result of the actions and omissions by the agents of the 2nd respondent.
  - b. A Declaratory Order do and hereby be issued that the Petitioners’ right to acquire and own property as guaranteed under Article 40 of *the Constitution* has been threatened, and or infringed as a result of the actions and omissions by the agents of the 2nd respondent.
  - c. A Declaratory Order do and hereby be issued that the Petitioners’ right to fair administrative action has been violated contrary to article 47 (1) of *the Constitution*.
  - d. A conservatory order restraining, prohibiting and restricting the Respondents and any other persons acting on their behalf from interfering with the Petitioner’s title and ownership and peaceful possession over Kwale/shimoni Village Squatter Scheme/87.



- e. An order of prohibition barring the 2nd respondents from committing acts and omissions that are prejudicial to the petitioner's interest in land parcel Kwale/shimoni Village Squatter Scheme/87.
- f. Orders do issue in appropriate terms, affirming in favour of the fundamental rights of the Petitioner.
- g. The cost of these proceedings be borne by the Respondents.”

The petition is premised on the fifteen (15) grounds/facts marked (13) to (28), and the alleged contraventions marked (29) to (36) on its face respectively. It is supported by the affidavit of Beth Wanjiku Kiura, petitioner, sworn and notarized on 12<sup>th</sup> February 2021. The petitioner inter alia deposed that she is the registered legal and beneficial owner of a parcel of land known as Kwale/shimoni Village Squatter Scheme/87, suit property, that she purchased from one Omar Makame Vuae; that through a letter dated 17<sup>th</sup> December 2020, the 2<sup>nd</sup> respondent summoned her to appear before its investigators on 21<sup>st</sup> December 2020, in respect investigation on allegations of irregular alienation of several parcels of land belonging to the State Department for Fisheries; that as she was then in Switzerland, and due to the Covid-19 travel restrictions, she instructed her advocates to respond to the letter and or represent her; that her advocates responded to the summons vide a letter dated 18<sup>th</sup> December 2020 indicating her willingness to cooperate in the investigations if given sufficient notice to enable her travel, but no response was received; that on 22<sup>nd</sup> January 2021, her staff notified her that the 2<sup>nd</sup> respondent, accompanied by police officers and government surveyors had forced their way into the suit property, and also trespassed onto the adjacent parcel Kwale/shimoni/634, which also belongs to the her, and taken measurements; that she contacted her advocates who contacted Mr. Mugwe, who had led the operations, and who claimed they had authority to do what they were doing; that the 2<sup>nd</sup> respondent's action was a continuation of events of one Mr. Kiogora, who was the head of the Fisheries Department in 2017, and who had started agitating against her acquisition of the suit property, but his efforts had failed; that her ownership of the suit land had previously been investigated by one Mr. Biwott, the area Deputy County Commissioner, who examined the parcel documents at the Kwale Land Registry, and confirmed the correctness of her title; that the 2<sup>nd</sup> respondent has continually harassed her and have threatened her quiet and peaceful enjoyment of the suit property; that the actions by the 2<sup>nd</sup> respondent are an affront to the petitioner's rights and entitlements under Articles 27(1), 40, 47, 48 and 50 of *the Constitution*, and the reliefs sought should be granted.

- 2. The Attorney General, and Land Registrar, Kwale, the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, opposed the petition through their statement of grounds of opposition dated 17<sup>th</sup> January 2023 inter alia on the grounds that the petition is misconceived, frivolous, vexatious and an abuse of the court process; that the petitioner has not tendered evidence to warrant the granting of any orders against the 1<sup>st</sup> and 3<sup>rd</sup> respondents; that the petitioner has not met the constitutional threshold in *Anarita Karimi Njeru v Republic (No.1) – (1979) KLR 154*, and prayed for the petition to be dismissed with costs.
- 3. Ethics and Anti-Corruption Commission, the 2<sup>nd</sup> respondent, opposed the petition through the grounds of opposition dated the 6<sup>th</sup> March 2023 and replying affidavit of one Paul Mugwe, forensic investigator, sworn on the 19<sup>th</sup> May 2023, inter alia deposing that the 2<sup>nd</sup> respondent is established under Article 79 of *the Constitution*, and section 3 of the *Ethics and Anti-Corruption Commission Act* No. 22 of 2011; that the 2<sup>nd</sup> respondent is vested with powers under section 11 (d) and (k) of the said Act to investigate the extent of liability for loss of or damage to any public property and or institute and conduct proceedings in court for purposes of recovery of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures; that the deponent was part of the team that went to



the suit property, to investigate allegations of irregular, illegal and fraudulent allocation of the suit property, that was alleged to be part of riparian reserve, and fish landing sites, in prime areas along the Indian Ocean, from the State Department for Fisheries, Aquaculture and Blue Economy; that upon investigation, the 2<sup>nd</sup> respondent established that the suit property measuring 0.0845 hectares, is near Shimoni Slave Cave, adjacent to the Shimoni Fisheries Office, and directly opposite Wasini dispensary; that on the the suit property is Wasini Guest House, also known as Betty's Camp, that comprises of parking lot, swimming pool, bar area, offices, hotel rooms, jetty, water tower, staff houses and other ancillary facilities belonging to the petitioner; that there is overwhelming evidence that part of the hotel, which stands on the suit property, is on riparian reserve; that though the petitioner had responded to their summons indicating she was ready to cooperate in the investigations, but could not travel then due to the Covid-19 pandemic, she is yet to communicate when she would be available for interview; that their investigations are at the preliminary stages, and had informed the petitioner of their visit to the two properties to identify their boundaries, and the said visit does not amount to trespass; that the petitioner has not specified the nature of the rights that the 2<sup>nd</sup> respondent had violated; that it is only after completion of the investigations that that the legality or otherwise of the petitioner's acquisition of the suit property will be determined and the orders sought against the 2<sup>nd</sup> respondent cannot be issued at this stage, as it would contravene Articles 249(2)(b), 252(1)(a) of *the Constitution* and section 11(1)(d) & (j) of the Ethics and Anti-Corruption Act; that the petition should be dismissed with costs.

4. That after hearing the learned counsel for the parties on 18<sup>th</sup> September 2023, the court gave directions on filing and exchanging submissions within the set timelines. The learned counsel for the petitioner and 2<sup>nd</sup> respondent filed theirs dated 24<sup>th</sup> January 2024 and 18<sup>th</sup> April 2024 respectively, which the court has considered.
5. The issues for the court's determinations in the petition are as follows:
  - a. Whether the petitioner's claim has met the constitutional threshold for any of the respondents to be held in breach;
  - b. Whether the acts of the 2<sup>nd</sup> respondent amounted to breach or infringement of the petitioner's constitutional rights and freedoms.
  - c. Who pays the costs?
6. After considering the grounds on the petition, affidavit evidence, grounds of opposition, submissions by the learned counsel, superior courts decisions cited thereon, the court has come to the following determinations:
  - a. The locus classicus case, when it comes to petitions, is the case of Anarita Karimi Njeru v Republic (No1)- [1979] KLR 154 where the court stated as follows:

“... 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.” (see also Meme v Republic & another [2004] 1 KLR 637)



The Court of Appeal in *Mumo Matemo v Trusted Society of Human Rights alliance* [2014] eKLR, stated that:

“...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

Furthermore, in the case of *Christian Juma Wabwire v Attorney General* [2019] eKLR, the court relied on the decision in Lt Col *Peter Ngari Kagume and 7 others v AG, Constitutional Application No 128 of 2006* where it was held that: -

“It is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the court is deal to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation... However, mere allegation of incarceration without providing evidence of the same does not at all assist the court. It was incumbent upon the Petitioners to provide evidence of long incarceration beyond the allowed period and not to be presumptuous that the court knows what happened.....”

The learned judge proceeded to hold as follows: -

“I am alive to the fact, that the petitioner in his petition alluded to various constitutional violations, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms. The petitioner herein ought to have produced documentary evidence such as medical reports and called witnesses to ensure court considers the same. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof. I find that the petitioner did not give evidence of probative value to enable this court decide the petition in his favour and grant the orders sought.”

- b. The case laws above require that, for a petitioner to succeed in a petition like the instant one, the alleged violation, breach or infringement of constitutional rights and freedoms must be particularized and proved. In this petition, the petitioner alleged that the 2<sup>nd</sup> respondent has been interfering with her peaceful enjoyment and quiet possession of the suit property. The 2<sup>nd</sup> respondent has admitted summoning the petitioner for interview, in pursuant to the investigations it is carrying out on irregular and illegal acquisition of public land. It has further agreed it had entered the suit property on 22<sup>nd</sup> January 2021 as part of their ongoing investigations, but the petitioner has been uncooperative despite initially promising to do so.
- c. Though the petitioner has alleged that the 2<sup>nd</sup> respondent has been harassing her, she has not given specific particulars on the nature of the harassment complained of. The fact that she



was summoned by 2<sup>nd</sup> Respondent for an interview in relation to her acquisition of the suit property does not perse amount to harassment or infringement of her constitutional rights and freedoms. It is not lost on the court that the 2<sup>nd</sup> respondent has the power to investigate allegations on acquisition of public property as accorded by section 13 of the *Ethics and Anti-Corruption Commission Act*. The orders sought by the petitioner are in the nature of preventing the 2<sup>nd</sup> respondent from carrying out its constitutional mandate, which endeavor the court cannot reasonably be expected to be party to. The petitioner's action of commencing this petition without waiting for the 2<sup>nd</sup> respondent to carry out its investigations to completion, had the effect of stalling the same. It was however a premature act, and the court find the petitioner's claim against the 2<sup>nd</sup> respondent to be without merit and is dismissed.

- d. The court has noted from the response of the petitioner to the summons issued in 2020, that she had indicated her preparedness to avail herself for an interview. The 2<sup>nd</sup> respondent has not availed any other subsequent summon addressed to her directly, or through her advocate in rebuttal to her claim, that no other summons has been received by her from the 2<sup>nd</sup> Respondent. In view of the fact that she was then living abroad, and evidently needed sufficient time and resources to organize herself to travel to the 2<sup>nd</sup> respondent's offices for an interview, it would be reasonable to believe that she was still willing to cooperate in the investigations and would be given sufficient notice when the 2<sup>nd</sup> respondent decide to summon her next time.
  - e. That throughout the petitioner's deposition, there is no specific allegation levelled against the 1<sup>st</sup> and 3<sup>rd</sup> respondents and the court is left wondering whether the two parties were really necessary parties in the petition. The petitioner's claim against the 1<sup>st</sup> and 3<sup>rd</sup> respondents is therefore dismissed.
  - f. That as costs follow the event unless otherwise ordered for good cause, like in public-spirited petitions, and noting that this petition was for personal, as opposed to public benefit, and as the petitioner has lost her claim entirely, the respondents are entitled to costs.
7. Flowing from the foregoing, the court finds and orders as follows:
- a. That the petition against the three respondents is hereby dismissed.
  - b. That the petitioner to pay the respondents' costs.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

**In the presence of:**

Petitioner: M/s Takah holding brief for Baraza

Respondents: M/a Abdulrahim for 2<sup>nd</sup> Respondent.

Court Assistant: Leakey

S. M. KIBUNJA, J.

ELC MOMBASA.

