



**Ndatho v Gitonga & 3 others (Environment and Land Constitutional Petition E002 of 2022) [2024] KEELC 6270 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6270 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E002 OF 2022  
CK YANO, J**

**SEPTEMBER 25, 2024**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE RIGHT TO OWN  
AND ENJOY PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLE 47 OF THE  
CONSTITUTION, FAIR ADMINISTRATIVE ACTION**

**AND**

**IN THE MATTER OF: SECTION 30 OF THE LAND  
ADJUDICATION CAP 284 OF THE LAWS OF KENYA.**

**BETWEEN**

**GEOFFREY MWIKAMBA NDATHO ..... PETITIONER**

**AND**

**JOSEPH GITONGA ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL NTHATU ..... 2<sup>ND</sup> RESPONDENT**

**DLASO THARAKA NITHI ..... 3<sup>RD</sup> RESPONDENT**

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

**JUDGMENT**

1. By a petition dated 16<sup>th</sup> December, 2022, the petitioner is seeking the following orders: -
  - a. That a declaration be issued that the decision of the 3<sup>rd</sup> respondents purportedly read and or dated 18<sup>th</sup> November 2021 be declared Null and void for want of compliance with Constitutional provisions in respect of the petitioners right to property, fair hearing and fair administrative action.



- b. An order dismissing the objection No. 221/2021 hitherto lodged with the 3<sup>rd</sup> respondent against the petitioner.
  - c. An order declaring Land Parcel No. 1811 rightfully belongs to the petitioner.
  - d. A permanent and mandatory order, requiring the 3<sup>rd</sup> respondent to reverse his decision and have parcel No.1811 revert back to the petitioner.
  - e. A permanent and mandatory injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from entering upon Land Parcel No.1811 respectively.
  - f. Any other relief that the court may deem just to grant.
  - g. Cost of this petition.
2. The 2<sup>nd</sup> respondent filed a replying Affidavit dated 23<sup>rd</sup> October 2023 on his own behalf and that of the 1<sup>st</sup> respondent in response to the petition.
  3. The 3<sup>rd</sup> and 4<sup>th</sup> respondents filed grounds of opposition dated 16<sup>th</sup> February 2023 and a replying affidavit dated 25<sup>th</sup> May 2023 sworn by Denis M. Mutua.

#### **The Petitioner's Case.**

4. The Petitioner avers that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are his relatives, paternal cousins. That the petitioner's father and the 1<sup>st</sup> and 2<sup>nd</sup> respondents' father owned large pieces of unsurveyed land at Gatue Division Kamaguna Sub-Location, Tharaka-North District, Tharaka -Nithi County measuring approximately 60 acres.
5. The petitioner states that with the coming of the demarcation and adjudication the large piece of land has now been demarcated and Sub divided into three, to wit; land parcel No. 1909 registered in the 1<sup>st</sup> respondent's name, land parcel No. 1810 registered under the 2<sup>nd</sup> respondent's name and land parcel No. 1811 registered in the name of the petitioner. The petitioner avers that the piece of land measuring 60 acres belonged to the petitioner's father one Ndatho Mirugi.
6. The petitioner avers that between 2015 and 2016, the 1<sup>st</sup> and 2<sup>nd</sup> respondents forcefully entered the two pieces of land No. 1809 and 1810 and occupied the same and the petitioner filed Marimanti ELC Court Case No. 17/2018 which matter is still pending in court. That before the completion of demarcation in 1989, the 1<sup>st</sup> and 2<sup>nd</sup> respondents father approached the petitioner's father and told him that due to pressure of school fees he wished to sell some portion to the petitioner's father to enable him pay school fees and both agreed and made an agreement.
7. The petitioner states that after buying the parcel which is now land parcel No.1811, the petitioner's father and family, including the petitioner took possession and constructed permanent houses and that is where the petitioner and his family called home for almost 50 years to date. That while the suit No.17 of 2018 is pending in court, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed an objection No.221/2021 with the 3<sup>rd</sup> respondent and was adjudicated upon.
8. The petitioner enumerated particulars of collusion on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents alleging that they failed to disclose that their occupation of land parcel No. 1811 was subject of a sale of a willing buyer and willing seller.
9. The petitioner contends that the manner in which the 3<sup>rd</sup> respondent conducted himself and the entire proceedings is unfair, unprocedural and injures greatly the Constitutional rights of the petitioner and his family. The petitioner seeks orders for the said decision to be declared null and void abinitio.



10. The petitioner enumerated particulars of alleged unconstitutionality as follows: that the 3<sup>rd</sup> respondent failed to recognize that there was a valid sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondents' father and the petitioner's father, that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents colluded in order to deceive and or make the petitioner think that the decision was made on 18<sup>th</sup> November 2021 when correspondence from the 3<sup>rd</sup> respondent's office showed contrary view and states, that the petitioner shall contend that he was not informed of the decision day and was played by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents until the decision was read in the petitioner's absence and without notice, that the 3<sup>rd</sup> respondent mischievously made the petitioner to believe that the 3<sup>rd</sup> respondent was yet to give a decision until the statutory limitation expired, particularly through letters dated 18<sup>th</sup> November 2021 addressed to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, that the 3<sup>rd</sup> respondents in essence purported to have read the decision on 18<sup>th</sup> November 2021 which is not true and this was intentionally meant to mislead the petitioner to his prejudice, that the 3<sup>rd</sup> respondent intentionally and mischievously wrote a letter to the petitioner's wife with a clear intention of misleading the petitioner about the objection when the petitioner's wife was not party to objection proceedings and that the 3<sup>rd</sup> respondent failed to grant an opportunity to the petitioner to bring or produce an agreement to prove existence of the agreement.
11. The petitioner contends that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' acts of commission or omission led to a distortion of facts and immensely prejudiced the petitioner because the statutory time given by the Law under the [Land Adjudication Act](#) Cap 284 had lapsed.
12. The petitioner further contends that subsequently the 3<sup>rd</sup> respondent's letter dated 4<sup>th</sup> August 2022 to the petitioner's wife was disguised as information to the petitioner when in actual sense it was meant for the petitioner. That the 3<sup>rd</sup> respondent took up a position of judge, prosecutor and executor for the 1<sup>st</sup> and 2<sup>nd</sup> respondents against the rules of natural justice in that the 3<sup>rd</sup> respondent heard the case, made a decision/verdict, purported to issue eviction orders and that on the same day when the decision is purported to have been read, is the same day that the 3<sup>rd</sup> respondent is purported to have written another contradicting letter warning the objectors (the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein) against trespassing into the petitioner's land parcel No. 1811.
13. The petitioner states that consequently he came to know vide a letter dated 4<sup>th</sup> August 2022 that the decision was read on 18<sup>th</sup> November 2021 which decision awarded land parcel No.1811 to the 1<sup>st</sup> respondent after statutory limitation had already passed. That the petitioner also learnt that land parcel No.1811 situated at Kamaguna/Adjudication section Tharaka North Sub County is now recorded in the name of the 1<sup>st</sup> respondent vide purported objection [No.221/2021](#).
14. The petitioner avers that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have now threatened to evict the petitioner and his family from land parcel No. 1811 a place they have called home for decades since time immemorial to the prejudice of the petitioner and his family.

### **1<sup>st</sup> And 2<sup>nd</sup> Respondents' Case**

15. The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied the petitioner's claim and put him to strict proof. The 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that when the adjudication process began, interest in the Land parcel number Kamaguna Adjudication section 1809 was registered in the name of Joseph Gitonga and land parcel number Kamaguna Adjudication section 1810 was registered in the name of Daniel Nthatu. That the petitioner also registered his interest on the said land parcel 1809 and 1810, but before the committee could hear the objection of those parcels the petitioner filed a suit No.17 of 2018 in which he sought ownership of the said properties. The 1<sup>st</sup> and 2<sup>nd</sup> respondent annexed a copy of the plaint and amended defence marked "DN1 a' &b".



16. The 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that the petitioner's claim that land parcel No.1811 was bought by the petitioner's father is unknown to them. That the petitioner's father, Ndatho Mirugi, was the uncle to the 2<sup>nd</sup> respondent's father, Mwenda Rangani and that the suit property had been gathered by the 2<sup>nd</sup> respondent's grandfather who left the said property to the 2<sup>nd</sup> respondent's father. That it was the petitioner's father, who came to the respondent's father and asked whether he could graze his cows on a small portion of the property which he was allowed to. That over the years, there were wrangles between the petitioner's father and the 1<sup>st</sup> respondent's father who later surrendered 56 acres of the property to the petitioner's father and his family. That however, the petitioner, not satisfied with the division, invaded the respondent's property which is Land parcel number 1809,1810 and 1811.
17. The 1<sup>st</sup> and 2<sup>nd</sup> respondents state that parcel No.1811 is not subject to the proceedings in ELC Case No.17 of 2018, and therefore it was subject to adjudication proceedings which objection was duly heard and determined. That the petitioner did form part of the proceedings. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have annexed a copy of the objection proceedings marked "DN2."
18. The 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that the petitioner had ample opportunity to appeal to the minister upon the delivery of the ruling issued on 18<sup>th</sup> November 2021 as per the proper procedure. That the court needs to be alive to the fact that no constitutional rights have been breached since the land adjudication officer followed procedure and the petitioner had been offered a right to appeal which he failed to do.
19. The 1<sup>st</sup> and 2<sup>nd</sup> respondents deny any collusion with the 3<sup>rd</sup> & 4<sup>th</sup> respondents to circumvent the wheels of justice as the petitioner did form part of the proceedings thus cannot claim otherwise when the ruling did not go his way.
20. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further aver that the petitioner cannot claim that information and facts were distorted when he had an advocate in conduct of his matter who would have advised him should he not have understood the proceedings or the ruling. That 1<sup>st</sup> and 2<sup>nd</sup> respondents denied that the petitioner was not aware of the ruling as he was present during the hearing and delivery of the ruling. That it is in bad faith that the petitioner wishes to mislead the court in such a way.
21. The 1<sup>st</sup> and 2<sup>nd</sup> respondents state that the Law is very clear and the petitioner ought to have exhausted the dispute resolution mechanisms provided for under the *Land Adjudication Act* before seeking the courts intervention. They asked the court to dismiss the petition with costs which to them lacks merits.

### **3<sup>rd</sup> And 4<sup>th</sup> Respondents' Case**

22. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents grounds of opposition dated 16<sup>th</sup> February 2023 are on the following grounds:-
  1. That the petition is fatally defective, misconceived, and mischievous or otherwise an abuse of the court process and therefore, are unsustainable in the obtaining circumstances.
  2. That the petition does not meet the threshold of a Constitutional petition as set out in the case of Anarita Karimi Njeru vs Republic [1979] eKLR as the Petitioner has not set out the specific provisions of *the Constitution* that have been infringed neither has he demonstrated the violation or threatened violation of his fundamental rights and the manner in which his rights have been violated by the Respondents.
  3. That the *Land Adjudication Act* provides for a clear procedure for raising objections against any dealings in land that is subject to adjudication and also provides for appeals to the minister in case one is dissatisfied by the determination of an objection.



4. That the issues raised and orders sought can only be determined and issued in an Application for Judicial review or an appeal.
  5. That further, it is an established principle of law that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order would be granted by Courts and the Plaintiffs [sic] herein have not established the existence of any exceptional circumstances.
  6. That the plaintiff's [sic] Application is bad in law only meant to defeat the cause of justice.
  7. That the petition is subjudice as the petitioner has admitted to having filed another suit in respect to the subject matter, the parties herein and involving a similar cause of action as in Marimanti CM ELC No. 17/2018 which is still pending before the Court.
  8. That the Petition is Otherwise frivolous vexatious and an abuse of the court process.
23. In his replying affidavit filed on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> respondents, Denis M. Mutua deponed that he is an employee of the Ministry of Lands under the [Land Adjudication Act](#) Cap 284 as the Land Adjudication/ Settlement Officer for Tharaka North and Tharaka South sub-counties. That he is responsible for implementing and overseeing the preparation of the adjudication register before the issuance of title deeds within Tharaka Nithi Adjudication Area.
  24. The deponent states that land parcel number 1811 Kamaguna Adjudication Section was initially demarcated and recorded in the name of the petitioner, but, upon the hearing and determination of objection number 221/2021, the land was awarded to the 1<sup>st</sup> Respondent herein. He further states that the Petitioner was present during the hearing of objection case no. 221/21 and recorded his statement accordingly. That all the decisions made by the Land Adjudication Officer were read to the concerned parties and their representatives at the Chief's Camp in Maragwa Location of Tharaka North sub county after prior notification to the parties involved of the venue, date and time of delivering the judgement.
  25. The deponent states that the decision in Objection case number 221/21 in respect to land parcel number 1811 Kamaguna Adjudication Section was made on 18<sup>th</sup> November 2021 and read out to all the parties and it was explained to the parties and their representatives that they had the right to appeal to the minister within sixty days from the date of making of the decision. That the decision was to the effect that land parcel number 1811 Kamaguna Adjudication Section was awarded to JOSEPH GITONGA MWENDA, the 1<sup>st</sup> Respondent herein. That from the records at the objection stage, the land adjudication officer in his finding stated that the petitioner did not produce any sale agreement to prove that the alleged sale actually took place.
  26. The deponent states that the Petitioner visited Tharaka Lands Office a few days after the decision of objection case 221/21 was delivered to the parties and obtained consent to institute a suit against parcel no. 1811 but failed to file the suit within the stipulated timelines stated in the consent, hence the allegation that he was not aware of the decision is false and baseless. That the objection cases against the adjudication records are currently complete with only appeals to the minister pending.
  27. The 3<sup>rd</sup> and 4<sup>th</sup> respondents contend that the adjudication process was well guided and conducted under the [Land Adjudication Act](#) Cap 284 of the laws of Kenya. That the office of the 3<sup>rd</sup> Respondent acted within its scope and mandate as provided under the [Land Adjudication Act](#). It is the contention of the 3<sup>rd</sup> and 4<sup>th</sup> respondents that the Petitioner has neither satisfied the conditions laid down by the law for the Court to exercise its discretion in his favors, nor has he proved the grounds relied upon in his prayers to warrant granting of the orders sought.



28. That the petition lacks merit and warrants dismissed with costs to the respondents.

### **Submissions**

29. The petition was canvassed by way of written submissions. The petitioner filed his submissions dated 17<sup>th</sup> May 2024 through the firm of Leonard K. Ondari & Co. Advocates while the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their submissions dated 19<sup>th</sup> July 2024 through the firm of Charles Kariuki & Kiome Associates Advocates and the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed their submissions dated 24<sup>th</sup> July 2024 through the office of the Honourable Attorney General.

### **Petitioner's Submissions**

30. The petitioner gave a brief background of the matter and referred the court to the date when the judgement is said to have been read (by the 3<sup>rd</sup> respondent) and the date of the letter dated 18.11.2021. That the date is the same, while the letters dated 18.10.2021 and 04.08.2021 are at variance. That the address of the letter dated 04.08.2021 is not a party to objection *No. 221/2021*.
31. The petitioner submitted that the petition meets the threshold of constitutional petitions as established in the cases of Anarita Karimi Njeru vs The Republic [1970]eKLR and Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013]eKLR. The principle established in those cases were that a constitutional petition should set out with a decree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed.
32. The petitioner made reference to the letters dated 18.11.2021 and 04.08.2022 from the 3<sup>rd</sup> respondent and submitted that there are pertinent questions arising from the two letters, if the judgement was read on 18<sup>th</sup> November 2021 which was supposed to be in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and why the letter did not state categorically so, why the two letters are categorically contradicting in content and if it is a coincidence that the letters are ironically dated the same day.
33. The petitioner submitted that he was subjected to an unfair administrative action and cited Article 47 of *the Constitution*.
34. It is the petitioner's submission that no written reasons were given to him as required by Article 47 [2] of *the constitution*. That further the letter purporting to communicate a decision of the 3<sup>rd</sup> respondent decision is dated 4<sup>th</sup> August 2022 and it was addressed to a person who was not a party to the objection before the 3<sup>rd</sup> respondent and it raises several issues such as why the letter is written to Muthoni Geoffrey Ndatho, why the letter is not addressed to Geoffrey Ndatho, the objector and what evidence has been provided to show that the objector, now the petitioner, who got the message that was destined to reach him.
35. The petitioner reiterated that he has materially complied with the requirements in Mumo Matemu and Anarita Karimi Njeru [supra]. The petitioner argued that if the judgement was indeed given on 18<sup>th</sup> November 2021, nothing could have been easier than the letter dated 18<sup>th</sup> November 2021 reflecting the same.
36. The petitioner submitted that none of the respondents have adequately answered the issues of infringement as raised by the petitioner. It is the petitioner's submissions that he is entitled to the reliefs sought and urged the court to grant the same.



## 1<sup>st</sup> And 2<sup>nd</sup> Respondents' Submission.

37. The 1<sup>st</sup> and 2<sup>nd</sup> respondents identified four issues for determination. These are; whether the court can usurp this responsibility of the institutions established by the [Land Adjudication Act](#) and the [Land Consolidation Act](#) to ascertain ownership of land. Whether the proceedings and decision by the respondent meet the statutory and constitutional threshold; whether this court has jurisdiction over the suit and costs.
38. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondent submission that to answer the first issue, the court has to determine which Law is applicable as far as the dispute was concerned. That a person aggrieved by the decision of the adjudication officer is required by Law to seek redress before the Minister whose decision is final. The 1<sup>st</sup> and 2<sup>nd</sup> respondent cited section 29 of the [Land Adjudication Act](#) and section 26 of the [Land Consolidation Act](#) and relied on the case of Tobias Achola Osindi & 13 others vs Cprianus Otieno Ogalo & 6 others[2013]eKLR.
39. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that it goes without saying that the procedure for lodging objections during the process of adjudication and appeals therefrom must be adhered to. They relied on the cases of Speaker of the National Assembly vs Karume [1992] KLR 21, Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 others [2015]eKLR, Reuben Mwongela M'itelekwa[Suing as ther Legal Representative of the estate of M'itelekwa M'mucheke Naituri Alias M' itelekwa Mucheke v Paul Kigea Nabea & 2 others [2019]eKLR and Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another [2015]eKLR.
40. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents' submission that a perusal of the petition reveals that the petitioner is agitating for his rights and interests in land within land parcel no.1811 Kamaguna adjudication section. That the 1<sup>st</sup> respondent filed the case in the objection proceedings where he won in the decision dated 18<sup>th</sup> November 2021. That if aggrieved with the said decision the petitioner ought to have lodged an appeal to the minister within 60 days of the challenged decision as per section 29 of the [Land Adjudication Act](#) in the event that the proceedings were conducted under the [Land Adjudication Act](#). That if the Law applied was the [Land Consolidation Act](#), then the decision in the objection proceedings was final, unless the issue of compensation was raised.
41. Regarding the petitioner's claims that he was not informed of the decision, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' argued that it was his duty being a party to the proceedings and having participated in the proceedings to follow up on the matter. That the petitioner has not shown that he followed up with the matter thus unable to be aware of the ruling delivered.
42. With regard to the second issue whether the proceedings and decision by the respondent meets the statutory and Constitutional threshold, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the threshold of what amounts to a Constitutional petition was set out in Anita Karimi Njeru vs Republic [1979]eKLR. That a petition ought to follow the principles laid down of drafting constitutional petitions. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also relied on the case of Mumo Matemu versus Trusted Society of Human Rights Alliance & Another [2013]eKLR and Anita Karimi Njeru [supra]
43. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents' submissions that they have demonstrated that they acquired their land without any fraudulent means and followed due process and therefore held a valid and good certificate of registration. They cited Section 7 of the [Land Act](#) No. 6 of 2012. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further submitted that the instant petition is an afterthought, an abuse of the court process and an attempt to circumvent the laid down procedures provided under the law. The 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the case of Gabriel Mutava & 2 others vs Managing Director Kenya Ports Authority & Anor [2016]eKLR.



44. Regarding jurisdiction, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that this court has no jurisdiction to entertain the suit. The 1<sup>st</sup> and 2<sup>nd</sup> respondents relied on the cases of Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd [1989]KLR 1, Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others [2012]eKLR.
45. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the doctrine of exhaustion ought to apply before seeking other orders in another forum. They relied on the case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others [2020]eKLR. It is there submission that by failing to follow the procedure laid out by a statute with regard to adjudication process, it was improper for the petitioner to invoke the court’s jurisdiction to question either the procedural propriety or substantive merits of the adjudication process. They submitted that the jurisdiction of the court was premature and relied on the case of the Speaker of National Assembly versus Karume [Supra]
46. Regarding the issue of costs, the 1<sup>st</sup> and 2<sup>nd</sup> respondents cited section 27(1) of the *Civil Procedure Act* which provides that costs largely follow the event, and that the court is given discretion to determine which party will meet the costs and to what extent.
47. The 1<sup>st</sup> and 2<sup>nd</sup> respondents pointed out that the court ought to note that the petitioner had filed a similar case before the lower court in ELC case No.17 of 2018 in Marimanti which was dismissed due to the fact that the plaintiff had not exhausted all dispute resolution mechanisms given that the land was not titled and was under adjudication.
48. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ submission that the petition is incompetent, frivolous, vexatious and otherwise an abuse of the due process of court. That the petitioner has not demonstrated any clear case of abuse of any of his Constitutional rights as to acquisition, ownership, use and possession of the suit property.

### **3<sup>Rd</sup> And 4<sup>Th</sup> Respondents’ Submissions**

49. The 3<sup>rd</sup> and 4<sup>th</sup> respondents identified two issues for determination, namely whether the court has jurisdiction to hear and determine this matter and whether the petition meets the threshold for a constitutional petition with regard to the first issue, the 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that Section 29 of *Land Adjudication Act* provides that any person who is aggrieved by the determination of an objection under Section 26 of the Act may, within sixty days after the date of the determination, appeal to the minister whose decision shall be final. They relied on the cases of Kiroket Ole Punyua v Umash Ole Mwanik & 2 others [2021]eKLR, Speaker of the National Assembly vs. James Njenga Karume [1992]eKLR, Mutanga Tea & Coffee Company Ltd. vs. Shikara Ltd.& Another [2015]eKLR and Geoffrey Muthinja Kabiru & 2 Others...Vs...Samuel Munga Henry & 1756 Others [2015]eKLR.
50. The 3<sup>rd</sup> and 4<sup>th</sup> respondents’ submitted that the suit parcel of land was subject of proceedings in the objection proceedings allegedly in the Year 2021 and the Petitioner though aware of the proceedings and having participated in the hearing of the same, did not appeal to the minister against the impugned decision. That the Petitioner has not given reasons why he could not pursue that avenue before coming to court. In the premises, they submit that the court lacks jurisdiction to hear and determine this suit and it ought to be dismissed with costs to the Respondents.
51. Regarding the issue whether the petition meets the threshold for a constitutional Petition, the 3<sup>rd</sup> and 4<sup>th</sup> respondents cited Rule 10 of *the Constitution* of Kenya [Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual] Practice and Procedure Rules, 2013 and relied on the case of James Gacheru Kariuki & 19 others v County Government of Mombasa & 56 others



[2019] eKLR, and East Africa Pentecostal Churches Registered Trustees & 1754 others vs Samwel Muguna Henry & 4 others [2015]eKLR .

52. It is the 3<sup>rd</sup> and 4<sup>th</sup> respondents' submission that the petitioner has failed to set out and show how the 3<sup>rd</sup> Respondents have violated or infringed against his right to property and that fair administration has been infringed. That according to the objection proceedings, it is clear that the Petitioner was aware of the proceedings and even attended the proceedings and tendered his evidence in person and therefore he cannot claim infringement of the right to fair administrative action. That there is no evidence to show that the petitioner raised any objections to the proceedings. That the petitioner has also failed to demonstrate how the constitution has been violated through the alleged violations by the Respondents.
53. It is 3<sup>rd</sup> and 4<sup>th</sup> respondents' submission that that the matters at hand were heard and determined by the DLASO in exercise of their statutory mandate and as such the exercise of their legal mandate which has not been challenged either through an appeal or Judicial review proceedings and cannot be said to be infringing rights of an indolent petitioner. That the Petitioner's sole intention is to engage in fishing expedition in the high seas of constitutional litigation to avert the statutory time limitation of appeals and Judicial review proceedings. That the petition is imprecise and too general and has failed to meet the threshold of a constitutional petition, to warrant any positive order from the court. The 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that in the court must guard against transmission of normal disputes and frivolous and vexatious disputes into constitutional petition. That the petition is an abuse of court process and ought to be dismissed with costs.

#### **Analnsis & Determination**

54. The issues for determination are:
- i. Whether the court has jurisdiction to deal with the matter.
  - ii. Whether the matter meets the Constitutional threshold.
  - iii. Whether the petitioner is entitled to the relief sought.
  - iv. Who bears the cost.

#### **Whether the court has jurisdiction to deal with the matter**

55. The respondents have submitted that the court does not have jurisdiction to deal with the instant matter. It is the respondents' submission that the suit parcel was subject of proceedings in the objection proceedings of 2021 and the petitioner was aware of the proceedings and participated in the hearing of the same but did not appeal to the minister against the impugned decision as provided under the Land Adjudication Act and the Land Consolidation Act.
56. The question of jurisdiction is germane as it sets the stage for the case in so far as determining the competence of the court or tribunal to decide on a dispute. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows-;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for



a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

57. From the onset, I opine that the court has no jurisdiction to deal with this matter due to the doctrine of exhaustion which requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to the courts. The principle has been expressed and upheld in several decisions.

58. In the case of *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR the doctrine was expressed by the Court of Appeal as follows:

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.”

59. The purpose of the principle was earlier stated by the Court of Appeal in *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts”.

60. I am further guided by the many decisions where Courts have held that where a specific dispute resolution mechanism is prescribed by *the constitution* or a statute, parties need to resort to that mechanism first before resorting to court action. In the case of *Mohamed Ahmed Khalid (Chairman) and 10 others Vs Director of Land Adjudication & 2 others* [2013] eKLR Angote J in a persuasive decision held: -

“Considering that the *Land Adjudication Act*, Cap 284 has an elaborate procedure on how complaint arising from the planning, demarcation and surveying of trust land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with these complaints. The petitioners can only move this court for declaratory orders and Judicial review orders or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place. In view of the provisions of the *Land Adjudication Act* Cap 284, I find that the petition was prematurely filed.”

61. In this petition, it is not in dispute that there was an objection which was decided by the 3<sup>rd</sup> respondent. It is also apparent that the petitioner was party to and participated in those proceedings. It appears the decision made by the 3<sup>rd</sup> respondent was not in favour of the petitioner. Section 29 of the *Land Adjudication Act* expressly provides that any person who is aggrieved by the determination of an objection under Section 26 of that Act may within sixty days after the date of the determination, appeal to the minister whose decision shall be final. In this case, the petitioner did not appeal to the minister although he was aggrieved. Instead, he filed this petition and other cases. To this end am persuaded that the court does not have jurisdiction to deal with the matter before exhaustion of the statutory dispute resolution mechanisms. It is trite law that the *Land Adjudication Act* has an elaborate procedure under section 29 which provides for an Appeal if a party is dissatisfied with the outcome of an objection.



## Whether the matter meets the Constitutional threshold

62. In *Javan Oscar Bulemi [suing as Secretary General Tiriki Union (E.A) v Permanent Secretary, Ministry of Internal Security and Principal Administration & 2 others [2015] eKLR*, the court observed:

“The manner in which constitutional petitions are to be drafted has also severally been dealt with by our courts. In the late 1970’s the High Court dealt with this issue in the case of *Anarita Karimi Njeru vs The Republic [1976-1980] KLR 72* and came up with the following precise principle in dealing with constitutional petitions. It is now required of a petitioner to:

- I. Specifically set out the provisions in *the constitution* that have been allegedly violated
- II. Provide the particulars of the alleged violations
- III. Provide particulars in which the respondents have purportedly infringed their rights.”

63. Further, in the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 Others [2013] eKLR* the Court of Appeal observed that:

“We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and save the court from the embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new constitution is whether a Petition as stated raised issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare”

64. In the instant case, the Petitioner has raised the issue that between 2015 to 2016, the 1<sup>st</sup> and 2<sup>nd</sup> respondents forcefully entered the two pieces of land No. 1809 and 1810 and occupied the same. That the petitioner filed *Marimanti PMC ELC Court Case No. 17/2018* which matter is still pending in court. That before the completion of demarcation in 1989, the 1<sup>st</sup> and 2<sup>nd</sup> respondents father approached the petitioner’s father and told him that due to pressure of school fees, he wished to sell some portion of land to the petitioner’s father to enable him pay school fees and that both reached an agreement. The petitioner states that after buying the parcel which is now land parcel No.1811, the petitioner’s father and family including the petitioner took possession and constructed permanent houses which is where the petitioner and his family called home for almost 50 years. That while the suit *Marimant PMC ELC No.17 of 2018* is pending in court, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a purported objection *No.221/2021* with the 3<sup>rd</sup> respondent which was adjudicated upon. The petitioner enumerated particulars of collusion on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, including alleged



failure to disclose that their occupation of land parcel No. 1811 was subject of a sale of a willing buyer and willing seller.

65. Having gone through the petition herein, I am of the view that the same has not raised a constitutional issue. In the case of Benard Murage – Vs Fine Serve Africa Ltd & 3 others [ 2015] eKLR, the Supreme Court held that-

“Not each and every violation of the law must be raised before the High court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

66. In this case, the issues raised in the petition are disputes that were subject to adjudication and if the petitioner were dissatisfied with the outcome of objection, then he could have appealed to the Minister as provided for in section 29 of the *Land Adjudication Act* or brought the subject matter to court as a Judicial review matter. I also note that the petitioner has pleaded that he filed Marimanti ELC Case No. 17 of 2018 which is still pending in court.

67. Having carefully considered the petition before me and the submissions, I find that the petition does not raise any constitutional issues at all. Secondly, the petitioner has failed to prove the alleged infringement of constitutional right to the required standard. I am therefore not persuaded that the petitioner is entitled to the orders sought in the petition

68. I find that the petition has no merit and I dismiss it with costs to the respondents.

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

In the presence of:

Court Assistant - Moses

N/A for Petitioner

Ms. Kendi for 3<sup>rd</sup> and 4<sup>th</sup> Respondent

N/A for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

**C. K. YANO**

**JUDGE.**

