



**Kiogora & 6 others v National Land Commission & another (Environment & Land
Petition E001 of 2023) [2024] KEELC 6092 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6092 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E001 OF 2023**

CK NZILI, J

SEPTEMBER 18, 2024

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

BETWEEN

**HENRY KIOGORA 1ST PETITIONER
NATHAN MWENDA 2ND PETITIONER
SAMWEL KIRUNGURU 3RD PETITIONER
JULIUS MWORIA 4TH PETITIONER
FRANCIS RIUNGU L/R OF PATRICK BUNDI 5TH PETITIONER
ERICK MWENDA MWIRIGI 6TH PETITIONER
WINFRED KANANU ANAMPIU L/R OF JOSPHAT MWONGERA 7TH
PETITIONER**

AND

**THE NATIONAL LAND COMMISSION 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT**

JUDGMENT

1. What is before the court is the petition dated 6.7.2024, brought by the 1st-8th petitioners describing themselves as the legal and legitimate owners of L.R No’s. Ntima/Igoki/5985, 5591, 5983, 5998, 5990, 5995, 5986, and 5988 hereinafter the suit parcels of land. The petitioners have averred that between 2001 and 2005, the then chief land registrar unilaterally, unlawfully, unjustifiably, illegally, and without any color of right entered and indefinitely registered restrictions on all the said registered parcels of land without involving them or giving them a fair hearing.



2. The petitioners averred that, as a result, they have been unable to utilize and or use or derive any economic benefit from their parcels of land. Further, they lawfully and procedurally acquired the suit parcels of land; hence, there was no justification or reason for the chief land registrar to enter or indefinitely restrict the title registers.
3. The petitioners averred that they had filed ELC No. 14 of 2021, which the court ruled that it had been filed out of time. Similarly, it was averred that leave to file the suit was also denied in ELC No. OS No. E02 of 2022.
4. Therefore, the petitioners pray for:
 - a. A declaration that the restrictions are invalid, illegal, and unjustified.
 - b. Removal of the same.
 - c. Costs.
5. The petition was accompanied by an affidavit of Henry Kiogora, a petitioners' joint written statement, and a list of documents dated 6.7.2023. It was duly served upon the 1st respondent and an affidavit sworn by Joseph Kithinji Thurairara and filed on 21.8.2023 and filed.
6. The 2nd respondent opposed the petition through grounds of opposition dated 21.11.2023 for disclosing no cause of action against the Hon. Attorney General for being fatally defective and or badly drawn and for seeking no orders against it.
7. Following directions and with concurrence of the parties the petition was heard viva voce. At the trial, Henry Kiogora, the 1st petitioner, testified as PW 1 and relied on a witness statement dated 6.7.2023 as his evidence in chief. He produced copies of green cards for L.R No. Ntima/Igoki/1769 as P. Exh No. (1), letter dated 2.9.1997 as P. Exh No. (2) minutes from the Meru County Council meeting held on 13.5.1997 as P. Exh No. (3) letter dated 27.9.1999 as P. Exh No. (4) list of beneficiaries regarding L.R No. Ntima/Igoki/1769 as P. Exh No. (5), field sketch map for L.R No. Ntima/Igoki/1769 as P. Exh No. (6), certificates of official search for L.R No's. Ntima/Igoki/5985, 5991, 5998, 5990 & 5995 as P. Exh No. (7 – 11), a notice of intention to sue dated 22.1.2021 as P. Exh No. (12), letter dated 22.2.2021 as P. Exh No. (13), plaint and summons in Meru ELC Case No.(14) of 2021 as P. Exh No.14 court order dated 18.4.2021 as P. Exh No. (15), ruling in Meru ELC OS No. E02 of 2022 as P. Exh No. (16) and a letter dated 30.8.2022 as P. Exh No. (17).
8. In cross-examination by the 2nd respondent, PW 1 told the court that the land in issue was registered in the name of the County Government of Meru. However, P. Exh No. (3) shows that the initial land was subdivided and allocated to individuals and organizations, whose names were missing from the list before the court.
9. PW 1 said that the initial suit was dismissed and did not appeal against the dismissal order of the court. Similarly, PW 1 confirmed that he also filed Meru OS No. E02 of 2022, over the same land but was unable to tell the outcome.
10. Again, PW 1 told the court that his prayers were for the restrictions to be removed so that they could develop their parcels of land. P.W 1 told the court that his claim was directed against the 1st respondent and not the Hon. Attorney General.
11. The petitioners rely on written submissions dated 9.8.2024 isolating four issues for determination. On the threshold, they submitted that they met the same as set out in the cases of Mumo Matemo



- vs Trusted Society of Human Rights & others (2015) eKLR and Annarita Karimi Njeru vs Republic (1979) eKLR.
12. Further it is submitted that the respondent could not justify the registration of the restrictions as he who alleges must proof under section 107 of the *Evidence Act*. On costs and reliefs, the petitioners submitted that the petition is undefended and the costs should follow the events as under Section 27 of the *Civil Procedure Act*. The respondents did not file any written submissions.
 13. The issues calling for my determination are:
 - i. If the petition meets the constitutional threshold
 - ii. If the petition is an abuse of the court process.
 - iii. If the petitioners have exhausted the internal dispute mechanism under the laws.
 - iv. If the petition has merit
 - v. What is the order as to costs?
 14. A party seeking to enforce constitutional rights must comply with Articles 19, 20, 21, 22, 23, 258, and 260 of *the Constitution*, as read together with *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules 2013, by disclosing the party's capacity, the nature of the constitutional provisions breached, infringed or threatened, the particulars of injury, loss or damage, any previous or pending matters over the subject matter, the nature of the breach, the reliefs sought and the signature of the petitioner. In Annarita Karimi Njeru vs. Republic (1979) eKLR, Mumo Matemu vs Trusted Society of Human Rights Alliance (2013) eKLR, and Communication Commission of Kenya vs Royal Media Services & others (2014) eKLR, the courts held that a constitutional petition must be pleaded with specificity, clarity, and particularity so that the opposite party may know what questions or issues to answer to.
 15. Clarity of pleadings in a constitutional petition is geared towards defining the issues in litigation, saving the court's time and resources. See Kenya Medical Practitioners Pharmacists and Dentists Union vs University of Nairobi & another (2021) eKLR and Thort vs Holdsworth (1876) 3 CHD 637.
 16. In CCK & 2 others vs Royal Media supra, the court said a party invoking Article 22 (1) of *the Constitution* has to show the rights said to be infringed as well as the basis for their grievance and must link the claim with the Articles contravened and the manifestation of the contravention.
 17. In Nasra Ibrahim Ibren vs IEBC & others (2018) eKLR, the court said that a party is under a constitutional forensic duty to set out the particulars of the constitutional transgression that, in his opinion, has been committed in a precise manner.
 18. A constitutional petition must also raise constitutional questions or issues whose answers flow from *the Constitution* and not statutes. It must require the interpretation of *the Constitution*. See Haki Ziman Abdul Abdulkarim vs Arrow Motors E.A Ltd & another (2017) eKLR and Fredrick & others vs MEC for Education and Training East Cape and others 9200 23 L.J 81. Claims of statutory or statutory rights violations cannot give rise to a constitutional violation. See Turkana County Government & others vs A.G. & others (2016) eKLR.
 19. In Trans Nzoia Chingano Grain Farmers Coop Society vs. Hon. AG & others (2013) eKLR, the court observed that a party could not bring a claim for adverse possession in a constitutional petition since the Civil Procedure Rules provide the manner in which such a claim can be brought. See Parkire Stephen Munkasio & others vs. Kedong Ranch Ltd and others (2015) eKLR.



20. In *John Harun Mwau vs Peter Gastrow & others* (2014) eKLR, the court observed that courts would ordinarily not consider a constitutional question unless the existence of the remedy depends on it and that where a matter can be resolved without recourse to *the Constitution, the Constitution* should not be invoked at all.
21. In *Uhuru Muigai Kenyatta vs Nairobi Star Publications Ltd* (2013) eKLR, the court observed that where there is a remedy in civil law, a party should pursue that remedy, since not every ill in the society should attract a constitutional sanction.
22. Additionally, in *Rapinder Kaur Atwal vs Manjit Singh Amrit* *Petition No. 236 of 2011*, the court observed that *the Constitution* was a solemn document and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes.
23. As to exhaustion of other available alternative dispute mechanisms, a party is supposed to move to a constitutional court as a last resort after utilizing other available dispute mechanisms set out under any law unless the same is not efficacious, sufficient to grant the constitutional reliefs or only in exceptional circumstances as per Section 9 of the *Fair Administrative Action Act*.
24. In *Mwanzia vs Rhodes* *Constitutional Petition E115 of 2023* (2023) KEHC 2688 (KLR) *Constitutional and Human Right* (31st March 2023 (Judgment), the court cited *William Odhiambo Ramogi & others vs A.G. & others* (2020) eKLR, that where the court said that the exhaustion doctrine 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 interest within the mechanism outside the court and that it encourages alternative dispute resolutions in line with Article 159 of *the Constitution*.
25. Applying the preceding parameters to the instant case other than invoking Article 40 of *the Constitution*, the petition does not specify the Articles of *the Constitution* infringed, manner of infringement, nature, and particulars of loss or damage caused, the outcomes as previous intervention through statutory law and whether there are exceptional circumstances to warrant invoking the constitutional route instead of the statutory manner of lifting restrictions, cautions or inhibitions as set under Section 68 and 78 of the *Land Registration Act*.
26. In *Henry Kiogora and others vs National Land Commission & another Meru ELC OS NO. E002 of 2022*, the court observed that Sections 77 and 78 of the *Land Registration Act* had not been invoked by the petitioners herein, as the first port of call. The court pronounced itself on the requisite procedure to follow in lifting restrictions. Instead of appealing or invoking the statutory procedure available, the petitioners have filed a constitutional petition against the National Land Commission and the Hon. Attorney General, who, unfortunately, are not the ones who filed or registered the restrictions in the first instance.
27. The official search certificates produced as exhibits show that the chief land registrar restricted the land, claiming that the suit properties are reserved as public utilities for a public works camp. The office of the chief land registrar is autonomous and can sue and be sued. See *Nemchanda Laghdir Shah & others vs Appollos Hiram Muna & another* (2007) eKLR. It is an office established under Section 12 of the *Land Registration Act*.
28. In *Chief Land Registrar & others vs Nathan Tirop & others* (2018) eKLR, the petition was grounded on Article 40 of *the Constitution*, just like the instant petition. The court observed that it is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim deemed as an abuse of the court process. Even though there are no time limits in constitutional petitions, the court must decide on a case-to-case basis. The



- court said that there can also be no estoppel or acquiescence against *the Constitution*, for no individual subject to Article 24 of *the Constitution* of Kenya can barter away acquiesce or waive fundamental rights & freedoms.
29. The court said that delay in enforcing a claim for violation of fundamental rights and freedoms may be permitted depending on the circumstances of each case. As to laches, the court said that no citizen in line with Article 20 of *the Constitution* could by his act or conduct relieve the state or state organs or any person of the solemn obligation to respect the Bill of Rights and that neither of the three above can arrogate to itself or himself a right or justification to commit a breach of fundamental rights and freedoms of any citizen and resort to the doctrine of waiver, acquiescence, inordinate delay, estoppel or any other similar principle as absolute defense or excuse.
 30. The procedure of challenging the powers of the chief land registrar in effecting caveats, restrictions, or inhibitions and or compelling him to do so is through an ordinary suit. It is not every transgression of the law that should attract constitutional sanctions.
 31. In *Bamburi Cement Ltd vs. Chief Land Registrar & AG* (2018) eKLR, the proceedings by way of judicial review had been filed under Sections 62, 64 and 65 1 (F) of the Registration of Titles Act claiming the caveats as contravening Article 40 of *the Constitution*. The court observed that the protection of the right to property afforded by Article 40 of *the Constitution* is to be enjoyed by the proprietor, except where the property is found to have been unlawfully acquired as contemplated by Article 40 (6) thereof.
 32. Guided by the caselaw cited, I take the considered view that the petition should have invoked the statutory route instead of trivializing *the Constitution* using a petitional path. See *Mutanga Tea and Coffee Co. Ltd vs Shikara Ltd & another* (2015) eKLR.
 33. In *Brooke Bond (K) Ltd & another vs Chief Land Registrar and others* (2007) eKLR, the court observed that the law that governs the chief land registrar in lodging or lifting encumbrances in the land titles register was always there so that compliance by a public officer such as the land registrar was already ordained and that all what an aggrieved party to take the needed action is to vary the status quo represented by those restrictions. Further, the court said that there is an absolute obligation imposed on the land registrar to make requisite inquiries and to serve notices on the parties interested in the matters and accord them fair hearing and due process.
 34. The exhibits relied upon by the petitioners generally and in particular P. Exh No's. (12), (13), (14), (15) & (17) were not addressed to the office of the Chief land registrar. A copy of the register produced as P. Exh No. (1) shows that the head lessor is the County Government of Meru, a successor to the title of the defunct Municipal Council of Meru. P. Exh No. (1), (3), (4), (5) & (6) do not show if the process of allocation of plots was followed with the requisite approvals and permits issued by the relevant bodies. There is no evidence that the petitioners have complained to the head lessor about the existence of the restriction based on the public utility principle raised in the restrictions.
 35. None of the petitioners have displayed a certificate of lease. A title is not an end result but an outcome of a process. The restrictions were imposed before the 1st respondent was created by *the Constitution* of Kenya in 2010. It is doubtful if the 1st respondent can be liable for acts of omission or commission that took place years before it came into existence. Its mandate touches on the management of public land.
 36. There is no evidence that the petitioners engaged the chief land registrar's office and lodged a complaint against it in line with the Fair Administrative Actions Act. A cause of action is defined as an act on the part of the defendant that gives the plaintiff a reason to complain. In *Anne Jepkemboi Ngeny vs Joseph Tireito & another* (2021) eKLR, the court cited *A.G. & another vs Andrew Maina Githinji & another*



(2016) eKLR that a cause of action is an act on the part of the defendant that gives the plaintiff his cause of complaint. In this petition, the petitioners have not disclosed the link between the imposition of the restrictions in 2001, 2003, and 2005 with the respondents.

37. The roles of the respondents in the lodging and sustenance of the restrictions have not been pleaded. The respondents have no role to play under the [Land Registration Act](#) or, in its predecessor, Registered [Land Act](#) (Cap 300) in restricting title registers. I, therefore, agree with the 1st respondent that the petition discloses no known cause of action against it.
38. If then the respondents have no statutory or constitutional role to play in the registration of disposition in the land, it goes without saying that the petitioners have failed to substantiate the allegations in the petition, which unfortunately discloses no constitutional question(s) or issues.
39. The upshot is that the petition is incompetent, discloses no known cause of action and lacks merits. It is dismissed with no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18th DAY OF SEPTEMBER, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

Petitioners

Ondari for the petitioners

