



REPUBLIC OF KENYA



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**Munga v Tinga & 3 others (Environment & Land Petition E003 of 2021)
[2024] KEELC 13492 (KLR) (25 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13492 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION E003 OF 2021
FM NJOROGE, J
NOVEMBER 25, 2024**

BETWEEN

JAMES MWAMUYE MUNGA PETITIONER

AND

TINGA KALU TINGA 1ST RESPONDENT

MUNGA MAGESHO DZILA 2ND RESPONDENT

LAND REGISTRAR KILIFI 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated 29/3/2021 seeking the following orders: -
 1. A declaration that the petitioner's constitutional rights to property have been breached;
 2. A declaration that the petitioner is the lawful owner and proprietor of the unsurveyed parcel number Kilifi /Pingilikani/994 Kilifi County;
 3. A declaration that the 1st and 2nd respondents have no rights on Kilifi/ Pingilikani /994 Kilifi County
 4. An order directing the Registrar Of Land and the Attorney General to cancel title issued in the names Munga Kalu Tinga, Tinga Kalu Tinga, Munga Magesho Dzila and Walter Nyale Mwando;
 5. An order that the Registrar of Lands Kilifi issue a new title in the names of James Mwamuye Munga;
 6. Any other relief the court may deem fit and just to grant.



2. The petition is supported by the affidavit of the petitioner sworn on even date to which certain documents are attached as exhibits.
3. The petitioner's case is as follows: that he and his family are the rightful owners of the suit land; that the land is now registered in the names of the 1st and 2nd respondents; that during adjudication in 2009, a dispute arose as to who was the rightful owner of the suit land; that the petitioner's plea for consent to file a suit were ignored by the relevant adjudicating officer compelling the petitioner to proceed to file pleadings in a case known as Land Dispute No 3 Of 2009 –James Munga Mwamuye and Munga Kalu Tinga which ended in favour of the petitioner; that court instructed auctioneers to execute the decree and the respondent was evicted in 2011; the court orders have never been set aside; however, Walter Nyale Mwango perpetrated some fraud and the suit land was registered in the names of persons other than the petitioner.

THE RESPONSES

4. Angela Munyony a State Counsel filed grounds of opposition on behalf of the Attorney General and the 3rd respondent on 6/5/2021. The particulars of those grounds are as follows:
 - a. Ownership issues can only be determined in a civil suit;
 - b. The 3rd and 4th respondents were acting in compliance with the law;
 - c. No violation of right has been demonstrated;
 - d. The petition is imprecise as to the alleged violations or threatened violations;
 - e. The petition is not supported by sufficient evidence to enable court identify the petitioner's interest in the suit property;
 - f. The proceedings in the Land Disputes Tribunal Case No 3 Of 2009 was commenced in disregard of the provisions of Section 30 of the Land Adjudication Act CAP 284 and the petitioner has come to court with unclean hands.
5. Tinga Kalu Tinga filed a replying affidavit on 10/5/2021 in opposition to the motion. He deponed that the respondents are the registered and true owners of the suit land; that land in an area declared an adjudication section can not be subjected to the Land Disputes Tribunal proceedings; that the petitioner failed to lodge an objection or file an appeal to the Minister and instead sued a deceased person in a land disputes tribunal and thus illegally got a tribunal award in his favour; that in any event no consent was granted for such tribunal proceedings; that the petitioner and his family have an alternative parcel elsewhere which they occupy unhindered to date and the respondents have been on the suit land for many years; that the court could not validly adopt a judgment in respect of an area declared an adjudication section; that in any event the orders were stayed by the High Court; that the title deed was procedurally issued; that the deponent was not involved in the tribunal case.
6. No reply was filed on behalf of the 2nd respondent though Ronald Kai, advocate, filed appearance for both the 1st and 2nd respondents. It must be assumed then that the 1st respondent's response covers the 2nd respondent.

SUBMISSIONS.

7. The petition was disposed of by way of written submissions. The petitioner filed his on 27/2/2024. The 3rd and 4th respondents filed submissions dated 29/5/2024.



DETERMINATION.

8. The issues arising for determination are as follows:
 - a. Whether the jurisdiction of this court has been properly invoked;
 - b. Whether any violation of constitutional rights has been demonstrated by the petitioner;
 - c. What orders should issue.
9. Regarding whether the jurisdiction of this court has been invoked, this court must consider if going by the nature of the claim the manner of approaching court by way of petition is proper. This point appears to have attracted the Attorney General's attention much earlier, who raised a notice of preliminary objection in which it was set out. The preliminary objection was rightly dismissed by this court as all the matters therein required evidence contrary to the true nature of a preliminary objection.
10. As seen from the earlier paragraphs of this judgment the cause of action in the present claim lies in fraud: the petitioner claims that he and his family are the rightful owners of the suit land and that the land was fraudulently registered in the names of the 1st and 2nd respondents. The mere word "fraud" evinces an intention to deceive. The traditional manner of pleading concerning fraud is through a plaint in which specific particulars of fraud are set out and viva voce evidence is later called which lays all the evidence of all the sides to the case to test by way of cross-examination and examination of the documents produced. It is usually in that kind of scenario where the court would be truly able to establish from the total sum of oral and documentary evidence given as to whether there was intention to deceive on the part of the party suspected of fraud. In the case of *Petro Oil Kenya Limited v Kenya Urban Roads Authority* [2018] eKLR:

A constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called like in this case. Whether or not the suit property was hived from a road truncation is not an issue which I can determine on the affidavit evidence before me. If it is true that the suit property was hived from a road truncation, the title held by the Petitioner would not be valid since the property was not available for allocation to Wangs from whom the Petitioner purchased the suit property. Article 40 (6) of *the Constitution* provides that the protection accorded to property does not extend to the property which has been acquired unlawfully. Whether or not the Petitioner acquired the suit property lawfully is an issue that can only be determined in a civil suit and not in a Constitutional Petition. The courts have said over and over again that the mere fact that constitutional rights are alleged to have been violated or are threatened does not make the dispute a constitutional one calling for the filing of a petition under Article 22 of *the Constitution*. The court can still uphold constitutional rights in a normal civil suit...

In the case before me, I am of the view that due to the nature of the dispute which turned on whether the Petitioner holds a valid title, the ideal forum should have been a civil suit. In a civil suit, the court would have been better placed to determine all the issues raised by the parties. The court would also have been in a position to grant all the reliefs sought in the petition herein if merited. It is my finding therefore that although the Petitioner had a right to invoke the jurisdiction of the court under Article 22(1) of *the Constitution*, that jurisdiction was not ideal for the determination of the issues at hand. As aptly put by the Respondent in its replying affidavit, this court in exercise of that jurisdiction is not possessed



of the necessary tools to determine the validity or otherwise of the Petitioner's title to the suit property.”

11. Bearing in mind that the petitioner has invoked Article 47 and that the Fair Administration Action Act (FAA) enacted thereunder provides for the lodging of a review, it may appear that he has blundered in filing a petition and not a judicial review application as provided for in Part III of the FAA. However, Article 47 is in the same Constitution that provides for protection of fundamental rights and freedoms of the individual, as well as grants the court mandate to issue remedies of, inter alia, declaration of rights, such as those sought by the petitioner herein. Further, Article 159 (2) (d) provides that justice shall be administered without undue regard to technicalities. It is not strange then that today a finding of fraud can be made in a constitutional petition if the issue finds its place therein by virtue of being one of the claims of violation of constitutional rights made against a respondent, and the remedies sought are among those in *the constitution*. It is with the foregoing observations in mind that this court holds that the petition is properly before it for determination.

Has the petitioner demonstrated any violation of constitutional rights?

12. The usual rules as to proof of claims still govern a constitutional petition and there are certain matters that govern the success of the petition right from the start. These are matters of discharging the legal and evidentiary burden of proof and joinder of parties.
13. First, the petitioner claimed that he was born and that he lives with his family on a parcel of land inherited from his grandfathers which is thus his by inheritance. He links that parcel he has described with the parcel registered in the names of the 1st and 2nd respondents. Possession was ordered in the decree dated 16/6/2011 in the SRM's court, and he was put into possession thereof by an auctioneer. In sharp contrast the 1st and 2nd respondents have averred in the replying affidavit filed in the petition at paragraph 7 that the petitioner and his family have a distinct parcel of land which they occupy and utilize to date without any interference by any person. There is not any evidence to the effect, that the petitioner is on a different parcel, and this court holds that he is on a part of the suit land.
14. I must also examine if the existence of the court order effectively militated against the registration of the suit land in any person's name other than the petitioner. The question arises as to whether a case at the land disputes tribunal was the appropriate proceeding he could have filed at the time despite the express provisions of Section 30 of the *Land Adjudication Act* which barred suits without prior consent therefor in respect of such land as was under adjudication. In this court's view the applicant should have, if the consent was improperly denied, approached this court by way of judicial review proceedings to quash the decision denying him consent to pave way for his lodging of a civil suit in court. However, the conduct evident in this case is that the respondent's father participated in the tribunal proceedings and even attended the proceedings adopting the award of the tribunal as a judgment of the court on 5/3/2009 and was granted 30 days to appeal. He never filed an appeal. It is also evident from the documents filed by both sides in this case that though his name was used in the tribunal proceedings it is not the 1st and 2nd respondent's father who appeared at the tribunal or at the magistrate's court but his sons. The sons having so participated at every stage of the proceedings that gave rise to the order of the magistrate's court, their allegation that the petitioner sued a deceased person before the tribunal therefore has no force. They subjected themselves to that tribunal on his behalf and ought to have filed an appeal too. Further, it is seen from the court record that one Thomas Kiti Soda in the capacity of administrator to the estate of their father had the occasion to lodge a judicial review Miscellaneous Civil application No 4 of 2009 for leave to apply for judicial review orders against the Chonyi Land Dispute Tribunal and the Kilifi Senior Resident Magistrate, but failed to pursue a substantive judicial review application for unknown reasons and the leave and stay orders previously granted therein were



vacated by the court on 18/5/2011 in the presence of his advocate and no further action in that regard took place.

15. Thirdly, the petitioner obtained a decree in his favour in respect of Parcel No 994 Pingilikani Adjudication Section in the magistrate's court and was, according to the record herein, apparently put in possession of the suit land by way of execution of that decree.
16. Fraud must be specifically pleaded and proved. See the case of Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others [2013] eKLR where the Court of Appeal held as follows:
17. In R. G. Patel vs. Lalji Makani (1957) E.A. 314, the predecessor of this Court at pg 317 held:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
18. It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In Mutsonga vs. Nyati (1984) KLR 425, at pg 439, this Court held: “Whether there is any evidence to support an allegation of fraud is a question of fact”. We find that the appellant did not prove fraud on the part of the respondents.”
19. The fact that the claim of fraud has been made in a constitutional petition does not relieve the petitioner from compliance with rules of pleadings and practices formulated to aid the court arrive at a just decision and to prevent ambush on his adversary.
20. The petitioner merely stated as follows:
 13. However, by way of fraud and illegal activities perpetuated by one Walter Nyale Mwangi who now appears in the title deed as the 4th owner, the parcel of land was illegally registered in the names of persons other than the petitioner.”
21. After this statement the petitioner proceeds to state that it is illegal and fraudulent to have a person not captured at the adjudication and whose particulars do not appear anywhere in the adjudication records and in the parcel file to end up being registered as proprietor. No copies of any land adjudication records are provided as proof.
22. Regarding this issue, it has been the legal position that a person who desires to seek and obtain relief for violation of a constitutional right must be specific of that of which he complains, the constitutional provisions said to have been violated and the manner in which they have been violated. In the celebrated Anarita Karimi Njeru - v - The Republic (1976 - 1980) KLR case in which the court held as follows:

We would, however, again stress that 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.”
23. From the above holding it is expected that a petitioner in a constitutional matter would plead with a degree of precision, the particulars of the alleged violations committed by the 1st respondent against them, including that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.



24. The Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR held the position that though pleadings may not be exact or precise, they must convey the complaint of the petitioner with reasonable understandability. The court stated as follows:
- (40) It was the averment of learned counsel for the 1st, 5th and 6th respondents that the petition had cited with precision complaints regarding the violation of Articles 10 and 73 of *the Constitution*; that Article 159 of *the Constitution* enjoined the courts to administer justice without undue regard to procedural technicalities.
- (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.”
25. The question that arises then is “Can the court make out the sort of claim lodged before it by the petitioner by a reading of the petition and the supporting affidavit and the annexures?” The petitioner has provided the provisions he has come under in the title to the petition. The body of the petition shows that he is complaining of fraud, and denial of the right to a fair hearing by the Adjudication Officer and the Registrar of Lands. Regarding the Land Registrar, his act of Registration of Title is the matter that is offensive to the petitioner. It has been stated as follows:
- By issuing title to the respondent (sic) the Registrar did not afford the petitioner fair administrative action as is envisaged in *the constitution*.”
26. However, it has not been shown how he could have entered the dispute during the adjudication process which was not under his mandate. That process took place before the subject title was registered. No proceedings were alleged to have been commenced before him in which he denied the petitioner the right to a fair hearing. However, Registration of the 1st and 2nd respondents and others must be assumed to have arisen from the adjudication exercise in which the Land Registrar played no role but the Land Registrar must be assumed to have received the record directing him on how to register the land and in which named from the Land Adjudication and Settlement Officer. The latter had already been apprised of the developments in court vide the petitioner’s letters dated 22/10/2011 and 19/4/2012 before he communicated with the Land Registrar. Clearly, he was aware of those letters. His letter dated 16/4/2009 evinced his knowledge of the existence of tribunal and the Magistrate’s Court proceedings. However, he never attended court to set aside or appeal against any award orders or decree granted by those institutions. He is now adequately represented by the Attorney General in these proceedings.
27. The petitioner has stated as follows in his petition:
- It is illegal for any department of government or public office to ignore a lawful court order as the one issued in the Land Dispute Case No 3 Of 2009.”
28. It has not been pleaded that the Land Registrar was asked to grant the petitioner any hearing at any point, or that he was aware of the court order issued pursuant to the land disputes case. However, the Land Adjudication Officer knew of the order.



29. Though the 1st and 2nd respondents castigate the order as illegal, they never undertook the judicial review orders challenging it to the end. The title deed they hold was issued despite the said court order which has never been set aside. This petition is not an appeal against that court order or decree. Neither is it a judicial review application by the respondents for certiorari. The Magistrate's court is not joined in these proceedings even. This is a case filed by the petitioner for enforcement of his constitutional rights. By the totality of this petition, this court can hear him, and finds it appropriate for him to say as follows:

I was not heard before the title to the land I occupy was registered in the names of the 1st and 2nd respondents together with others whose connection with the land and/or with the past court proceedings are non-existent and I want the said registration quashed.”

30. If the respondents were aggrieved at that Magistrate's court decree, then they could have pursued judicial review proceedings to the end but they failed to. It should not be forgotten that the elders who adjudicated the tribunal case originate from the area and have extensive knowledge of land ownership on the ground. In Alternative Justice Systems prevalent nowadays it is not strange for a courts of law to refer disputes before them, if it appears most appropriate, to panels of elders or traditional fora for resolution, and adoption by courts of such awards is not also strange phenomena. It is remarkable that the Land Disputes Tribunal found for the petitioner in that case which was later translated into a court decree which put the petitioner into possession of the suit land. I find that the court order and decree vide which the petitioner obtained possession, however irregular it may have seemed to the respondents, can not be faulted in this petition by way of a mere defensive affidavit from the respondents for several reasons.

31. First, they ought to have objected to jurisdiction of the tribunal before it ruled on the case before it. Secondly, they ought to have objected to the jurisdiction of the trial magistrate when the matter went for adoption of the tribunal award but they never did so. Thirdly they attempted to quash the Tribunal and Magistrate's court proceedings and failed. That last action singles out the 1st and 2nd respondents as persons who were aware of what they ought to have done but failed to do to obtain a remedy. This court shall not allow them to beat their response into a sword in this petition that they did not file, for use against the petitioner for the purpose of remedying their neglect and laches. And for as long as they have never been set aside, and for as long as the respondents' conduct has impressed a legitimate expectation upon the petitioner over a lengthy period spanning 13 years that they are no longer interested in quashing those two sets of proceedings one in the Tribunal and the other before the Magistrate's court, those proceedings must all be taken to have been properly conducted at the time they were undertaken without demur on the respondents' part and I find that they must be remain undisturbed as the final arbitration over the dispute as to who should own the land. By those proceedings award and decree, the property in the suit land vested in the petitioner.

32. It is for the foregoing reasons that the Land Adjudication Officer should have heeded the two letters written by the petitioner and, in deference to the decree of the court, registered him as the proprietor of the suit land. And if he was inclined to take any action that was adverse to the rights that had accrued to the petitioner by virtue of the decree and of being put into actual physical possession, either he or any of the other respondents in this matter ought to have either first heard the petitioner or moved a court of law for such orders. They never did so.

33. Consequently, I find that the registration of persons other than the petitioner as proprietor of the suit land was improper and deprived the petitioner of his property rights contrary to Article 40 of *the constitution* and that without any prior opportunity for his case to be heard by the Land Adjudication Officer in a fair and impartial manner under Articles 47 and 50 of *the constitution*.



34. The upshot of the foregoing is that the petition dated 29/3/2021 has merit and it is hereby granted in terms of prayers nos (a), (b), (c) (d) and (e) thereof. The costs of the petition shall be borne by the respondents jointly and severally.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 25TH DAY OF NOVEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

