



Makutano Self Help Group (Suing Through its Representatives Luke Gitonga, Cyprian Iguna Gwatia and Gitonga Chakanu) v County Government of Tharaka Nithi & another (Environment and Land Constitutional Petition E002 of 2023) [2024] KEELC 13302 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E002 OF 2023**

CK YANO, J

NOVEMBER 20, 2024

BETWEEN

MAKUTANO SELF HELP GROUP (SUING THROUGH ITS REPRESENTATIVES LUKE GITONGA, CYPRIAN IGUNA GWATIA AND GITONGA CHAKANU) PETITIONER

AND

**THE COUNTY GOVERNMENT OF THARAKA NITHI 1ST RESPONDENT
THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER
THARAKA NITHI COUNTY 2ND RESPONDENT**

JUDGMENT

1. By a petition dated 14th November, 2023, the petitioners are seeking for the following orders: -
 - a. A declaration that the actions of the respondents have expressly contravened the petitioners' right to acquire property under Article 40 of *the Constitution* of Kenya.
 - b. A declaration that Kanjoro B Adjudication Section within which land parcel No. 2597 Kanjoro B Adjudication Section is a community land held in trust for the community by the 1st respondent.
 - c. An order of certiorari quashing the decision of the 2nd respondent to award land parcel No. 2597 Kanjoro B Adjudication Section to the 1st respondent.
 - d. An order of mandamus compelling the 2nd respondent to demarcate the land parcels now known as No. 2597 Kanjoro B Adjudication Section to the petitioners.
 - e. Costs of the petition.



2. The petition is supported by the affidavit of Luka Gitonga dated 14/11/2023 and a supplementary affidavit dated 14/10/2024.
3. The 2nd respondent filed grounds of opposition dated 20th September, 2024.

The Petitioner's Case

4. The Petitioners aver that in or about 2005, they purchased land at Makutano, Kanjoro Location, Mauthini sub location. That at the time of purchase, the land had not yet been adjudicated and they entered the land immediately and have continued utilizing it peacefully.
5. The petitioners state that during the adjudication process of Kanjoro B, there was no objection as to the ownership of their property and as such, they had a legitimate expectation that the parcel would be demarcated to them. That the land adjudication officer Tharaka North neither displayed the original adjudication register for inspection at a convenient place with the adjudication section nor did he give notice that the adjudication register has been completed and may be inspected at the place during a period of sixty days from the date of the notice.
6. The petitioners aver that as much as there was no objection towards their land during the Kanjoro B Adjudication Section, their land was not acted upon. That due to that, they wrote a letter to the land registrar Marimanti dated 22nd June, 2021 and copied to the Land Adjudication Officer Tharaka North which letter was never responded to.
7. The petitioners state that it is only recently that they came to learn that the said parcel of land had been demarcated and recorded in the name of the 1st respondent.
8. The petitioners state that their parcel of land is community land which the 1st respondent holds in trust for the community and cannot use it in a manner that is contrary to the wishes of the community unless the said land is converted to public land either through surrender, transfer or compulsory acquisition. That the 1st respondent has no right to have the land demarcated in its name and neither the 2nd respondent has the mandate to demarcate and record it in the 1st respondent's name.
9. The petitioners contend that as proprietors of the said property, the 1st respondent never approached them with intention to have them either transfer, surrender or compulsorily acquire the land parcel now known as 2597 Kanjoro B Adjudication Section.
10. The petitioners state that upon realization that the land had been unprocedurally allocated to the 1st respondent, they wrote to the 2nd respondent requesting for consent to institute a suit which was declined. The petitioners aver that that was an initiative done in 2015 when plot owners within Makutano area called upon the 1st respondent to establish a market so that they could pay rates and rent. That that was met and the 1st respondent placed a beacon.
11. The petitioners state that they were left at the receiving end as all members affected by the placement of beacons within the area were allocated their respective plots yet the petitioners were left without any allocation.
12. The petitioners aver that theirs is a quest for justice for their right to property as enshrined in *the Constitution* of Kenya, 2010. That it is in the interest of justice that the petition be allowed.
13. The petitioners state that the petition is anchored on Article 22 (1), 23, 35, 62, 63, 67, 40 of *the Constitution*, Part viii of the *Land Act* 2012, Section 25, 29 (3) and 30 of the *Land Adjudication Act* Cap 284 and Section 22 of the *Community Land Act*.



14. The petitioners state that their constitutional rights were breached by the 1st respondent in failing to allocate them the land, colluding with the 2nd respondent to have the land issued to itself in violation of the petitioners' right to own property granted under Article 40 of *the Constitution*, failing to take cognizance that the land falls within Kanjoro B Adjudication Section which is a community land as per *the Constitution* of Kenya 2010, failing to invoke the proper procedure of compulsory acquisition of land by the government as laid down under Article 67 of *the Constitution* as read with part viii of the *Land Act* 2012 and cumulatively denying the petitioners members their right to own property as contemplated under Article 40 of *the Constitution* of Kenya 2010.
15. The petitioners enumerated particulars of alleged breach of their constitutional rights on the part of the 2nd respondent as failing to provide information on the completion of the adjudication or issue a notice in that regard in contravention of Section 25 (b) and (c) of the *Land Adjudication Act* and in contravention of Article 35 of *the Constitution* of Kenya 2010 on the right to information, failing to respond to the petitioner's letter thus denying them the right to information, denying the petitioners consent in contravention of Section 30 of the *Land Adjudication Act*, colluding with the 1st respondent to ensure that the petitioners have no information in regard to the land as to enable it transfer the land to the 1st respondent and denying the petitioners right to own property.
16. In the affidavits, the petitioners have annexed copies of certificate of registration agreement and letters.

2nd Respondent's Case

17. The 2nd Respondents' grounds of opposition 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, is 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 how the specific provisions of *the constitution* that have been infringed neither have they demonstrated the violation or threatened violation of their fundamental rights and the manner in which their rights have been violated by the Respondents.
 3. That the *Land Adjudication Act* provides for a clear procedure for raising objections against any dealing 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. However the petitioners have not demonstrated having raised any objections or appealed to the minister.
 4. That further, the *Community Land Act* provides for Dispute resolution mechanisms for settlement of disputes relating to Community land which the petitioners did not explore.
 5. That this Honourable court has no jurisdiction to ascertain and determine interests in an adjudication area.
 6. 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 Petitioners herein have not established the existence of any exceptional circumstances.
 7. That the petitioners' 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.



8. That the petition is otherwise frivolous, vexatious and an abuse of the court process.
18. The petition was canvassed by way of written submissions. The petitioners filed their submissions dated 14th October, 2024 through the firm of Mugiira & Associates Advocates while the 2nd respondent filed submissions dated 27th October, 2024 through the office of the Honourable Attorney General.

Petitioners' Submissions

19. The petitioners gave a brief background of the matter and identified four issues for determination. It was submitted that the petitioners are members of Makutano Self Help Group. The petitioners reiterated the averments in the petition and supporting affidavits as set out hereinabove.
20. The petitioners submitted that they bought the said land from one Josphat Iguna Mucee and James Matiba Kwenga. That they have produced a copy of the said sale agreement. They submitted that during land adjudication process, there was no objection raised by anybody on the ownership of the said land parcel and therefore the petitioners had a legitimate expectation that the land would be allocated to them, but the land adjudicating officer kept the Kanjoro "B" Adjudication register as a secret. That he did not publish the adjudication register and did not give a notice as per the requirements under section 25 (b) and (c) of the *Land Adjudication Act*. That that contravened the petitioners' right to information as stipulated under Article 35 of *the Constitution*.
21. The petitioners submitted further that though they made efforts to follow up the matter vide a letter dated 22nd June, 2021 addressed to the Land Registrar Marimanti, the information about their parcel of land was not availed as the said letter was never responded to.
22. The petitioners reckon that after due diligence and after adjudication record had closed that they came to realize that the said parcel of land was fraudulently allocated to the 1st respondent. That was brought to their attention when the 2nd respondent responded to demand letter from their advocate confirming that indeed land parcel 2597 KANJORO "B" Adjudication Section had been allocated to the 1st respondent. It is the petitioners' case that the allocation of the said parcel of land to the 1st respondent was unprocedural and illegal. The Petitioners' submitted that had the 2nd respondent complied with section 25(b) and (c) together with Article 35 of *the Constitution* of Kenya and published the register as required, the petitioners would have had a chance to examine the register and file an objection in view of the allocation of the land parcel to the 1st respondent. That in the absence of publication of the said register and upon the same being kept as a secret, the petitioners had no way of knowing whether the land had been awarded to another party other than themselves.
23. The petitioners submitted that there are procedures laid down through which the government, be it the national government or the County Government, may acquire private land by way of compulsory acquisition, transfer or surrender but the 1st respondent never employed any of the three laid down procedures.
24. The petitioners submitted further that the 1st respondent which is the County Government holds land in trust for the community. That under Section 4 (3) of the *Community Land Act*, Community Land can be held under customary, freehold or leasehold tenures. That the process of registering a community land to a freehold tenure is regulated by *Land Adjudication Act* which in turn Section 25 (b) and (c) requires the adjudication officer to display the original adjudication register for inspection at a convenient place within the adjudication section and give notice that adjudication register has been completed and may be inspected at that place during a period of sixty days from the date of the notice. The petitioners cited section 25 (b) and section 26 of the *Land Adjudication Act*.



25. It was submitted that the purpose or requirement that the adjudication officer publishes the register is to provide information to the public to enable them confirm or differ with what the adjudication officer has provided which information goes a long way culminating to process of title. That the provision of information is in line with article 35 of *the constitution* of Kenya 2010. The petitioners submitted that to the extent that the adjudication officer never displayed the original adjudication register for inspection at a place within the adjudication section nor give notice that the adjudication register had been concluded, it is bound that the right of access to information had been violated.
26. The petitioners further submitted that to the extent that the 2nd respondent allocated the land to the 1st respondent when the 1st respondent had not followed due process to enable it own the land either through surrender, compulsory acquisition or transfer the petitioners right to own property was violated.
27. It was submitted that since the adjudication register was not made available for inspection or even a notice of completion of the adjudication register made, the petitioners had no way to ascertain to whom the suit land had been allocated to and that is why the petitioners fault the 2nd respondent for violating article 35 of *the Constitution*.
28. It was submitted that it was not mandatory for parties to pursue mediation or arbitration first under the *Community Land Act*. That it gives an option of judicial proceedings as one equal to mediation or arbitration. The petitioners submitted that what is complained of by the petitioners is breach of a constitutional bill of right which can only be protected by the court which is conferred by Article 23 in accordance with Article 165 of *the Constitution* which crowns the court with jurisdiction to hear and determine application for redress, denial, violation, infringement of, threat to, a right or fundamental freedoms in Bill of Rights.
29. The petitioners submitted that the claims raised in the petition have been substantiated and that there has been no rebuttal by the respondents or any evidence tendered to show that indeed the 1st and 2nd respondents did not infringe the petitioners' rights as alleged and thus have proved their case to the required standards. The court was urged to find the petition merited and allow the same as prayed.

2nd Respondent's Submissions

30. The 2nd respondent identified the issues for determination to be whether this Honourable Court has jurisdiction to hear and determine this matter and whether the petition meets the threshold for a constitutional petition.
31. The 2nd respondent cited the provision of Section 29 of the *Land Adjudication Act* that provides that any person who is aggrieved by the determination of an objection under Section 26 of that Act may, within 60 days after the date of the determination, appeal against the determination to the minister. The 2nd respondent also cited Section 39 (3) of the *Community Land Act* and relied on the case of Kiroket Ole Punyua Vs. 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 and submitted that the petitioners have not demonstrated having explored any of the dispute resolution mechanisms set out in the *Land Adjudication Act* and the *community Land Act*. That the petitioners have not given reasons why they could not pursue the dispute resolution mechanisms set out in those Acts before coming to court. In the premises, it was submitted on behalf of the 2nd respondent that the court lacks jurisdiction to hear and determine the suit and the same ought to be dismissed with costs.



32. On whether the petition meets the threshold for a constitutional petition, the 2nd respondent 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 Vs. County Government of Mombasa & 56 Others [2019]eKLR and submitted that the petitioners have failed to set out and show how the Respondents have infringed their right to property and fair administration. That according to the petitioners, during adjudication process, there was no objection raised as to their ownership of the land. It is submitted that the petitioners have not demonstrated having raised an objection, appeal or having engaged the respondents in the manner set out in the *Community Land Act*. It is the 2nd respondent's submission that that it is clear that the petitioners were aware of the Land Adjudication Proceedings as set out in paragraph 18 of the petition. That there is no evidence to show that the petitioners raised any objection to the proceedings. That the petitioners have also failed to demonstrate how *the constitution* has been violated through the alleged violations by the respondents.
33. It is the 2nd respondent's submission 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 cannot be said to be infringing rights of an indolent petitioner. That the petitioners' sole intention is to engage in fishing expedition in the high seas of constitutional litigation to avert the statutory time limitation of appeal and judicial review proceedings. It is also submitted 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 this court.
34. In the premises, it is the 2nd respondent's submission that this court must guard against transmission of normal disputes and frivolous and vexatious disputes into a constitutional petition. It is submitted that this petition is an abuse of the court process and ought to be dismissed with costs.

Determination

35. I have considered the petition, the responses and submissions. The issues for determination are: -
- i. Whether this court has jurisdiction to entertain the matter.
 - ii. Whether the petition meets the threshold of a constitutional petition.
 - iii. Whether the petitioner is entitled to the reliefs sought.

Whether this court has jurisdiction to entertain the matter.

36. The case before this court is a constitutional petition alleging violation of various rights enshrined in *the Constitution*, including the right to property as provided for under Article 40 of *the Constitution*, Article 63 and 67 of *the Constitution*. The petitioners also allege infringement to their right to information.
37. There is no denial that besides the alleged violations of their rights as stated above, the petitioners dispute relates to the ownership of the suit land known as Title Number 2597 Kanjoro "B" Adjudication Section which is currently registered to the 1st respondent herein.
38. Under Article 162 (2)(b) of *the Constitution*, this court has the mandate to hear disputes relating to the environment and the use of, and occupation of, and title to land. Section 13(1) of the *Environment and Land Court Act* provides disputes to include disputes relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals



and other resources. Section 13(2) (e) makes it clear that what is set out in paragraph (a) to (d) thereof is not conclusive. It is clear from the above provisions of law that the court can hear any dispute relating to the environment and land, including title to land. It is also clear that the court may grant remedies, including declaration and prerogative orders such as the ones sought in the present petition.

39. It is my considered view that this court is the only one mandated to hear and determine applications for redress for denial, violation or infringement of, or threat to right and fundamental freedoms relating to the environment and land. The court also has powers to grant prerogative orders. In view of the above, and in particular the clear provisions of Article 162(2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*, and bearing in mind that the dispute is over ownership of land, it is my finding that this court has the requisite jurisdiction to hear and determine this case.
40. Having determined that this court has jurisdiction to hear the case, I proceed to consider the other issues. It is plain from the facts pleaded in the petition and the responses that the petitioners claim relates to and/or arise from the 2nd respondent's exercise of his mandate under Section 26 of the *Land Adjudication Act*. The petitioners state that the 2nd respondent, the land adjudication officer Tharaka North, allocated the land to the 1st respondent and never displayed the original adjudication register for inspection at a convenient place within the adjudication section nor did he give notice that the adjudication register had been completed and may be inspected at the place during a period of sixty days from the date of the notice. The petitioners however acknowledge that there was adjudication process in the section in question. Indeed, they aver that there was no objection during the process.
41. Section 26 of the *Land Adjudication Act* provides inter alia that any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete. This in my view, is what the petitioners should have done.
42. Further, Section 29 of the *Land Adjudication Act* provides inter alia as follows:
 - “(1) Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination appeal to the minister by
 - a. Delivering to the Minister an appeal in writing specifying the grounds of appeal and,
 - b. Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”
43. Going by the above provisions of law, I opine that the petitioners herein ought to have objected to the Land Adjudication Officer or appealed to the Minister against the decision of the 2nd respondent. It is clear that the petitioners did not exercise their right under Section 26 and 29 of the *Land Adjudication Act*. Instead, the petitioners opted to approach this court by way of the instant petition.
44. The *Land Adjudication Act* contains specific legislation that governs all grievances and prescribes the procedure that has to be strictly followed in the resolution or adjudication of such grievances or disputes. It is my finding that the petitioners must first of all exhaust those other mechanisms before coming to court. The petition as drawn, in my view, is inviting this court to sit on the objection and or an appeal over the decision of the 2nd respondent. In other words, the petition is essentially an appeal against the decision of the 2nd respondent.



45. Further, Section 39(3) of the *Community Land Act* provides as follows:
- a. A registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.
 - b. Any dispute arising between members of a registered community, a registered community and another registered community shall, at first instance be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws.
 - c. Where a dispute or conflict relating to community land arises, the registered community shall give priority to alternative methods of dispute resolution.
 - d. Subject to the provisions of *the constitution* and this Act, a court or any other dispute resolution body shall apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with *the Constitution*.
46. The petitioners aver that the suit land is community land held by the 1st respondent in trust for the community. If that is so, I opine that the petitioners ought also to have explored the alternative dispute resolution mechanisms stipulated under the *Community Land Act* before approaching the court.
47. I must point out that there must be exhaustion of internal mechanisms provided under Statute which is a concept that is also buttressed under the law. The same was comprehensively dealt with in many cases including Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Petition No. 201 of 2019 William Odhiambo Romgoi & 3 Others Vs. Attorney General & 4 Others, Muslims for Human Rights and 2 Others (Interested Parties) [2020]eKLR; Republic Vs. Independent Electoral and Boundaries Commission (IEBC) Ex-parte National Super Alliance (NASA) Kenya and 6 Others [2017]eKLR and Speaker of National Assembly vs. Karume (1992)KLR 21.
48. It has also been held that a constitutional question is one whose answers flow from either the interpretation of *the constitution*, relate to the enforcement of constitutional rights and freedoms, its roles, powers, directions and decisions of state organs as they exercise power and whose reliefs must flow from *the constitution* and not on a statute, and that not each and every violation of the law must be raised as a constitutional issue.
49. In my humble view, the dispute herein is more of a civil nature than constitutional, hence capable of being resolved by other means than by way of petition. Since the issue is one over ownership of the suit land, there are no constitutional issues raised that warrant the intervention of the court.
50. The *Land Adjudication Act* provides for a clear procedure for raising objections against any dealing 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. However, the petitioners have not demonstrated having raised any objections or appealed to the minister.
51. Further, a reading of the issues presented in this petition leave no doubt that the petitioners' grievances can adequately and effectively be addressed by Statute and through a normal Civil suit. I find that the petition has not been pleaded with precision and does not meet the standard enunciated in Anarita Karimi Njeru Case (Supra).
52. Having carefully considered the petition before me and the submissions, and for the reasons stated herein above, I find that the petition has no merit. The same is dismissed with costs to the respondents.



53. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF NOVEMBER, 2024.

Court Assistant – Mwangi

Ms. Musyimi holding brief for Mugiira for Petitioner

Ms. Kendi for 2nd Respondent

No appearance for 1st Respondent

C. K. YANO

JUDGE

