



Kiguru v Lenana Gardens Limited & another (Environment & Land Petition E003 of 2024) [2024] KEELC 13381 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13381 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E003 OF 2024**

AA OMOLLO, J

NOVEMBER 14, 2024

IN THE MATTER OF: ARTICLES 2(1), 3(1), 10, 20, 22, 23, 24, 33, 36, 40, 43, 46, 47, 165, 258 & 259 OF THE CONSTITUTION OF KENYA IN THE MATTER OF: THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE PETITIONER UNDER ARTICLES 33, 36, 40, 43 & 46 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF: RULES 3, 4, 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) (PRACTICE & PROCEDURE) RULES, 2013 AND IN THE MATTER OF: THE SECTIONAL PROPERTIES ACT OF 2020

BETWEEN

CATHERINE WANJIKU KIGURU PETITIONER

AND

LENANA GARDENS LIMITED 1ST RESPONDENT

VILLA CARE MANAGEMENT LTD 2ND RESPONDENT

JUDGMENT

1. This petition is hinged on the alleged violation of articles 33, 36, 40, 42, 43, 46 of *the Constitution* of Kenya. In her Petition dated 19th February, 2024, the Petitioner prays for;
 - a. A declaration be and is hereby issued that the Respondents, either jointly or separately have violated the Petitioner’s rights as enshrined under Articles 33, 36, 40, 42 and 46 of *the Constitution*;
 - b. An order of mandamus be and is hereby issued compelling the Respondents to either jointly and separately, issue the Petitioner herein with a share certificate in the management company known as Lenana Phase One Management Limited and ensure that the said management company is operationalized in line with Part III of the *Sectional Properties Act*, Number 21 of 2020;



- c. An order of mandamus be and is hereby issued compelling the Respondents to either jointly and or separately, connect the Petitioner's Apartment Number D11 located on Block 6th Floor, on Dagoretti/Mutuini/618 to the Nairobi City County Government Water Systems and Kenya Power and Lighting Company and provide the Petitioner with her own separate meters billed directly by the Nairobi City County Government and the Kenya Power and Lighting Company in the Petitioner's name;
 - d. An order of mandamus be and is hereby issued compelling the Respondents to either jointly or separately, give permission and/or access to the Petitioner to install a back-up water tank at her own cost;
 - e. Such other appropriate reliefs that this Honourable Court may deem expedient to meet the ends of justice;
 - f. The Respondent be ordered to either jointly or separately meet the costs of this petition.
2. The Petitioner contends that vide an agreement for sale dated 7th July, 2020 she bought Apartment D11 located on Block D, 6th Floor on Dagoretti/Mutuini/618 from the 1st Respondent with several expectations among them that as per the agreement she would be accorded a quiet and peaceful enjoyment of the properties with all the amenities. First, she states that the 1st Respondent have declined to operationalize the management company and hand over her share certificate to the company. That despite constant requests, demands the 1st Respondents have not issued her with the certificate.
 3. She contends further that the 1st Respondent has declined to connect water and electricity on the property, not offered up any explanation and refused to accept her application to install a back-up water tank as well as directly connect her to the Kenya Power and Lighting Company to have electricity in her individual apartment. That instead, the Respondents had opted to supply her with borehole water at exorbitant rates but they disconnected the same leaving her with no options for clean water.
 4. That as an attempt to supply electricity to the apartments, the Respondent opted for a temporary centralized meter system to power the entire project which the Petitioner contends is unsustainable because there is an overload therefore denying her access to reliable electricity. That the Respondents have since disconnected the electricity from her apartment and her attempts to get permission to install solar-back up to her apartment were denied.
 5. The Petitioner states that she declined to pay the service charge due to the lack of the services. That her freedom of expression under Article 33 of *the Constitution* is being infringed on as she has no access to power thereby limiting any access to internet and freedom. That the lack of power also limits her freedom of association as enshrined under Article 36 of *the Constitution*.
 6. She continued to state that the Respondents have violated her right to develop and quietly and peacefully enjoy her property under Article 40 of *the Constitution* by denying her permissions to install solar power and put up a back-up water tank. That the failure to operationalize the management company infringes this right further.
 7. That her consumer rights under Article 46 had also been violated given that she is entitled to goods and services of reasonable quality and to protection of her health, safety and economic interests. The Petitioner urged this Court to allow the petition with costs.



Response to the Petition

8. Daniel Ojjo swore the Respondents' replying affidavit on the 10th of June, 2024. He dismissed the Petition as being devoid of merit, pre-emptive and an abuse of the Court process because the Petitioner had come to court with what he terms as unclean hands as well as material non-disclosure. He states that the Petitioner has not been paying service charge like the rest of the home owners causing them to disconnect the same. That the service charge arrears stood at K.Shs. 84,000 as at 1st February, 2024 which amount the Petitioner has declined to settle despite several demands from the Respondents including a letter to the Petitioner's former advocates Kayla & Co. Advocates. That the Tenancy agreement had express terms which the Petitioner agreed upon after signing the same and is not expected to enjoy services she does not pay for.
9. On the approvals for personal water and electricity connections, the Respondents depone that clause 3.10 of the Sub Lease required the Petitioner to obtain written consent of the Lessor and or the Manager in order to make any structural alterations or extensions to the apartment. That despite being aware of this, the Petitioner has opted to come to Court instead of following the correct procedure. The Respondents confirm that they applied to the Kenya Power and Lightning Company for a single/three phase 150.0kVa service line on the 6th of June, 2022 and the process is still ongoing. Save for that, electricity is available only that the Petitioner has not paid the arrears for reconnection.
10. The Respondents depone further that they have not declined to issue the Petitioner with her Original Share Certificate but the same is not yet available because they are yet to complete the registration of the leases in the project, which was the condition in the undertaking dated 15th March, 2022 from the Respondents' advocates. That since the process of registration of leases is still ongoing, the Petitioner is estopped from rushing to this Court in an alleged claim of violation of her rights.
11. The Respondents also faulted the Petitioner for coming to Court without exhausting the remedies available under the Sale Agreement in particular clause 10 thereof which provided for arbitration. They deponed further that the present petition does not satisfy the threshold of a constitutional petition in accordance with the principles laid down in the case of Anarita Karimi Njeru and Mumo Matemu cases. That the prayers in the petition are therefore not tenable as they should have been enforced under judicial review. They urged this Court to dismiss the petition with costs for being fatally defective and legally untenable.

The Petitioner's Rejoinder:

12. The Petitioner swore a further affidavit on the 18th of June, 2024 in response to the Respondents' affidavit. She explained that she stopped paying service charge because the Respondents had stopped offering their services and she notified them of her decision to stop the payment of the service charge until her issues were addressed. That the Respondents ignored her constant demands forcing her to file the instant petition.
13. She avers that the Respondents continue to mislead this Court that they have been supplying electricity yet Kenya Power had informed them that their connection was illegally connected with the wiring not conforming to the standards. That the Respondents have refused to complete the water connection forcing all the residents to use borehole water which is unsanitary and unsafe. She urged this Court to uphold her petition.



Submissions:

14. The parties consented to have the Petitions canvassed by way of written submissions. The Petitioner's submissions are dated 4th July, 2024. She submitted on the following issues for determination: whether this Court has jurisdiction to hear and determine this case in light of the arbitration clause in the sale agreement dated 7th July, 2020; and whether the Respondents have violated the Petitioner's rights and what orders should be granted.
15. On the first issue she submitted that the Petition is properly before court as it raises violation of her constitutional rights which are preserved for the High Court as provided under Article 165 (2)(b) of *the Constitution*. That arbitration as a means of dispute resolution is not sanctioned by *the Constitution* as an avenue where violations of fundamental human rights can be sufficiently and effectively canvassed. She relied on the case of *Roshanara Ebrahim Vs. Ashleys Kenya Limited & 3 Others* (2016) Eklr where the Court stated that:

“The Petitioner has however, a clear right to approach the Court for the determination of the question of breach of her right to privacy...”
16. That the High Court has held severally that the Court cannot abdicate its constitutional duty to hear and determine violations of rights when alternative disputes presented is not accessible, affordable, timely or effective. That section 13(3) of the *Environment and Land Court Act* delegates jurisdiction to this Honourable Court to hear and determine the petition. The Petition submits that the sale agreement was performed leading to her taking possession of the property that thereafter, the *Sectional Properties Act* envisages a fully functional management company which owners of the units are shareholders to handle any disputes that may arise. She relied on the case of *Leonard Otieno Vs. Airtel Kenya Limited* (2018) Eklr and submitted that this court qualifies as the appropriate forum to ventilate issues to do with constitutional violations in accordance with Article 23 of *the Constitution* and that the petition was rightly before the Court.
17. On the second issue, she submitted that having purchased the unit and fully paid for it and even took up ownership and possession therefore acquiring all the rights to the property. That she made payments to the 1st Respondents for purposes of water and electricity payments with the legitimate expectation that there would be water and electricity in her house but this was not the case. That she started pursuing and complaining about water and electricity as early as June 2022 and despite being informed over a year ago that the connections are yet to be made. That the 2nd Respondent has tried to frustrate the installation of the power back up system demanding that she has to first seek an approval. She relied on the case of *Catherine Kageni & 5 Others Vs. County Government of Meru* (2016) Eklr where the Court held that:

“I opine that the Plaintiffs in this suit who are still in occupation of their rental premises by dint of a court order can not enjoy their right to a clean and healthy environment if they do not have water. That there is also no doubt that provision of electricity enhances the enjoyment of a clean and healthy environment...”
18. While relying on the case of *Wekesa Vs. Kenya Power And Lighting Company Ltd & Another (Constitutional Petition 12 Of 2021)* 2023 (eklr) the Petitioner continued to submit further that the Respondent has not given any tangible reason as to assist the Court to depart from a finding of the violations of her rights in the affirmative.



19. The Respondents' submissions are dated the 8th of July, 2024 and they submitted on the following issues for determination: whether the Petitioner's rights have been violated as submitted, whether the Petition satisfies the threshold for a constitutional petition; whether the petition has exhausted the doctrine of exhaustion mechanisms and whether the Petitioner is entitled to costs.
20. On the first issue, the Respondents submitted that the alleged violations that the Petitioner has outlined in her petition are untenable since she has come to Court with unclean hands and wants to enjoy services that she has not paid for and keeps pushing her way without involving the management company. That it is trite law that once parties have entered into an agreement like the current lease, they are free to determine terms that govern their relationship and the Court's role is limited to the enforcement of those terms. That the parties in this case agreed that any dispute centered around service charge or any other dispute should be solved in accordance to the terms of the lease; Arbitration. That this Court's powers are limited to enforcing the agreement and it cannot change the terms of the contract or rewrite the same for the parties. They placed reliance on the case of *Filipo Fedrini Vs. Ibrahim Mohammed Omar* (2019) Eklr where the Court held that parties to a contract are free to determine terms that govern their relationship and the Court's role is limited to enforcement of those terms. They also relied on the cases of *National Bank Of Kenya Limited Vs. Pipeplastic Samkolit (k) Limited & Another* (2001) and that of *Tom Otieno Odongo Vs. Cabinet Secretary Ministry Of Labour Social Security Services & Another* (2013) Eklr.
21. That clause 3.10 of the sublease provides that the Lessee cannot make structural extension/alteration to the premises without the written consent of the Lessor and the Manager. The conditions have to be followed to the letter and the Petitioner was aware of the same but failed to follow the requisite steps.
22. On the issue of the original share certificate, the Respondents reiterated that the undertaking by their advocates was clear that the share certificate would be issued once all the units are sold and this is yet to happen, a fact that is not novel to the Petitioner. That the Petitioner's water and electricity will be reconnected once she pays the arrears. The Respondents submitted that the assertions in the petition are therefore far-fetched. They relied on the case of *Tiffany Wang'eri Njuguna Vs. Wilson Gikonyo Kimani* (2019) Eklr where the Court held that:

“The Petitioner as a member of a gated community is subject to the terms and conditions governing that community and will enjoy common services subject to the terms applicable to all members. Any dispute should be resolved in accordance with the terms and conditions upon which services are provided. Indeed where a member is genuinely aggrieved, that member may approach the court for resolution of the dispute but not through a non-founded constitutional petition by invocation of constitutional petitions...What is clear, however is that it is the Petitioner who has failed to meet her obligations to the community for purposes of enjoying the common services including supply of treated water from the borehole under the management of the community.”
23. That the Petitioner is one of the members of a gated community and payment of services are shared among the residents yet she has declined to pay her part of the service charge. That she cannot therefore contend that her rights have been violated as the Respondents have no constitutional obligation to supply the Petitioner of water free of charge.



24. On the second issue, the Respondents relied on the case of Anarita Karimi Njeru Vs. Republic (1979) Eklr where the Court laid down the threshold for a constitutional petition and stated that:
- “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.”
25. That this petition does not meet the aforementioned threshold as it fell short of the very substantive test to which the Court made reference to especially without elaborate particulars of the alleged infringements to enable the Respondents respond or answer to the allegations and/or complaints. While relying on the case of Grays Jepkemoi Kiplagat Vs. Zakayo Chepkoga Cheruiyot (2021) EKLR and urged this Court to dismiss the petition with costs.
26. While submitting on their third issue, the Respondents urge that jurisdiction is so central in judicial proceedings and a court without jurisdiction is one acting in vain. They relied on the holding in the case of Owners Of Motor Vessel ‘lillian S’ Vs. Caltex Oil (kenya) Limited and submitted that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenues or forums and not invoke the court process in the dispute. That this Court lacks jurisdiction to hear the matter in view of the doctrine of exhaustion of the mechanisms under the agreement on resolving the matter and the issues raised herein do not meet the threshold of a petition. That this was the holding in the case of Speaker Of The National Assembly Vs. James Njenga Karume (1992) Eklr And That Of Dickson Mukwe Lukeine Vs. Attorney General & 4 Others (2012) Eklr.
27. On the issue of costs, the Respondents submitted that costs follow the event and having proved that the petition is premature and the Courts lacks jurisdiction and as such the Respondents should be awarded the costs of the petition. The Respondents urged this Court to dismiss the Petition with costs.

Analysis And Determination

28. Keeping in mind the foregoing, and having reviewed the Petition, the Replying Affidavits and the respective parties’ submissions, the following issues arise for determination:
- a. Whether this Court is seized with the requisite jurisdiction to handle the instant petition;
 - b. Whether the Petition falls within the ambit of a constitutional petition;
 - c. Whether the Respondents have infringed on the Petitioner’s constitutional rights; and
 - d. Who bears the costs of this petition?
29. Without jurisdiction, a court should down its tools and this Court is no exception. The Respondents have submitted that the dispute between the parties arises from the sale agreement dated 7th July, 2020. Both parties have confirmed that they entered into an agreement for purchase of an apartment known as Apartment D11, Block D on the property known as Dagoretti/Mutuini/618 for the consideration of K.Shs. 7,500,000. It is also not in dispute that the agreement has been performed partly with the Petitioner already taking possession of the apartment.
30. The Respondent has confirmed that since the parties voluntarily entered into the agreement, they should be held to the terms therein including the arbitration clause which the Respondents contend



it ousts the jurisdiction of this Court. The Arbitration Clause is contained in clause 7 and sub-clause 7.1 of the agreement. It provides that:

“ All disputes and questions whatsoever which shall arise between the parties hereto touching this lease or the construction or application thereof or any clause or sub-clause herein contained or to the rights or liabilities of any party under this Lease shall be referred to a single Arbitrator (being a registered fellow of the Kenya Branch of the Chartered Arbitration of Kenya) to be agreed upon by the respective Lessee and the Management Company. A vote by a simple majority being a numerical majority of lessee will be the choice of Arbitrator.”

31. Article 159(2)(c) of *the Constitution* of Kenya encourages alternative forms of dispute resolutions including reconciliation, mediation, arbitration and traditional forms of dispute resolution. Section 6(1) of the *Arbitration Act* No. 4 of 1995 is key. It provides thus:-

“ A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—

- a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
- b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

32. The petitioner alleges infringement of her fundamental rights under Articles 33, 36, 40, 42, 43 and 46 of *the Constitution* and the question that arises therefore is whether the petition as filed should have been litigated by an Arbitrator in line with the provisions of clause 7.1 of the Agreement for Sale. Article 22(1) of *the Constitution* provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Thus the jurisdiction to deal with infringement of fundamental rights lies with the High Court under Article 165 of *the Constitution*, the Employment and Labour Relations Court under Article 162(2)a and the Environment and Land Court under Article 162(2)(b) of *the Constitution*. This means that the arbitration clause does not limit the Petitioner’s right to invoke this Court jurisdiction for determination of the alleged violation of her fundamental rights and freedoms.

33. With regards to the second issue, the Petitioner alleges that her fundamental rights were infringed upon. The Court of appeal case of the Mumo Matemu Vs. Trusted Society Of Human Rights Alliance & Another (2013) Eklr provided the standards of proof in the Constitutional Petitions as founded in the case of ANARITA KARIMI NJERU supra where the court is satisfied that the Petitioner’s claim was well pleaded and articulated with absolute particularity. It held that:

“ Constitutional violations must be pleaded with a reasonable degree of precision.....”

34. Hon. Lenaola J. (as he then was) in Benard Murage Vs. Fine Serve Africa Limited & 3 Others [2015] Eklr, observed that not each and every violation of the law must be raised before the High Court as a constitutional issue. He relied in the case of Harrikinson Vs. Attorney General Of Trinidad And Tobago [1980] AC 265, where it was stated that;

“ The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or



fundamental freedoms guaranteed for individual by...*the constitution* is fallacious. The right to apply to the High Court under... *the Constitution* for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court ... if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

35. The Petitioner states that the Respondents have violated her rights by disconnection of her water and electricity. Although pleaded in the Petition, the Petitioner has not pleaded with particularity how her rights have been infringed upon and neither has she provided any evidence that she attempted to resolve the issues of the disconnections with the Respondents before claiming the violation of the rights under *the Constitution*.
36. The Respondent annexed to its replying affidavit a lease agreement dated 19th August, 2021 executed between the Petitioner and the Respondent. The Petitioner acquired interest in the property L.R Dagoretti/Mutuini/618 by virtue of this lease agreement hence she is bound by the terms of that lease. what she claims as violations of her Constitutional rights in my view would be breaches of the terms of the lease. The lease set out obligations on the lessee (the Petitioner).
37. For example, at the following clauses the lease provides that;
- “(g). This Lease is granted and the Lessee takes it upon the express condition that the Lessors will apply for and become a member of the Manager (or in the case of an assignee of the original Lessees will take a transfer of such membership) and will on any assignment of deviation of the title to this sub lease ensure that the said membership is transferred to the assignee or transferee.”
- “3.1. To pay all the charges (hereinafter defined) hereby reserved on the days and in the manner aforesaid and not to exercise or seek to exercise any right or claim to withhold the charges or any right or claim to legal or equitable set-off.”
- “3.4 Electricity and Water and other Services
- The apartments have sub metered for water and separately metered for electricity, unless otherwise the Lessee will pay any indemnify the Lessor and or Manager against all changes for electricity, and telephone and other services consumed or used at the apartments including standing charges, meter rent and charges payable in respect thereof and at all-time comply with all rules and regulations of the respective utility Company. The Lessor will ensure the meters are registered in the name of the Lessee at hand over.”
38. There is an existing contract between the parties which this court cannot re-write its terms. In the case of National Bank of Kenya Ltd. Vs. Pipe Plastic Sam Koit (K) Ltd. (2002) 2 EA 503 it was held that a court of law cannot rewrite a contract between parties. The petitioner ought to have demonstrated that he has complied with the terms of the lease but water and electricity has not been supplied
39. It is therefore this Court’s opinion that this constitutional petition does not meet the threshold of constitutional petition and it cannot be used to introduce new terms into the existing agreement



between the parties by way of a declaratory order to connect apartment D11 to the Nairobi City Water Systems. In any event, there is no evidence laid down to show there is no connection to the said Nairobi City Water Systems within the suit premises. I agree with the findings of the Court in *Tiffany Wang’eri Njuguna Vs. Wilson Gikonyo Kimani* (2019) EKLR where the Court held that:

“It is a cardinal principle in constitutional litigation that to establish a cause of action in a constitutional petition, the petitioner must show much more than merely stating that his or her constitutional rights have been violated. The petitioner must show, first, that s/he enjoyed a constitutional right; second, that the right had been violated and, third; that the defendant is liable for the said violation. (See *Elizabeth v President of the Court of Appeal* (2010) SLR 382)”

40. On the third issue, on whether the Petitioner’s rights have been infringed by the Respondents, she has stated that she has had no access to water and electricity at her suit premises for a while after the Respondents disconnected the same. The Petitioner has however confirmed in her petition and affidavit that she stopped paying service charge for the services because the same were not being provided. The Respondents deponed that at the time of the disconnection, her arrears amounted to KShs. 84,000. The Petitioner’s contention is that the electricity is illegally connected and that the water is supplied from a borehole that is untreated and unsanitary hence not safe for human consumption, allegations that have not been substantiated.
41. The Petitioner has not produced an expert’s report to corroborate her assertion that water from the borehole is untreated and unsanitary. Is the illegal connection to Kenya Power affecting only her apartment? I am persuaded by the holding in the case of *Tiffany Wang’eri Njuguna* (supra) presenting similar circumstances where Mwita J. stated that:

The petitioner resides in a gated community. According to the respondent, and this has not been denied by the petitioner, residents in that community have obligations and requirements that they have to meet and abide by in order to get certain communal services. One of the requirements is payment of service charge which enables residents get common services including treated water from the borehole which is supplied to those residents who have met their obligations.

In my considered view, the answer must be in the negative. The petitioner lives in a community with rules and regulations. All other members oblige and meet their obligations. The petitioner having opted not to follow the regulations, she must have driven herself out of the right to get common services including water from the common source. Her right to water from the common source was founded on her meeting the contractual obligations to pay service charge. Payment of service charge would put her in a position to demand common services from the respondent, including the right to get water from the common borehole otherwise she may not rightfully demand and consume water she does not pay for given that there is much more the service charge does for the benefit of the community than just water.”

42. Lastly, the issuance of the share certificate in the Respondents’ Management Company was conditional on the completion of the project which both parties are aware of. The Petitioner has not denied that she received a professional undertaking on this and the fact that the undertaking is to be fulfilled fourteen days after the completion of the project makes this particular prayer immature. This is because no evidence has presented to confirm that, first the project is complete and that fourteen days have lapsed without the Respondents handing the Petitioner her share certificate.
43. The upshot of the foregoing is that, the Petition is unmeritorious and the same is not proved. It is therefore dismissed with an order that each party shall bear their respective costs.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024

A. OMOLLO

JUDGE

