



Fleig & 6 others v The county Government of Mombasa & 2 others (Environment & Land Petition 12 of 2021) [2024] KEELC 7461 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7461 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION 12 OF 2021

SM KIBUNJA, J

NOVEMBER 13, 2024

**IN THE MATTER OF ARTICLE 19, 22(1) AND ARTICLE 23 OF THE
CONSTITUTION OF KENYA AND ENFORCEMENT OF BILL OF RIGHTS**

AND

**IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION
OF KENYA ON PROTECTION OF RIGHT TO PROPERTY**

AND

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION
OF KENYA ON FAIR ADMINISTRATIVE ACTION**

BETWEEN

ROBER FLEIG 1ST PETITIONER
FARIDA ABDULLA 2ND PETITIONER
ALVIN JONES 3RD PETITIONER
UWE MEIXNER 4TH PETITIONER
MANFRED DIESTLER 5TH PETITIONER
IRENE OMONDI 6TH PETITIONER
FLORIDA MANAGEMENT SERVICES LIMITED 7TH PETITIONER

AND

THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF LANDS 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT



JUDGMENT

1. Vide the amended petition dated 18th September 2023, the petitioners seek the following orders:
 - a. A Declaration that the petitioners have Constitutional Proprietary rights on property known as Pungu Villas on plot known as Pungu Fuel/77 now subdivided into several plots as stated above.
 - b. A Permanent Conservatory Order of Injunction restraining the respondents jointly and severally by themselves, their agents or any other person acting on their behalf from demolishing the petitioner's properties on property known as Pungu Villas on land formerly known as Pungu Fuel/77, creating a road their through or in any other way whatsoever interfering with that property formerly known as Pungu Fuel/77.
 - c. The cost of this Petition.
 - d. Any other relief this Honourable Court may deem fit to grant.

They inter alia allege that they are owners of land/houses known as Pungu Villas on land known as Pungu Fuel/77, Likoni, which they had acquired as a single parcel with a perimeter fence around it, and established a gated community with each having a house therein. That in 2019 they subdivided the said land so that each petitioner would have their title as follows:

 - a. "Kwale/Pungu Fuel/139 registered in the name of Abdalla Farida Haron
 - b. Kwale/Pungu Fuel Area/135 registered in the names of Alvin Jones, Cynthia Wood, Lilly Pen and Robert Fleig.
 - c. Kwale/PunguArea/134 registered in the names of Alvins Jones, Cynthia Wood, Lilly Pen and Robert Fleig.
 - d. Kwale/Pungu Fuel Area/143 registered in the names of Manfred Adam Distler.
 - e. Kwale/Pungu Fuel Area/142 registered in the names of Robert Fleig, Alvin Jones,Cynthia Wood and Lily Pen.
 - f. Kwale/ Pungu Fuel Area/141 registered in the name of Uwe Meixner.
 - g. Kwale/Pungu Fuel Area/140 registered in the names of Alvin Jones, Cynthia Wood, Lily Pen and Robert Fleig.
 - h. Kwale/Pungu Fuel Area/136 registered in the names of Alvin Jones, Cynthia Wood, Lily Pen and Robert Fleig.
 - i. Kwale/Pungu Fuel Area/141 registered in the name of Florida Management Services Ltd.
 - j. Kwale/Pungu Fuel Area/137 registered in the name of Tam Wing and Robert Fleig.
 - k. Kwale/Pungu Fuel Area/133 registered in the name of Irene Omondi."
2. The petitioners averred that at the time of demarcation and registration of Pungu Fuel/77 there were no roads going through the property, a fact that was confirmed in writing by the then Coast Provincial Roads Engineer. That they had to literally cut through rocks to create a road to the property, but sometimes on 30th December 2020, the 1st respondent through its department of Lands Planning and Housing demanded in writing that they should demolish the buildings that were blocking access.



They allege that the demand is a violation of their constitutional right under Articles 40 and 47 of *the Constitution*. That they later learnt of the existence of a map which was said to have been drawn sometime in 2019 purporting to show an access road passing through the suit property, without their consent and participation and hence this petition.

3. The 1st respondent opposed the petition through the replying affidavits of John Wambua Francis, County Physical Planner, and Calistus Luseno, Building Inspector in the Department of Lands, Planning and Housing, sworn on 15th April 2024 and 7th May 2021, respectively, inter alia deposing that upon receiving a letter addressed to the Chief Officer Department of Lands, Planning, Housing & Urban Renewal from Mr. Paul Kariuki Njoroge, the registered owner of Plot *Pungu/1471/MS*, complaining that the petitioners had blocked the access road serving his plot and other neighbours the Department of Lands, through building inspector Mr. Calistus Luceno, wrote to the Petitioners requiring them to open up the road by removing the structure/boundary wall causing the blockage. That the petitioners have not challenged the survey plan that they have attached and shows a public road was created through parcel 114 that was one of the eleven resultant subdivisions. That the petitioners' blocked the access road without obtaining the necessary approvals' contrary to section 57 (1) of the Physical and Land Use Planning Act 2019. That under section 56 of the said Act, the 1st respondent has the power to inter alia implement approved physical development plans. Consequently, the blocking of the access road is a violation of Article 40 of *the Constitution* as the petitioners are preventing their neighbours from enjoying their property.
4. By a consent of counsel adopted by the court 26th April 2024, the parties agreed to canvass the petition through written submissions. The learned counsel for the 1st respondent, and 2nd & 3rd respondents filed the submissions dated 5th July 2024 and 4th July 2024 respectively. The only submissions filed by the learned counsel for the petitioners is that dated 28th August 2024 that is headed "SUBMISSIONS IN REPLY/REJOINDER". I have checked both the court's manual record and the CTS and no other submissions by the petitioners has been seen. I have also noted a document headed "PETITIONERS ADDITIONAL DOCUMENTS" dated the 20th September 2024, which was definitely filed long after the respondents had filed their submissions and without leave. The court has considered all the filed submissions.
5. The issues for determination by the court in this petition are as follows:
 - a. Whether the petitioners have established infringement or breach of their constitutional rights or established a reasonable case for the orders sought to be granted.
 - b. Who pays the costs?
6. The court has carefully considered the pleadings, the affidavit and documentary evidence tendered as summarized above, submissions by the parties' learned counsel, superior courts decisions cited thereon, and come to the following conclusions:
 - a. There is no dispute over the petitioners' proprietorship of land parcel Pungu Fuel/77, Likoni, suit property. The dispute is whether the road of access through the suit land ends within the property or connects to the road beyond that parcel. The Petitioners' claim is that they created the access to serve their plots internally and therefore it ends within the property. The Petitioners are further disputing that there was an access road when they came onto the suit property, and that they had to create their own access road and do not wish to share it with the neighbours, such as the said Mr. Paul Kariuki. The respondents have disputed the petitioners' claim, insisting that the road of access through the suit property goes beyond that land, and that its blockage by the petitioners was without authority and contrary to the law.



- b. In the case of *Anarita Karimi Njeru v Republic* (1979) eKLR the court set out the standard for constitutional matters 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.”

In the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 Others* (2013) eKLR the Court of Appeal observed that:

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

In this petition, the Petitioners have cited the rights under Articles 40 and 47 of *the Constitution* to be the ones alleged to have been violated by the respondents. Those are rights to peacefully enjoy their property, and fair administration.

- c. The respondents have through their replying affidavits and submissions reiterated that there was no challenge of the survey plan which both sides have relied upon, and which clearly shows that there was a road through the suit property that was provided at the time of subdivision of the mother title.
- d. The learned counsel for the 2nd and 3rd respondent inter alia submitted that the issues in the petition ought to have been raised through an ordinary civil suit and not a petition. In the cases of *Haki Ziman Abdul Abdulkarim versus Arrow Motors E.A Ltd & Another* (2017) eKLR and *Fredrick & Others versus MEC for Education and Training East Cape and Others* 9200 23 L.J 81, the courts stated that a constitutional petition must raise constitutional questions or issues whose answers flow from *the Constitution*, and not statutes and that it must require the interpretation of *the Constitution*. Indeed this petition does not have any single constitutional issue that demands the court to interpret any provision of *the Constitution*.
- e. What the petitioners have raised are matters that fall within the statutes including questions on development of the subdivision scheme, that preceded the partitioning of their jointly owned land into the eleven individual parcels. Those are matters under the statutes including *Physical*



and Land Use Planning Act chapter 303 of the Laws of Kenya and the Survey Act. The survey plan that both parties relied on, and which has all the plots the petitioners referred to, is shown to have been registered on 8th July 1985, and it is doubtful that survey plan with the road of access going beyond the suit property was prepared in 2019 as the petitioners alleged.

- f. Clearly the issues herein ought to be canvassed in a civil claim. It is also not lost on this court that there are steps in challenging the survey map, which have been provided for in the statutes, such as the Liaison Committee under section 76 of the abovementioned Act. There is nothing to suggest that the petitioners had exhausted that statutory dispute resolution forum before coming to court. I therefore find this petition was filed prematurely in court. In the case of *S.K Macharia versus Kenya Commercial Bank Ltd & Another* (2012) eKLR, the Supreme Court of Kenya at paragraph 68 of the decision stated and held that;

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

- d. The learned counsel for the petitioners has inter alia submitted that the petition should not be thrown out on technicalities and referred to Article 159(2)(d) of the Constitution. There is no technicality in the form of the petition herein. It is simply that the heart of the petitioners’ claim is civil in nature, and should have been pursued as such, upon first complying with the demands of the doctrine of exhaustion. The petition therefore fails.
- e. Before addressing the issue of costs, I want to briefly look at the “PETITIONERS ADDITIONAL DOCUMENTS” dated the 20th September 2024, long after all parties had filed and exchanged submissions. The parties had agreed to canvass the petition through written submission on 26th April 2024. Other than the submissions, the evidence to be considered was that filed through the various affidavits. The documents dated 20th September 2024 were not attachments to any affidavit, and were filed without leave, and there is no indication that they were ever served. That is a strange way of attempting to introduce evidence long after the closure of pleadings, when all that was remaining was a date for judgement. The practise of introducing documentary evidence through methods unknown in the laws and rules, like attaching such documents to submissions should stop. Those documents dated 20th September 2024 are hereby struck out and expunged from the record.
- f. That as all the respondents are state/public agencies, and in view of the nature of the dispute, and the final orders of the court, each party should bear their own costs.

7. From the foregoing conclusions the orders that commends themselves to be issued are as follow:

- a. That the Petition is without merit and is hereby dismissed in its entirety.
- b. That each party to bear their own costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 13TH DAY OF NOVEMBER 2024.

S. M. KIBUNJA, J.



ELC MOMBASA.

In The Presence Of:

Petitioners : Mr. Paul Magolo.

Respondents : M/s Kuria For 1st Respondent

Mr. Mwanjeje for 2nd and 3rd Respondent

LEAKEY – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

