



REPUBLIC OF KENYA



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Maingi & 2 others v Kenya Forest Service & 2 others (Environment & Land Petition E002 of 2023) [2024] KEELC 13917 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13917 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT & LAND PETITION E002 OF 2023

TW MURIGI, J

DECEMBER 18, 2024

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 29 (D), 40, 47, 162, 165, 232, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 26 OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF PART VIII OF THE LAND ACT, 2012

AND

IN THE MATTER OF OWNERSHIP AND DENIAL OF ACCESS OF LAND PARCELS TITLE NO. MAKUENI/KIVANI/1528, 1529 AND 1530

BETWEEN

JONES MUUMBI MAINGI 1ST PETITIONER

JOEL MUTIKU KIMONYI 2ND PETITIONER

GEORGE MUTHIANI MUTUKU 3RD PETITIONER

AND

THE KENYA FOREST SERVICE 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT



JUDGMENT

1. The Petitioners filed the Petition dated 15th March, 2023 seeking the following orders: -
 1. A declaration that the actions and/or inactions of the 1st Respondent of denying the Petitioners access to their respective parcels of land known as Makueni/Kivani/1528, 1529 and 1530 contravenes national values under Article 10, protection of the right to property under Article 40 and the values and principles of public service under Article 232 of the Constitution of Kenya 2010.
 2. A declaration that the Petitioners fundamental rights and freedoms as enshrined under Articles 29 (d), 40 and 47 of the Constitution of Kenya 2010 have been contravened and infringed upon by the 1st Respondent and the 2nd Respondent jointly and/or severally.
 3. An order awarding the Petitioners compensation for the period they have been unable to access the suit land known as Makueni/Kivani/1528, 1529 and 1530.
 4. An order awarding costs of the Petition to the Petitioner.
5. Any other or further orders, writs and directions this court considers appropriate and just for the purpose of the enforcement of the Petitioners' fundamental rights and freedoms; the enforcement and defence of the Constitution pursuant to Article 23 (3) of the Constitution.
2. The Petition is supported by the affidavit of Jones Muumbi Maingi sworn on his own behalf and on behalf of his Co-petitioners.

The Petitioners Case

3. The deponent averred that he is the registered proprietor of land Parcel No. Makueni/Kivani/1528 while the 2nd Petitioner is the registered proprietor of Parcel No. Makueni/Kivani/1530 and that the 3rd Petitioner is the personal representative of the estate of the late Nason Mutuku Ngolania, the registered proprietor of land Parcel No. Makueni/Kivani/1529. He further averred that the suit properties arose from the subdivision of land Parcel No. Makueni/Kivani/1476 which was in the 1970s awarded to their parents as compensation when their land was taken by the government for construction of a community dam.
4. He deposed that during the land adjudication process in Kivani Adjudication Section, he raised an Objection together with the fathers of the 2nd and 3rd Petitioners against Masaku County Council. That the Objection was determined vide the judgment dated 15/10/1992 where it was ordered that Parcel No. 1476 be extracted from Parcel No. 1078 and be registered in the names of the Objectors. He averred that no appeal was preferred by any party against the judgment of the Land Adjudication Officer and the title deed for Parcel No. 1476 was issued.
5. That despite being issued with the Title deed for Parcel No. 1476 and successfully subdividing it into the suit properties, they have been unable to access and develop the land because the 1st Respondent's officers have denied them access to the suit properties. He further averred that several letters written to the 1st Respondent have been ignored. That through their Advocates, the Petitioners wrote to the 2nd Respondent regarding their land but to date, they have received no response.
6. He went on to state that while the land they surrendered to the government in the year 1975 has continued to benefit the community through the construction of Kivani Dam, they have derived no



benefit from the suit properties which was awarded to them as compensation. He averred that the acts of the Respondents constitute a violation of their constitutional right to own property. In conclusion, he urged the court to grant the orders sought in the Petition.

The 1st and 3rd Respondents Case

7. The 1st and 3rd Respondents opposed the Petition through the replying affidavit of Evans Kegode, the Head of Survey and Mapping, Kenya Forest Service. He averred that the Petition is inconsistent with the express provisions of the Constitution and the Forest Conservation and Management Act No. 34 of 2016. He denied the averment that the suit properties were initially unadjudicated ancestral land or that the land was properly registered in favour of the Petitioners.
8. He contended that Makongo Forest being part of Akamba Native Land was gazetted and declared as Makongo Forest area vide Legal Notice No. 532 of 1960. That the boundaries of Makongo Forest were gazetted with a spatial spread of 166.33 hectares (411) acres vide Legal Notice No. 300 of 1964. That vide Legal Notice No. 174 of 1964, the boundaries of Makongo Forest Reserve were declared and Makongo Forest became Central Forest. He further contended that the Legal Notice has not been degazetted.
9. He further averred that in the 1980s, a land exchange transaction was done between the then Chief Mr. Joel Malinda and Kimonyi Ngoranie on Makongo Forest for provision of land by Kimonyi for the construction of Kivani earth dam as a public utility. That during the exchange transaction, Kimonyi Ngoranie was allocated approximately 22.88 hectares of Makongo Forest land without following the required procedure for allocation of forest land. He further contended that the 1st Respondent never participated in the land exchange exercise and hence the purported land that was alienated still forms part of Makongo Forest.
10. He deposed that upon inquiry he discovered that the suit properties were irregularly acquired by the Petitioners in collusion with individuals from the Ministry of Lands who ought to have known that Makongo Forest land was not available for allocation or alienation. According to him, the Title deeds for the suit properties are a nullity ab initio and hence, they do not enjoy protection of Article 40 of the Constitution since they were acquired illegally.
11. He contended that the Petitioners' attempts to take possession of forest land violates Article 42 of the Constitution which guarantees the right to a clean and health environment as well as Article 69 which imposes obligations on the State towards the protection and conservation of the environment. He further contended that the Petition does not meet the threshold set out in the case of Anarita Karimi Njeru v Republic (1976 – 1980) KLR 1272. In conclusion, he urged the court to dismiss the Petition with costs.
12. The 2nd Respondent did not file any response in opposition to the Petition.
13. The Petition was canvassed by way of written submissions.

The Petitioners Submissions

14. The Petitioners filed their submissions dated 25th September, 2024. On their behalf, Counsel identified the following issues for the court's determination: -
 - a. Whether or not the Petitioners hold a good title to the suit property?
 - b. Whether or not the Petitioners' rights were violated?



c. Whether or not the Petitioners are entitled to the reliefs sought?

15. On the first issue, Counsel submitted that lawful procedure was followed in the subdivision of land Parcel No. 1476 into the subsequent suit properties. Counsel submitted that the 1st and 3rd Respondents did not prove that the Petitioners titles were acquired irregularly. Counsel argued that the Respondents would have already taken steps to level charges against the Petitioners if they were involved in any illegalities in acquiring the title deeds for the suit properties. Counsel submitted that the Petitioners have gone beyond the instrument of title and have explained how they acquired the suit properties To buttress this point, Counsel relied on the case of *Munyu Maina v Hiram Gathiha Maina* (2013) eKLR.
16. It was submitted that the Petitioners' titles are protected by Section 26 of the Land Registration Act. Counsel relied on the provisions of Sections 24 and 25 of the Land Registration Act to submit that the Petitioners are the absolute and indefeasible owners of the suit properties.
17. On the second issue, Counsel submitted that the Petitioners have demonstrated that their allocation of the suit properties was done lawfully. Counsel further submitted that the 1st Respondent's action of continued denial of access to the suit properties is an infringement of their right to property.
18. Counsel submitted that the 2nd Respondent received the Petitioners' complaints but still refused to resolve the same in breach of Article 47 of the Constitution.
19. On the third issue, Counsel submitted that the Petitioners have sufficiently proved that the Respondents violated the Petitioners' constitutional rights. Concluding his submissions, Counsel urged the court to grant the orders sought in the Petition together with costs.

The 1st and 3rd Respondents Submissions

20. The 1st and 3rd Respondents' filed their submissions dated 17th April, 2024. On their behalf, Learned State Counsel identified the following issues for the court's determination: -
 - i. Whether the Petitioners obtained the title fraudulently;
 - ii. Whether the Respondents violated the Petitioners' constitutional rights; and
 - iii. Whether the Respondents discharged its mandate in accordance with the law.
21. On the first issue, Learned State Counsel submitted that the suit properties are part and parcel of Makongo forest land which was gazetted vide Legal Notice No. 174 of 1964. Submitting on Article 62 (1) (g) of the Constitution, Counsel contended that the Petitioners have not presented any evidence to show that any part of the forest was converted to allow for allocation to the Petitioners. Learned State Counsel argued that the suit properties being government land, the subsequent acquisition was unlawful and fraudulent as the land was not available for alienation and allocation. Learned State Counsel submitted that the process for degazettement of forest land was not followed.
22. On the second issue, Learned State Counsel submitted that the Petitioners' right to own property under Article 40 (3) of the Constitution is a qualified right under Article 40 (6) rather than an exclusive right. It was submitted that the title deeds for the suit properties do not enjoy the protection guaranteed under Article 40 of the Constitution as they were unlawfully acquired.
23. On the third issue, Learned State Counsel submitted that the titles held by the Petitioners are null and void ab initio and should be cancelled. In conclusion, Learned Counsel urged the court to dismiss the Petition with costs.



Analysis And Determination

24. Having considered the Petition and the submissions by both parties, the following issues fall for determination:-
- a) Whether the Petitioners Constitutional rights and freedoms have been violated.
 - b) Whether the Petitioners are entitled to the orders sought.
25. From the evidence in support of the Petition and the 1st and 3rd Respondents' replying affidavit, the following facts are not disputed: -
- i. The suit properties Parcel Nos. Makueni/Kivani/1528, 1529 and 1530 are registered in the names of Jones Muumbi Maingi, Nason Mutuku Ngolania and Joel Mutiku Kimonyi respectively;
 - ii. The suit properties came about from the subdivision of Parcel No. Makueni/Kivani/1476;
 - iii. Parcel No. Makueni/Kivani/1476 was awarded to the Petitioners in a land exchange agreement that was negotiated by Chief Joel Malinda in 1975;
 - iv. Since the judgment of the Land Adjudication Officer was delivered on 15/10/1992, the Petitioners have been unable to take possession of the suit properties as their efforts have been thwarted by the 1st Respondent
26. It is trite law that the Petitioners must specifically and precisely demonstrate evidence of the alleged Constitutional violations.
27. In the case of *Anarita Karimi Njeru v Republic* [1979] KLR 154 the court set out the substantive test to be applied when making a finding whether the alleged violation formed the basis of the Petitioners complaint 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.”
28. The Supreme Court in *Communications Commission for Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR aptly held as follows: -
- “Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic* [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”
29. It is not in dispute that the Petitioners are the registered proprietors of the suit properties. The Petitioners produced the certificates of official search for the suit properties (Annexure JMM1) to show



- that they are the registered proprietors of the suit properties. They narrated how they acquired the suit properties. It is the Petitioners case that their parcels of land in Kivani were acquired by the government in the 1970s for the construction of Kivani earth dam. The Petitioners contended that vide Objection Case No. 522 of 1992, the Land Adjudication Officer allowed their Objection against Masaku County Council by awarding Parcel No. Makueni/Kivani/1476 to them.
30. They further contended that they were given land Parcel No. Makueni/Kivani/1476 as compensation and that the same was officially confirmed through the area Chief's letter dated 28/7/1975. The Petitioners contended that the Parcel No. 1476 was subdivided sometimes in the year 2009 with the consent of the Land Control Board (Kaiti) giving rise to the suit properties.
 31. On its part, the 1st Respondent contended that the Petitioners acquired the suit properties through collusion with the Ministry of Lands officials. The 1st and 3rd Respondents contended that the gazette notice declaring Makongo Forest has not been degazetted. They urged the court to cancel the title for suit properties.
 32. It is trite law that fraud must be specifically pleaded and proved.
 33. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR Tunoi JA (as he then was) adopted the above position when he aptly held as follows: -

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
 34. The 1st and 3rd Respondents did not file a cross-petition to disclose the particulars of fraud and illegality on the part of the Petitioners. Rule 15 (3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules stipulates that a Respondent may reply to a petition via a cross-petition.
 35. The proceedings and judgment in Objection Case No. 522(Annexure JMM7) show that the Petitioners were the Objectors while Masaku County Council was the Respondent. The Land Adjudication Officer in his findings stated as follows in part:-

“The objectors claimed the area occupied by Kivani dam. They contributed the area in co-operation and persuasion of the former chief Mr Joel Malinda who promised them that they might be compensated with another area under Masaku County Council probably from Makongo Forest which is registered under Masaku County Council P/No. 1078”.
 36. In the judgment dated 15/10/1992, the Land Adjudication Officer directed that a portion be extracted from P/No 1078 and be registered in the names of the objectors M/S Kimonyi Ngolania Mutyauyu, Nason Mutuku Ngolania and Jones Muumbi Maingi under new P/No 1476. The Respondent was granted 60 days right of appeal. The Respondents did not appeal against the decision of the Land Adjudication Officer delivered on 15/10/1992 to the Minister in accordance with Section 29 of the Land Adjudication Act.
 37. The 1st and 3rd Respondents contended that the title deeds for the suit property were irregularly issued to the Petitioners and as such, the titles are null and void.



38. Section 24(a) of the Land Registration Act provides for the interest conferred by registration. It provides;

“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”

39. Section 25 of the Land Registration Act provides protection for the rights of a proprietor of land as follows: -

1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

40. Section 26(1) of the Land Registration Act, 2012 as follows: -

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

41. These provisions vest the registered owner of land with rights and privileges and provides for instances when the right can be taken away.

42. No evidence was adduced to show that the titles for the suit properties were acquired fraudulently, illegally, unprocedurally or through a corrupt scheme. I therefore find that the Petitioners hold a good title to the suit properties.

43. The Petitioners sought for a declaration that the actions and/or inactions of the 1st Respondent of denying the Petitioners access to their respective parcels of land contravenes Article 10, 40 and 232 of the Constitution. Article 10 of the Constitution provides for national values and principles of governance while Article 232 provides for values and principles of public service. The Petitioners did not adduce any evidence to show that the 1st and 2nd Respondents violated the said provisions of the constitution. As regards Article 40 of the Constitution, I will determine the same simultaneously with prayer No 2 of the Petition as they are both related. The Petitioners sought for a declaration that the 1st and 2nd Respondents have violated their right under Articles 29(d), 40 and 47 of the Constitution.



44. Article 29 of the Constitution provides that:-
- “Every person has the right to freedom and security of the person which includes the right not to be-
- (d) subjected to torture in any manner whether physical or psychological.
45. The Petitioners did not adduce any evidence to show that the Respondents have violated the right to freedom and security of the person.
46. Article 47(1) and (2) of the Constitution provides as follows;
- i. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- ii. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action
47. The above provision is echoed in Article 50(1) of the Constitution and Section 4(3)(b) of the Fair Administrative Action Act. It is clear from the above provisions that the tribunal or authority entrusted with the mandate of making decisions must act in a fair manner. Procedural fairness is a Constitutional requirement in administrative actions.
48. The Petitioners produced the letter dated 15/03/2017 (Annexure JMM1) addressed to the 2nd Respondent herein. In the said letters, the Petitioners complained about the violation of their rights to property by the officers from the 1st Respondent. The 2nd Respondent in their letter dated 31st October 2017 (Annexure JMM12), confirmed receipt of the Petitioners letter dated 2/10/2017. The chairman National Land Commission sought for time for the Ministry of Lands and Physical Planning to investigate on the issue of compensation. The Petitioners through their Advocate wrote another letter dated 1/2/2018 (Annexure JMM13) seeking for a response to their claims. The 2nd Respondent did not act on the complaints made by the Petitioners. Failure to act on the Petitioners complaints meant that it did not act on the complaint and gave no reason for declining the same.
49. The 2nd respondent has a constitutional obligation to act expeditiously, efficiently, reasonably and procedurally. Having failed to act on the letters for a period of over five years was in violation of the Petitioners rights under Article 47 of the Constitution.
50. The Petitioners also sought for a declaration that the 1st and 2nd Respondents have violated their right under Article 40 of the Constitution. Article 40 (1) of the Constitution guarantees the protection of the right to property as follows: -
- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
- (b) in any part of Kenya.
51. The Petitioners contended that since they were allocated the suit properties they have not been able to access the same.
52. They produced the letter dated 15th February 1994(Annexure JMM8) addressed to the officer in charge forest department Makueni district where the district land adjudication officer who confirmed that



they are the registered proprietors and have been denied access to their plots by the officers of the 1st respondent.

53. They also produced a letter dated 11 May 1996 (JMM9) by the District Land Adjudication and Settlement Officer Makueni District addressed to the District Forest Officer Makueni District who gave a brief history of the suit properties and raised the Petitioners concerns in accessing the same.
54. It is not in dispute that Makongo Forest is public land within the meaning of Article 62 of the Constitution. The Respondents contended that the suit properties are situated within forest Makongo Forest which is public land. The Respondents produced Legal Notice No. 174 which declared Makongo Forest a central forest. No evidence was adduced to show that the suit properties are situated within Makongo forest. From the foregoing, I find that the Petitioners have demonstrated to the satisfaction of this court that they are the registered proprietors of the suit properties.
55. The Petitioners also sought an order awarding them compensation for the period that they have been unable to access the suit properties.
56. In the case of *Dendy v University of Witwatersrand, Johannesburg & Others* [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

57. The primary purpose of a Constitutional Petition is to vindicate guaranteed rights and prevent future infringement. In the matter at hand the Petitioners did not specifically plead and prove the damages for the alleged loss of use of their land. I am therefore reluctant to award the same.
58. In the end, the Petitioners’ claim against the Respondents ought to succeed in the following terms: -
 1. A declaration is hereby issued that the actions and/or inactions of the 1st Respondent of denying the Petitioners access to their respective parcels of land known as Makueni/ Kivani/1528, 1529 and 1530 contravenes their right to property under Article 40 of the Constitution of Kenya 2010.
 2. A declaration is hereby issued that the Petitioners’ fundamental rights and freedoms as enshrined under Articles 40 of the Constitution have been contravened by the 1st Respondent. A declaration is hereby issued that the Petitioners fundamental rights and freedoms enshrined under Article 47 of the Constitution of Kenya 2010 have been contravened and infringed upon by the 2nd Respondent.
 3. Each party to bear its own costs.

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HON. T. MURIGI
JUDGE



JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF DECEMBER, 2024.

In the presence of:

Mutia for the Petitioners

Kuria for the 1st and 3rd Respondents

Court assistant Alfred

