



Ichicha v Land Registrar Tigania East/West & another (Environment and Land Constitutional Petition E006 of 2024) [2024] KEELC 13832 (KLR) (11 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13832 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E006 OF 2024

CK NZILI, J

DECEMBER 11, 2024

**IN THE MATTER OF ARTICLES 10, 22, 23, 24, 27, 40, 50, 165, 258
AND 259 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

ELIJAH MAITAI ICHICHA PETITIONER

AND

THE LAND REGISTRAR TIGANIA EAST/WEST 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. What comes up for the court's determination is a petition dated 2.5.2024 and a notice of preliminary objection dated 5.11.2024.
2. The petition is premised on Articles 10(1), 22, 23(1), 24(1), 27, 40(1), 47(1), 48, 50(1), 165(3) and 259 of *the Constitution*. The petitioner prays for;
 - i. A declaration that the 1st respondent has violated his right to property and right to equal protection and benefit before the law
 - ii. An order directing the 1st respondent to implement the decision in Objection Nos. 570 and 582, by canceling any registrations or subdivisions from land Parcel Nos. 2925, 3670, 3704, 3828, 1500, 3647, 1252, 3660, 3666, 3668, 3675, 3816, 3813, 3821 and 3828, formerly Kiguchwa Adjudication Section and register the said parcels in his name.



- iii. Damages and costs.
3. The petitioner avers that he was the recorded owner of land Parcel No. 1496 Kiguchwa Adjudication Section, and in 1969, Peter Kabira Kairiama filed an Objection Case No. 201 of 1969 against him, which case was heard and dismissed. Despite losing the case, the said Peter Kabira fraudulently caused the suit land to be recorded in his name, prompting the petitioner to sue the land adjudication officer vide Meru High Court Miscellaneous Application No.5 of 1992, whose decree ordered for the reversal of the transfer and referral of the dispute for reconsideration by the arbitration board. It is averred that the arbitration board in Case No. 2 of 1992 awarded the petitioner the bigger portion and gave Peter a smaller portion, where he had planted tea.
 4. Further, the petitioner avers that before the implementation of the said decisions, Peter subdivided the suit parcel of land into Parcels No's. 2925 and 2940, which he subsequently transferred to his brother Leonard Kamenchu. To reverse the illegal transfers, the petitioner avers that he filed objection Cases Nos. 570 and 582. In furtherance of the fraud, Peter caused Parcel No. 2925 to be subdivided into Parcel Nos. 2925, 3670, 3704, 3828, 1500, 3647, 1252, 3660, 3666, 3668, 3675, 3816, 3813, 3821 and 3828. Consequently, the arbitration board ordered that all the resultant subdivisions of the suit parcel of land belong to the petitioner.
 5. It was averred that Leonard Kamenchu filed Meru ELC Appeal No. 70 of 2019, which was heard and dismissed on 28.7.2021. The petitioner thus avers that he remains the recorded owner of Parcel No. 2925 and the resultant subdivisions. He however, avers that the arbitration board's decision was yet to be implemented by the 1st respondent, despite his numerous requests for its implementation. The petitioner's fear is that title deeds may have been issued and possibly followed with further subdivisions of the initial parcels of land.
 6. The petitioner further avers that the failure or refusal by the 1st respondent to implement the decisions in Objection Case No's 570 and 582 is an infringement of his right to own property, fair hearing, and protection of the law. He urges the court to issue the orders sought in the interest of justice.
 7. The petition is supported by an affidavit sworn on 2.5.2024. In the said affidavit, the petitioner reiterates the grounds in the petition. As part of the annexures, the affidavit is accompanied by copies of the proceedings and judgment in Objection No. 201 of 1969; order dated 13.2.1992; proceedings and judgment of the arbitration board; proceedings and decisions in objection Nos. 570 and 582; decree dated 13.7.2022 and letter dated 18.5.2023, marked EM 1-6 respectively.
 8. The respondents opposed the petition through a notice of preliminary objection dated 5.11.2024. They aver that the petition should be struck out for;
 - i. Violating Section 8 of the [Land Consolidation Act](#) Cap 283 which requires a party to seek consent to institute a suit from the land adjudication officer over land falling under adjudication.
 - ii. The court lacks jurisdiction to hear and determine the petition.
 - iii. Objection Nos. 570 and 582 are defective and a violation of Sections 19 and 20 of the [Land Consolidation Act](#).
 9. Both the petition and the preliminary objection were canvassed by way of written submissions, which were to be filed by 30.11.2024 as directed by the court. The petitioner is the only one who complied and filed written submissions dated 28.11.2024. He isolated five issues for the court's determination. On jurisdiction as raised in the preliminary objection, the petitioner submitted that under Article 162 (2)



- & (3) and Section 13 of the *Environment and Land Court Act*, this court is clothed with the requisite jurisdiction to hear and determine the petition. Reliance was placed on *Benson Makori vs. Nairobi Metropolitan Services & 2 others* (2022) eKLR.
10. The petitioner submitted that the petition is filed correctly since the suitland is no longer under adjudication contrary to the provisions of Sections 8, 19, and 20 of the *Land Consolidation Act* cited by the respondents, which relate to disputes in land still under adjudication. In this case, the petitioner submitted that the suit lands are not under the adjudication process, since they have title deeds and some have even undergone subdivisions due to acts or omissions of the respondents.
 11. The petitioner submitted that the petition is challenging the non-implementation of the decisions in Objections No's 570 and 582 but not their validity. Similarly, the petitioner submitted that the two decisions were arrived at in strict compliance with Sections 17 and 18 of the *Land Consolidation Act* and therefore, did not violate Sections 19 and 20 of the Act.
 12. With regard to the infringement of his rights, the petitioner submitted that he had written severally to the respondents demanding that the 1st respondent implements the afore-stated decisions all in vain; thus, his rights to own property, fair hearing, and protection of the law have been infringed. The petitioner submitted that the 1st respondent has neither given reasons for the failure to implement the said decisions nor has he denied receipt of the letters requesting for the implementation.
 13. The petitioner also submitted that he is entitled to the prayers sought since the above decisions remain lawful and unchallenged. Similarly, the petitioner submitted that he has exhausted all available avenues for the implementation of the decisions. He relied on *Siewchand Ramanoop vs The Attorney General of Trinidad & Tobago*, PC Appeal No.13 of 2004, and *Wilfred Juma Wasike & 11 others vs Ministry of Interior & Co-ordination & another* (2022) eKLR on the award of damages.
 14. The issues calling for determination are;
 - i. Whether the preliminary objection has merits.
 - ii. Whether the court has jurisdiction to hear and determine the petition.
 - iii. Whether the petitioner exhausted all mechanisms under the statute.
 - iv. Whether the petition meets the threshold of a constitutional petition.
 - v. Whether the petitioner is entitled to the reliefs sought.
 - vi. What is the order as to costs?
 15. A preliminary objection is a pure point of law raised on the assumption that what the other party has pleaded is assumed to be true. See *Mukhisa Biscuit Manufacturers Ltd vs West End Distributors Ltd*. [1969] E.A. 696. Courts have also held that a preliminary objection must be a pure point on law based not on evidentiary issues or the court's exercise of discretionary power. See *Independent Electoral Boundaries Commission vs Jane Cheperenger & 2 others* (2015) eKLR.
 16. The respondents in the preliminary objection allege that the petition violates Sections 8,19, and 20 of the *Land Consolidation Act*. The sections apply to land that is still under adjudication. The petitioner has pleaded that the subject parcels of land are not under adjudication. He has averred that title deeds are already out, and some have been subdivided. The respondents have failed to bring rival evidence to show that the subject parcels of land are undergoing the adjudication process. He who alleges must prove. Establishment of the land as undergoing the adjudication would require evidence, which the



respondents have failed to adduce. On that score alone, the preliminary objection fails. See *Oraro vs Mbaja* (2005) 1 KLR 141.

17. The mandate of this court is governed by Article 162 2 (b) of *the Constitution*, Section 13 of the *Environment and Land Court Act*, the *Land Act*, and the *Land Registration Act*. The framers of our Constitution left no doubt in donating the power to handle disputes falling under the *Land Act* and the *Land Registration Act* to this court. See *Muriungi vs Mwebia & 2 others* (Environment and Land Appeal E027 of 2024) [2024] KEELC 4558 (KLR) (6 June 2024) (Ruling). Equally, this court has a supervisory and interpretative role to ensure that inferior tribunals adhere to the law. See *Tobias Achola Osidi vs Cyprianus Otieno Ogola & others* (2013) eKLR. It follows therefore that this court is clothed with requisite jurisdiction to hear and determine this petition.
18. Article 159 of *the Constitution* provides that where there are alternative remedies provided by law, such statutory mechanisms must be exhausted before a party can move to court. See *Bernard Murage vs Fineserve African Ltd & others* (2015) eKLR and *Geoffrey Muthinja Kabiru & others vs Samuel Henry Munga & others* (2015) eKLR. Further, in *Speaker of National Assembly vs Karume* (1992) KLR 21, the court held that where there is an alternative procedure for redress of any dispute under *the Constitution* or statute, such a procedure must strictly be adhered to.
19. The next issue is whether the petition meets the constitutional test. A constitutional petition must disclose constitutional questions or issues. In *Uhuru Muigai Kenyatta vs Nairobi Star Publication Ltd* (2013), eKLR Lenaola J, as he then was, now, SCJ, held that where there is a remedy in civil law, a party should pursue that remedy since not every ill in the society should attract a constitutional sanction.
20. In *John Harun Mwau vs Peter Gastrow & 3 others* (2014) eKLR, the court said it would not normally consider a constitutional question unless the existence of a remedy depends on it.
21. Further, the court said that where a matter can be disposed of without recourse to *the Constitution*, a constitution should not be invoked at all. In *James Kanyitta Nderitu vs AG and others* (2019) eKLR, the court observed that a constitutional petition should not be used to circumvent primary legislation for enforcement of a given right or violation. A constitutional court should also not be trivialized in hearing all manner of cases of violation of statutory rights. Similarly, a constitutional petition should be pleaded with specificity and particularity. See *Anarita Karimi Njeru vs AG* (1976 – 1980) eKLR and *Mumo Matemu vs Trusted Society of Human Rights Alliance* (2013) eKLR.
22. In this petition, what the petitioner is complaining about is the failure to implement decisions that were arrived from objections 570 and 582 by the Land Adjudication Officer. The court is urged to declare infringement of the petitioner's right to property and equal protection of the law and to order the cancellation of any registration or subdivisions emanating from land parcels No. 2925, 3670, 3704, 3828, 1500, 3647, 1252, 3660, 3666, 3668, 3675, 3816, 3813, 3821 and 3828 formally Kiguchwa Adjudication Section and order for register of the said parcel under the name of the petitioner.
23. The petitioner admits in paragraph 25 of the petition that the parcels of land have since been issued with title deeds, and possibly further subdivisions have occurred and resultant title deeds issued. The contention by the petitioner is that the failure to implement the decision(s) has infringed on his right to own property and further on the right to a fair hearing, protection of the law, equal protection, and benefit of the law. The petitioner has attached a letter dated 18.5.2023 as an annexure EM 1-06 addressed to the 1st respondent, invoking the powers of the land registrar under Section 79 (2) of the *Land Registration Act* copied to the land adjudication officer Kiguchwa Adjudication Section to rectify the record or carry out the implementation of the decision where title deeds have not been issued.



24. The right to fair administrative action is a constitutional right under Article 47 of *the Constitution* of Kenya, which the petitioner has invoked in this petition where quasi-judicial bodies must act efficiently, effectively, fairly and expeditiously.
25. The question before this court calls for the determination of whether the actions or inaction of the respondents adhere to *the Constitution*. The particulars and details of the alleged rights violations, infringements, and or threats meet the conditions set in Rule 10 of *the Constitution* of Kenya Mutunga Rules. The answer calls for interpretation of *the Constitution* and not from the statutes. I find that the petition discloses a constitutional question. The petition has also substantially complied with the requirements of pleadings in a constitutional petition. See CCK vs Royal Media Services & others (2014) eKLR.
26. As to the doctrine of exhaustion, this court has jurisdiction to determine the alleged infringement of constitutional rights and freedoms by inferior tribunals and or persons or organs charged with the exercise of administrative decisions or powers.
27. The questions as to whether the non-action or non-implementation of the objection outcomes by the respondents meet the constitutional rights and freedoms of the petitioner are to be answered by the constitutional court. The respondents have not denied receipt of the demand letter by the petition seeking action or reasons for not acting on time or at all. Therefore, I find the petition is rightly before the court.
28. The next issue is whether the petitioner has proved a breach of the right to property, equal protection and benefit of the law, fair hearing, and fair administrative action. Section 107-112 of the *Evidence Act* provides that whoever wishes the court to make a finding on the existence of specific facts has the burden of proof. See Raila Odinga and others vs IEBC Petition No. 5 of 2013.
29. In Kenya Medical Research Institute vs Samson Gwer & others (2019) eKLR, the court observed that courts only decide cases on the basis of claims pleaded and material evidence presented in proof of those claims. See Irene Wangari Gacheru & others vs AG (2017) eKLR. In this petition, the burden was on the petitioner to prove when the decisions in Objection No'. 570 and 582 were made when they were presented to the land adjudication officer and the land registrar for implementation if the land adjudication officer had the powers to implement the decisions and lastly, if the 1st respondent has powers in law to implement objection decision.
30. As a starting point, annexures marked EM 1 – 04 have no dates when they were made. The petition is equally silent on when the decisions were made. Other than averring that the decisions were objected to and ended up in court Meru ELC No. 70 of 2019, which was heard and dismissed on 28.7.2021, the petitioner has not pleaded at what stage the adjudication register was by 2021, and at the time, the demand letter was written to the 1st respondent. The status of the suit parcels of land as at the filing of the petition as pleaded in paragraph 25 of the petition is that title deeds were already out. Unfortunately, the petitioner has not pleaded when the adjudication register was published, the certificate of finality issued forwarded to the Director Land Adjudication for onward transmission to the chief land registrar for issuance of titles, and whether the decision made by the arbitration board were presented to the land adjudication officer, before the certificate of finality was issued. All these are facts that ought to have been tendered before the court to establish if the petitioner exhausted all the avenues available to have the adjudication register amended to reflect the objection outcomes.
31. The petition is brought against the land registrar for failing to implement the objection decisions under Section 79 (2) of the *Land Registration Act*. A land registrar has no such powers under the law. A title deed can only be recalled on account of mistake, fraud, illegality and issuance by way of a corrupt



scheme. There are no official searches and copies of the title deeds attached to show the owner(s) of the named parcel numbers. A court cannot condemn the owner(s) unheard.

32. Equally, the owners of the suit parcels of land are not parties to this petition. The petitioner has failed to substantiate the contents of his petition. It is dismissed with no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 11TH DECEMBER, 2024

In presence of

C.A Kananu

Mr. Kariuki for the petitioner

Juma for the respondents

HON. C K NZILI

JUDGE

