



REPUBLIC OF KENYA



KENYA LAW
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**M’Ithibwa v Kibaara & 5 others (Petition E017 of 2021)
[2023] KEELC 386 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 386 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION E017 OF 2021
CK NZILI, J
JANUARY 25, 2023**

BETWEEN

SIMON IKANGATU M’ITHIBWA PETITIONER

AND

ATANASIO KABOTOLE KIBAARA 1ST RESPONDENT

GEORGE MAILUTHA 2ND RESPONDENT

MUGAMBI RIBI 3RD RESPONDENT

LIBUKE WABEA 4TH RESPONDENT

LAND ADJUDICATION OFFICER TIGANIA EAST 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

JUDGMENT

1. Before the court is a petition dated February 17, 2021 in which the petitioner averred that he gathered before July 23, 1971 all that land known as parcel no 6387 Karama Adjudication section situated in Tigania Meru County which is already developed. He further averred that on November 22, 2016, the 5th respondent issued summons to him regarding objection No 860 raised by the 1st respondent claiming an encroachment upon Parcel No 6.25 Karama Adjudication section which was heard and determined.
2. The petitioner averred that unknown to him the 1st, 2nd, 3rd & 4th respondents colluded with the 5th respondent and fraudulently hived off 0.10 acres of his land thereby separating his land with an access road. He averred that the 5th respondent had no right to taken away his land and also transfer it in 2007 to the 1st respondent. Further the petitioner averred that previously he had unnecessary land committee cases with the 1st respondent before the 3rd respondent who despite clear evidence, showed open bias and hostility towards him.



3. Following the hearing and determination of the objections the petitioner averred that he sought from the 5th respondent a copy of the proceedings. Instead of being supplied with the decision, the petitioner averred that the 1st respondent brought the police to arrest him and charged in Tigania SPM CR Case No 450 of 2020 for an alleged offence of interfering with demarcated boundaries.
4. In addition, the petitioner averred that on May 25, 2019 the 1st and 2nd respondents entered into his land and damaged his crops which he reported to the police but despite the crop assessment report, the 1st & 2nd respondents were never charged over the offence.
5. In view of the foregoing the petitioner averred that the actions of the 5th respondent compromised his constitutional rights and freedoms as to right to; protection of property and dignity; protection against degrading treatment protection of the law, against torture, access to justice, fair hearing; fair administrative action; right to freedom and right against discrimination.
6. The petitioner prayed for:
 - a. An order directing the 5th respondent to register him as the owner of 1.40 acres of his original land.
 - b. Declaration that the 6th respondent illegally, wrongfully, maliciously, negligently, unconstitutionally arrested, imprisoned, charged and subsequently prosecuted him in Tigania SPM Criminal Case No 450 of 2020 leading to massive loss and payment of general and aggravated damages.
 - c. Declaration that the 1st, 2nd, 3rd and 4th respondents acts of alienating his land should lead to compensation.
 - d. An order compelling the 1st, 2nd, 3rd and 4th respondents to compensate him for false arrest, wrongful imprisonment, malicious and negligent prosecution.
7. The petition was supported by petitioner's list of witness statements and list of documents. The petition was duly served upon the respondent's vide affidavits of services by Kiogora Mugambi sworn on July 14, 2021 & February 8, 2021 and filed in court on July 19, 2021 and October 8, 2021 respectively.
8. The 5th and 7th respondents opposed the petition through a replying affidavit by EO Odemba, the sub county Land and Settlement Officer Tigania East Sub County sworn on February 16, 2022. He averred that the suit land fell under Karama Adjudication section which was governed by the [Land Consolidation Act](#) (cap 283). That an objection no 860 was filed against Parcel No 6387 by Atanasio Kabotole Kibaara against Simon Kaugatu M'Ithibwa which was heard and determined with each party availing their respective witnesses. He annexed a copy of the proceedings as annexure marked E00. He averred that that the basis of the objection was over an alleged encroachment of about 0.10 acres of the church land acquired from the petitioner's brother which is separated by an access road. It was averred that the hearing of the objection was interrupted by the petitioner who threatened to kill the objector, leading to an adjournment of the proceedings pending a ground visit.
9. The 4th, 5th and 7th respondents averred that during a ground visit, observations were made that a barbed wire fence had been destroyed and an access road had been blocked. That the bone of contention was around ten coffee trees allegedly belonging to the petitioner within the church land which unfortunately the petitioner if aggrieved, had not filed an objection against the church over any disputed boundary.



10. Further, the 4th, 5th and 7th respondents averred that after inspecting the area map it established that an access road existed separating the two plots though a brace on the map was missing to show that there was a continuation of the plot past a road. Therefore, it was averred by the 5th & 7th respondents that the objection was allowed, the petitioner's claim of land across the access road was nullified and parties advised to adopt the access road as the existing boundary between their respective plots.
11. The 5th & 7th respondents pleaded that given the foregoing, the petition lacked evidential basis, issues raised thereon were not constitutional in nature and that the petitioner had failed to demonstrate how the process laid down in the operative law and the mechanism set thereunder for dispute resolution had prejudiced his constitutional rights. Lastly, the 5th & 7th respondents averred that the petition was a non-starter and had procedurally conflated both land adjudication issues and criminal trial process. The 1st – 4th & 6th respondents did not oppose the petition despite service of the same.
12. Following directions, parties agreed to dispose the petition by way of viva voce evidence. The defendants were duly served with a hearing notice for October 11, 2022 but failed to attend the hearing.
13. The petitioner called three witnesses. PW 1 adopted his witness statement dated February 17, 2021 and produced a gathering book as P Exh No (1), a confirmation letter from the land adjudication and settlement officer dated August 10, 2020 for Parcel No 6387 Karama Adjudication Section as P Exh No 2, an agreement of sale dated January 22, 2021 as P Exh No (3), crop assessment report dated July 5, 2019 as P Exh No (4) and lastly relied on the supporting affidavit to the petition sworn on February 17, 2021.
14. With leave of court parties filed written submissions dated November 14, 2022 and November 8, 2022 respectively.
15. The petitioner relying on the pleadings and the evidence tendered urged the court to find that the petition had met the constitutional threshold; that the acts of the respondents violated his constitutional rights and freedoms and that the prayers sought were merited given that the 1st - 3rd respondents lacked capacity to represent a church in the dispute hence the outcome was a nullity. Further the petitioner submitted that on several occasion the 5th, 6th & 7th respondents agents refused to act against the 1st respondent but instead caused him to be arrested, charged and prosecuted hence violating his constitutional rights, which arrests, charges and prosecution was aimed at intimidating or silencing him so that his land could be alienated.
16. The petition submitted that the 1st-4th respondents failed to respond to his petition whereas the replying affidavit of the 5th, 6th & 7th respondents was not only a sham but also self-defeating, given that a statement by the 1st respondent talked of 0.20 acres while the judgment of the 5th, 6th & 7th respondents related to 0.10 acres and that no police report was ever made or produced if at all any threats were uttered during the proceedings. In sum, the petitioner submitted that the 5th respondent exceeded its powers and had no right to hive off 0.10 acres or issue an undated proceeding making it impossible for him to prefer an appeal against the decision.
17. On their part, the 5 & 7 respondents submitted that the 5th respondents were seized of jurisdiction over the suitland by virtue of objection proceedings which were properly heard and determined as per law, ground visit conducted and a fair finding arrived at. Therefore, the 5th & 7th respondents took the view the petition raised no constitutional question as held in *Gabriel Mutava & 2 others v MD KPA & another* (2016) eKLR, *Mugure v Fine Serve Africa Ltd & 3 others* (2013) eKLR and speakers of *National Assembly v James Njenga Karume* (1992) eKLR.



18. Further, the 5th & 7th respondents submitted that the objection proceedings attached to the replying affidavit showed that the petitioner was an active party to the proceedings where evidential issues were dealt lawfully under the statute in a regular manner. It was submitted that the petition ought to fail based on the doctrine of constitutional avoidance and exhaustion since the petitioner had failed to follow sections 17,18, 19 & 20 of the [Land Consolidation Act](#) after the decision by the 5th respondent and therefore there were no exceptional circumstances under section 9 (4) of [Fair Administrative Action Act](#) to warrant the petition.
19. The 5th & 7th respondents lastly submitted that since nothing was before court to demonstrate that the proceedings before the 5th respondent violated the petitioner's constitutional rights and freedoms and given the constitutionality of the [Land Consolidation Act](#) (Cap 283) was not in dispute or the soundness of its procedures/mechanisms and lastly, for lack of an explanation why judicial review was not sought to quash the decisions, the jurisdiction of the court was improperly invoked to found the remedies sought.
20. The court has carefully gone through the pleadings, evidence tendered, written submissions and the law. The issues for the determination are:
 - i. If the petition raises a constitutional controversy whose answers flow from the Constitution.
 - ii. If the petitioner exhausted the internal dispute mechanism and or should be exempted from the mechanisms under cap 283.
 - iii. If the petitioner has substantiated his claims on the violation of his constitutional rights to be entitled to the reliefs sought.
 - iv. If the 5th & 7th respondents have offered a reasonable defence for the actions taken relating to the hearing and determination of the objection proceedings.
21. A party invoking a constitutional claim and seeking for constitutional relief must meet the procedural requirements under articles 20, 21, 22, 23, 165 (3) (b), 159, 252 (2), 258, 259 and 260 of the [Constitution](#) and LN 117 of 2013, the [Constitution of Kenya Protection of Rights & Fundamental Freedoms \(Practice & Procedure Rules\), 2013 \(Mutunga Rules\)](#) by inter alia defining his capacity, nature and particulars of the rights or freedoms violated, threatened or infringed, setting the nature and particulars of the injury or damage caused, stating the previous or pending suits over the subject matter and specifying the reliefs sought and the basis of the petition.
22. In [Kavirondo CBO v AG & 2 others](#) constitution petitions E021 of (2021)(2022) KEELC 15063 (KLB) (24 November 2022 (Judgment) the court cited with approval [Mumo Matemu vs Trusted Society of Human Rights Alliance](#) (2014) eKLR Lt Col [Peter Ngari Kagume & 7 others v AG](#) (2009) eKLR, [Anarita Karimi Njeru v Republic](#) (1979) eKLR, [Christian Wabwire v AG](#) (2018) eKLR where the courts stated that there must be specificity and precision on the constitutional issues and support through tangible evidence instead of mere speculations, imaginations or assertions.
23. Further in [Gabriel Mutava & 2 others v KPA, Murage v Fine Serve](#) (supra), the courts held that constitutional questions must have their answers on the Constitution and not from a statute and that not every alleged violation of the law must attract a constitutional petition. Lenaola J as he then was in [Lewis Wilkinson Waiyaki v Hon Attorney General](#) (2016) eKLR cited with approval [Abraham Kanzika t/a Kapco Machinery Services & Milano Investments Limited v Gouverneur CBK & 2 others](#) Misc Civil Appeal 1759 of 2004 that a constitutional court should not be trivialized by bringing all manner of claims otherwise capable of being handled in the ordinary manner.



24. As to the doctrines of avoidance and exhaustion before filing a constitutional petition, article 159 (2) of the *Constitution* mandates the court to promote any internal and alternative dispute mechanism set out under the statute and the Constitution. In *Mutanga Tea & Coffee Company v Shikara Limited & another* (2016) eKLR the court took the view that would be wrong to muzzle, obstruct and or stifle the alternative dispute mechanism whose force flows from the Constitution.
25. The key question is whether the petition herein has surmounted the foregoing constitutional, procedural and substantive parameters so as to find the light of the day before this court.
26. The bottom line of the claim is the objection No 6387 brought before the 5th respondent by the 1st respondent which was heard and determined on November 22, 2016 under cap 283. The petitioner averred that as a recorded owner of Parcel No 6387 there was fraud, collusion, illegality, irregularity and unconstitutionality in the manner the objection was handled, determined and his land hived off in favour of the 1st respondent hence violating his constitutional rights, under articles 27, 40, 47 and 50 of the *Constitution*.
27. Looking at the petition in its entirety, my finding is that it was pleaded with precision and specificity such that the 5th and 7th respondents were able to respond to the issues raised.
28. Coming to the alleged violations and whether they are constitutional in nature the petitioner has sued both the 5th respondent alongside the Office of the Deputy Public Prosecution and the honorable Attorney General on their alleged acts of omission and commission bordering on breach of his constitutional rights to land, fair hearing, right from discrimination, torture, dignity and access to justice.
29. The question is whether in exercising their constitutional statutory duties, the 5th, 6th and 7th respondents violated any of the rights of the petitioner as set out in the Constitution.
30. The burden of proof is on he who alleges the violations as provided under sections 107-111 of the *Evidence Act*. As a starting point, the petitioner has not produced any single document written to the 5th, 6th & 7th respondents making any specific complaints regarding the infringement of his constitutional rights and freedoms and for that matter seeking for remedial action under article 47 of the *Constitution*.
31. The petitioner alleges that the 5th respondent acted fraudulently, unprocedurally and unconstitutionally in hearing and the determination of the objection. Further, it was alleged that the 1st respondent colluded with the respondents to use the criminal justice systems to intimidate, silence and or take away his land during and after the objection proceedings.
32. The power to investigate and apprehend crime and suspects falls under the inspector general of the police under the *National Police Service Act*, pursuant to articles 243 & 245 of the *Constitution* while the prosecutorial powers are under the ODPP as per article 157 of the *Constitution*.
33. The petitioner has not produced any evidence that he made a complaint under the relevant laws to the two independent offices before invoking the constitutional powers of this court. There was nothing tendered to show the nexus between the objection proceedings and the alleged arrest, charge and the prosecution. In any event, the pendency of any criminal charges or civil claims is no bar in law. Therefore, on that score alone I find the claim falling under a statute in so far as the alleged violation of statute laws relating the 6th respondents. The same does not raise a constitutional question at all.
34. As regards the claim over rights to land, fair hearing and fair administrative action in so far as the hearing and determination of the objection by the 5th respondent, the law as indicated above requires that



- this court shall promote alternative disputes procedures and mechanisms set out under statutes whose mandate is set out by the Constitution. The specific objection was governed by the [Land Consolidation Act](#) Cap 283 Laws of Kenya. The petitioner has not denied this position and challenged the replying affidavit by the 5th respondent including the objection proceedings.
35. Article 47 of the [Constitution](#) as read together with the [Fair Administrative Actions Act](#) is the law governing administrative actions by both state and non-state entities as they hear and determine administrative disputes.
 36. The cardinal constitutional parameters are the hearing and determining the dispute expeditiously, efficiently, lawfully, reasonably in a procedural fair manner and with the giving of written reasons for the action taken.
 37. The petition has attacked the objection proceedings and the decisions on account of collusion, fraud, lack of powers, failing to take his evidence, bias, hostility and intimidation.
 38. The [Land Consolidation Act](#) mandates the 5th respondent to exercise statutory powers and duties in the hearing and determination of objections to the ascertainment of interests in land falling under adjudication. Any aggrieved party to such decision has rights for reprieve under sections 17, 18, 19 & 26 (a) of the [Land Consolidation Act](#). When the decision was made on November 23, 2016, the petitioner had a right to move to court since the decisions of the land adjudication officer and the committee are final and not appealable to court.
 39. This was the holding in Peter Kimandiu vs Land Adjudication officer Tigania West District & 4 others (2016) eKLR. The court cannot usurp the jurisdiction of institutions created under the [Land Consolidation Act](#). Section 26 (3) of the [Land Consolidation Act](#) allows a land adjudication officer powers to dismiss or allow an objection. In [Tobias Osindi & 13 others v Cyprian v Ogallo & 20 others](#) (2013) eKLR, the court took the view that the supervisory powers of the court under adjudication statutes does not include the ascertainment and determination of interests in land within an adjudication area. The court however noted that it has residual powers to interpret and determine any point or issue of law arising out of the adjudication process.
 40. In this petition, the constitutionality of the Act, its processes, procedures and mechanisms are not in issue. The petitioner has not pleaded that the [Land Consolidation Act](#) was in conflict with the Constitution. Sections 11 (2), 13, 14 and 26 (1) of the [Land Consolidation Act](#) provides for mechanisms to any aggrieved parties in the ascertainment and determination on interests to land. Those provisions are within the constitutional parameters and were generally complied with by the 5th respondent as it handled the objection.
 41. The petitioner did not explain the delay of close to five years from the time the decision was made and the filing of this petition. Even if the court were to find the petition properly before the court as to questioning the legality and constitutionality of the proceedings and the decision the court would still find the petition filed after inordinate delay. The petitioner raised the issues of illegalities or procedural irregularities in the manner the 5th respondent heard and determined the objection. The same have not been substantiated to the required standards more so since each of the parties was given a fair hearing.
 42. Consequently, my conclusion is that the petition falls short of raising constitutional questions. Though filed in the right forum, the petitioner has failed to bring evidence on any statutory and or constitutional infringement of his rights and freedoms by the 5th respondent in particular and the rest of the respondents. The same is hereby dismissed.
 43. Each party to bear their own costs.



44 Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 25TH DAY
OF JANUARY, 2023**

HON. C.K. NZILI

ELC JUDGE

In presence of:

C/A: Kananu

Petitioner

Miss Mugambi for Kieti for respondents

Mr. Kiogora for petitioner

