



**M’Mwereria v District Land Adjudication and Settlement Officer Igembe
South/Central/North Sub County & 2 others (Environment & Land Petition
E001 of 2021) [2023] KEELC 15660 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15660 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E001 OF 2021
CK YANO, J
FEBRUARY 22, 2023**

BETWEEN

M’THIRARI M’MWERERIA PETITIONER

AND

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER IGEMBE
SOUTH/CENTRAL/NORTH SUB COUNTY 1ST RESPONDENT**

DIRECTOR ADJUDICATION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. By a petition dated January 7, 2021 and filed on January 13, 2021, the petitioner is seeking the following orders against the respondents jointly and severally.
 - a. An order that land developed and occupied by the petitioner at Iganyo measuring 0.74 acres or thereabouts is the property of the petitioner.
 - b. An order of mandamus compelling the respondent to issue a land parcel Number to the petitioner in respect of his land at Iganjo-Amung’enti “A” Adjudication section and as shown in the private surveyor’s sketch plan.
 - c. An order of mandamus compelling the respondents to register the parcel numbers so issued in the Adjudication register of Amung’enti “A” Adjudication Section in the name of the petitioner.
 - d. Costs of the petition and interest thereon.



2. In support of the petition, the petitioner filed a supporting affidavit sworn by M’thirari M’Mwereria the petitioner on January 7, 2021. The petitioner avers that he was recorded as the owner of a parcel of land measuring 0.74 acres at a place called Iganjo in Amung’enti “A” Adjudication Section which land the petitioner states he inherited from his father who had also inherited the same from his father as the same was ancestral land. That the land was originally one (1) acre but upon application of 10% cut for public utilities, the petitioner was left with 0.74 acres. The petitioner has annexed a sketch map marked ‘MM1” from a private surveyor.
3. The petitioner states that the said land was demarcated and registered in the adjudication register in his name and the particulars thereof were recorded in the petitioner’s note book which as destroyed by his daughter who was mentally sick. The petitioner further states that he has enjoyed peaceful possession and occupation of the said land together with his family without any claim from anyone since the year 1971 when he gathered the land and the same was demarcated by the 1st respondent. That they have developed the land and planted miraa, beans, yams and trees and has annexed copies of the photographs marked ‘MM 2”, “MM3”, “MM4” and “MM5”.
4. The petitioner states that he reported the loss of the note book to the 1st respondent and asked children to follow up the matter. He has annexed a copy of the letter marked “MM 6”. He states that during the follow up and discussion, they found that the 1st respondent’s records for Amung’enti “A” section was recorded in pencil which gave way for interference of the records as the same could be erased at will and another record made. That they requested the 1st respondent to among other things assign the land another folio number but no action was taken. A copy of that letter marked “MM 7” is annexed.
5. The petitioner avers that he later gathered from some land committee members that the 1st respondent was in the process of using some committee members to grab the land and secretly and corruptly sell it to an able and willing buyer who would be recorded as the owner. That it is clear from the conduct and actions of the 1st respondent that unless this court intervenes the petitioner’s constitutional rights will be breached and that the conspiracy to wrongfully, fraudulently, stealthily and unlawfully take away the petitioner’s land will come to pass at his detriment and that of his family, adding that he has occupied the land to-date without any dispute. The petitioner states that he risks being deprived the land and his inheritance unless the court intervenes and therefore urged the court to allow the petition.
6. In opposing the petitioner, the respondents filed a replying affidavit sworn on November 15, 2022, by J Mbai, the 1st respondent herein. He has deposed that Amung’enti “A” land adjudication section is currently being adjudicated and is at consolidation of one’s land fragments as per ones development. That in this case, the petitioner gathered his land in three land fragments, two in Muringa and one in Iganjo area. That the total acreage for the three fragments was 3.61 acres but 0.36 acres were deducted as a percentage cut allowance for public utilities, leaving the petitioner with a total of 3.25 acres.
7. The 1st respondent has deposed that all land was demarcated wholly where the petitioner’s developments were in map No. 104/8/109 with a total acreage of 3.25 acres. That after demarcation of the petitioner’s land in one place, the petitioner was left with no undemarcated land in Iganjo area as alleged. That parcel 1624 shows that the petitioner’s land is demarcated in Muringa area with an acreage of 3.25 acres that covers land belonging to other people who would be complaining to the petitioner or the 1st respondent. The 1st respondent states that the land in Iganjo should be demarcated to other land owners who have undemarcated land in Amung’enti “A” Land adjudication section. The 1st respondent has exhibited annexures marked JM (a) and (b) being RER of parcel 1624 indicating all the land fragmented gathered by the petitioner and a sketch map of parcel 1624.



8. Pursuant to directions given by the court, the petition was canvassed by way of written submissions. The petitioner filed his submissions dated November 8, 2020 through the firm of Maitai Rimita & co Advocates while the respondents filed theirs dated November 14, 2022, on November 21, 2022 through the Honourable Attorney General.

The Petitione’s submissions

9. In his submissions, the petitioner cited the provisions of Article 23 of the Constitution which gives the courts authority to uphold and enforce the Bill of Rights, and provide as follows.

“23(1) the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of or threat to, a right or fundamental freedom in the Bill of Rights.”

10. The petitioner’s counsel relied on the case of CNM VS WMG [2018] eKLR where the court weighted in on the constitutional question as follows;

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values. The issues raised here will only require the court to examine defamation law.”

11. It was submitted that the constitutional question in this matter is that the 1st respondent, his team and some committee members conspired to wrongfully, fraudulently, stealthily, arbitrarily and unlawfully deprive the petitioner’s constitutional rights, especially his right to property under article 40 of the constitution.

12. The petitioner also cited Article 22 (1) of the Constitution on the enforcement of the bill of rights and relied on the case of Anarita Karimi Njeru Vs republic [1978] eKLR where it was partly stated 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.”

13. The petitioner’s counsel also relied on the case of Brian Makori Vs Kenya Examination Council Kisii petition No. 17 of 2015 where it was held that-;

“When exercising the constitutional jurisdiction, the court is concerned to uphold or vindicate the constitutional right which has been contravened. See Wilfred Juma Wasike & 11 others v Ministry of Interior and Co-ordination and another [2022] eKLR”

14. It is the petitioner’s submissions that the petition meets the Constitutional threshold to be adjudicated by this court and that he is entitled to the orders sought.



The Respondent's submissions

15. The respondents' submitted that the dispute herein relates to the Amung'enti "A" section that is currently being adjudicated under the [Land consolidation Act](#), Cap 283 Laws of Kenya, which involves consolidation of one's land fragments as per one's development. That presently, the section in question is at the adjudication to registration stage. It is submitted that according to the Record of Existing Right (RER) the petitioner gathered his land from three land fragments – two in Muringa and one in Iganjo area and that the same was demarcated in Muringa.
16. The respondents contend that the petition offends the doctrine of constitutional avoidance by seeking to constitutionalize a matter that is fully addressed by statute. It is further submitted that the petition does not raise any constitutional questions. The respondents relied on the case of [South Lake Panorama Limited Vs Kenya Electricity Transmission Company Limited & 3 others](#) [2021] eKLR, Petition No. 14 of 2014 – [Communication of Kenya Vs Royal Media Services Ltd Vs 5 others](#), Petition No. 26 of 2015, [Tatitha Mugure Henry vs District Adjudication & Settlement Officer Tigania East/West & 5 others](#), [Abdullah Mangi Mobammad Vs Lazarus Beja & 5 others](#) [2021] eKLR and [Speaker of National Assembly Vs James Njenga Karume](#) [1992] eKLR and submitted that the petition herein is an abuse of the court process as the petitioner in ventilating his grievances, failed to follow the laid down procedures as set out under the [Land Consolidation Act](#), and cited Sections 8,9,11,17, 18,19 and 26 (1) of the said Act.
17. The respondents also relied on the case of [Kenya Bus Services Limited and 2 others Vs Attorney General](#) [2005] eKLR 787 and submitted that the petition is nothing more than a claim relating to Land Administration and management merely clothed and framed in the bills of rights language, adding that there is no evidence to show that the petitioner made attempts to have the matter resolved through the mechanisms provided under the [Land Consolidation Act](#). It is equally contended that this court is devoid of jurisdiction since the petitioner did not exhaust available remedies in law, and filing suit without consent of the District Adjudication officer.
18. The respondents further submitted that the petition is fatally defective for its lacks the mandatory specificity required of constitutional petitioners and relied on the case of Anarita Karimi Njeri (supra), [Grace Jepkemoi Kiplagat V Zakayo Chepkonga Cheruiyot](#) [2021]eKLR, [Mumo Matemo Vs Trusted Society of Human Rights Alliance & 5 others](#) [2013]eKLR, [Bernard Ouma Omondi & another Vs Attorney General & another](#) [2021] eKLR, [William Mutuura Kairiba Vs Samuel Nkari & 2 others](#) [2018] eKLR and urged the court to observe the principles evidenced in [Owners of Motor Vessel "Lillian S" vs Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR and down its tools. The respondents invited the court to find that the remedies sought by the petitioner do not properly lie in this instance and submitted that the suit is defective, a non-starter and ought to be dismissed with costs.

Analysis and determination

19. Having analyzed the pleadings and the submissions filed, I find that the following issues are for determination.
 - i. Whether the petition raises any constitutional issue.
 - ii. Whether the petitioner is entitled to the orders sought.
20. In order for the petitioner to succeed in any Constitutional Petition, the law require that the petitioner must demonstrate that the constitutional rights subject of the petition have actually been denied or



violated or threatened with denial or violation. In the case of *Benard Murage Vs Fine Serve Africa Ltd & 3 others* [2015] eKLR, the Supreme Court held that:

“Not each and every violation of the law must be raised before the High Court as a Constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”

21. The crux of the petitioner’s case is that he owned a parcel of land which was originally one acre but which after deduction of 10% for public utilities became 0.74 acres at Iganjo Amung’enti “A” Adjudication Section which was duly registered in his name and recorded in his notebook. The petitioner avers that his notebook got damaged and he requested the 1st respondent to issue him with the record, but that the 1st respondent told him to wait and come some other time. The petitioner stated that he noted that the 1st respondent did not use ink to write and keep its records but a pencil which he states could be erased at will. His fear is that his land is open to be allocated to any other person.
22. In response to the petition, the respondents have not denied the petitioners claim to the land. However, they contend that the petitioner’s three land fragments have been consolidated after demarcation, in one place and became parcel 1624 in Muringa measuring 3.25 acres after the deduction of a percentage for public utilities. The petitioner has not denied the averments made by the 1st respondent under oath in which they have exhibited a sketch map No. 104/8/10/9 and RER of parcel 1624.
23. In my view, the complaint raised in the petition is one that could easily have been resolved under the *Land Consolidation Act*. I am in agreement with the respondent’s submission that the petition herein is nothing more than a claim relating to land administration and management that can easily be resolved through the mechanisms provided under the *Land Consolidation Act*. It is my view that the petitioner’s claim is based on mere suspicion that has not been shown to have occurred or likely to happen. For example, there is no evidence to indicate that the petitioner reported the loss of the notebook to the police in order to obtain an abstract for the same. Further, there is no evidence to show that the petitioner has attempted to have the matter resolved under the *Land Consolidation Act* other than just to report the loss of his notebook. In my humble view, there are no constitutional issues raised in this dispute. The petition raises issues of land being adjudicated under the *Land Consolidation Act* which involves consolidation of one’s land fragments as per his/her development. The court therefore cannot jump to determine alleged constitutional issues when the said Act is clear on how disputes that arise can be resolved.
24. It is also convenient to state that a constitutional question is an issue whose resolution requires the interpretation of the *Constitution* or application of the Article of the *Constitution*. This court ought to discourage invocation of the constitutional process where there exists alternative statutory remedies. From the facts before me, I find that this petition does not raise constitutional issues at all and on this ground, the petition fails. Instead, the petition raises issues that can be addressed under the *Land Consolidation Act*.
25. Having carefully considered the petition before me and the submissions, I find that the petition does not raise any constitutional issues at all. Secondly, the petitioner has failed to prove the alleged infringement of constitutional right to the required standard.
26. I find that the petition has no merit and I dismiss it with costs.

DATED SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF FEBRUARY, 2023.

IN PRESENCE OF;

C A KIBAGENDI



NO APPEARANCE FOR PETITIONER
NO APPEARANCE FOR RESPONDENT
C K YANO
ELC JUDGE

