



REPUBLIC OF KENYA



**KENYA LAW**  
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**Agil v Kalu (Petition 4 of 2020) [2023] KEELC 15763 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15763 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**PETITION 4 OF 2020**

**MAO ODENY, J**

**FEBRUARY 21, 2023**

**IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTION  
AND THE BILL OF RIGHTS ARTICLE 22, 23 AND 24**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHT TO PROPERTY**

**AND**

**IN THE MATTER OF: RESIDENT MAGISTRATES COURT CASE NO. 4937  
OF 1994 ABDULRAHMAN M. AGIL VERSUS KATANA KASUMBE KALU**

**BETWEEN**

**ABDULRAHMAN M AGIL ..... PETITIONER**

**AND**

**KAINGU KITHI KALU ..... RESPONDENT**

**JUDGMENT**

1. On August 7, 2020, the petitioner filed an Amended Petition dated August 6, 2020, pursuant to Constitution provisions among them articles 22, 23 and 24 of the *Constitution* of Kenya, 2010. He sought the following relief :-
  - a. A declaration that the plaintiff (sic) is the rightful owner of that parcel of land known as plot no 180 and 181 situated at South West of Malindi Township.
  - b. A declaration that the petitioner's constitutional right to own property has been infringed by the 2<sup>nd</sup> respondent.
  - c. Damages for infringement of the petitioner's constitutional right to own property.
  - d. An order of forceful eviction of the 2<sup>nd</sup> respondent from the above parcel of land.



- e. An order that commanding Malindi police division to effect and assist the petitioner with the eviction.
  - f. The cost of this petition.
  - g. Any other relief this honourable court may deem fit to grant.
2. The Petition is based on the supporting affidavit sworn by the petitioner on July 9, 2020 where the petitioner deponed that he is the lawful proprietor of the parcels of land known as plot no 180 and 181 both situated at South West of Malindi township.
  3. The petitioner averred that the respondent and his family's trespass in to the suit property prompted the petitioner to file Rmcc no 4937 Of 1994 Abdulrahman M Agil Vs Katana Kasumbe Kalu where judgment was entered in favour of the petitioner.
  4. That the respondent's family was successfully evicted but have since returned to the suit property despite the respondent's failed attempts to set aside that judgment and appeal.
  5. The respondent was duly served on August 7, 2020 but did not enter appearance therefore the Petition proceeded for hearing ex-parte where only the petitioner testified.
  6. The petitioner adopted his written statement dated July 9, 2020 as evidence in chief and relied on his supporting affidavit and documents annexed thereto as PEXH 1-4 respectively.
  7. In his final submissions filed on October 14, 2022, the petitioner reiterated the facts contained in his Amended Petition and Supporting Affidavit. He submitted that having proved his case on a balance of probabilities, he was entitled to the reliefs sought.

#### **Analysis and determination**

8. The issues that arise for determination are: -
  - a. Whether the Petition meets the threshold of a constitutional petition.
  - b. Whether the Petition is merited.
9. It is trite that a party who alleges a constitutional violation is duty bound to demonstrate the nature of the right and how it has been violated. This is the threshold that was established in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR where the court explained; -
 

“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.”
10. Similarly, in the case of *Manase Guyo & 260 Others v Kenya Forest Services* [2016] eKLR the court stated as follows: -
 

“To succeed in their Petition, the petitioners are required to state in a clear, concise and precise manner the correlation between the alleged infringement and the action of the respondent. It was not sufficient to merely cite provisions of the *Constitution* they belief to have been infringed but to also state the manner in which the provisions were infringed. This is because as it was held in *Lyomoki And Others vs Attorney—general* [2005] E A 127, the onus, in



constitutional Petitions, as in other ordinary civil actions, is upon the petitioner or the plaintiff to establish a *prima facie* case, and thereafter the burden shifts to the respondents to justify the limitation to those rights”.

11. The Petition as presented does not advance any constitutional issue for determination by this court. It does not 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.
12. The Amended Petition, as pleaded is a civil dispute emanating from the execution of a decree, dressed up as a Constitutional Petition. In any event, the reliefs sought were substantially determined by another court of competent jurisdiction and eviction orders given.
13. Given the above reasons, I find and hold that the Petition is misconceived is therefore dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2023.**

**M A ODENY**

**JUDGE**

NB:

In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

