



Mugambi & 2 others v District Land Adjudication & Settlement Officer Amwathi/Maua Adjudication Section & 6 others; Ringera & 3 others (Interested Parties) (Environment & Land Petition E 020 of 2021) [2022] KEELC 12610 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12610 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E 020 OF 2021
CK YANO, J
SEPTEMBER 28, 2022

BETWEEN

CHARLES MUGAMBI 1ST PETITIONER
LAWRENCE MUTUMA MUGAMBI 2ND PETITIONER
BRIDGET KATHAMBI MUGAMBI 3RD PETITIONER

AND

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER AMWATHI/
MAUA ADJUDICATION SECTION 1ST RESPONDENT**
THE DIRECTOR ADJUDICATION & SETTLEMENT 2ND RESPONDENT
LAND REGISTRAR MERU NORTH 3RD RESPONDENT
CHIEF LAND REGISTRAR 4TH RESPONDENT
**THE CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL
PLANNING 5TH RESPONDENT**
NATIONAL LAND COMMISSION 6TH RESPONDENT
HON. ATTORNEY GENERAL 7TH RESPONDENT

AND

KIRIMI GEDION RINGERA INTERESTED PARTY
MISHACK MATTETA KABERIA INTERESTED PARTY
ANDREW KAINGA MUNORU INTERESTED PARTY
KIILI DANIEL KARITHO INTERESTED PARTY



JUDGMENT

1. By a petition dated September 2, 2021 and filed on September 7, 2021 the petitioners are seeking the following reliefs against the respondents and the interested parties.
 - a. a declaration that the actions of the respondents, their agents or servants to erase or de-register or remove the register of Amwathi Adjudication Section Maua/3457 and replace it with Amwathi/Maua/7285 both on the register/record reflecting the same ground with the deceased's parcel of land number L.R Amwathi/Maua/3457 was without notice or any known legal process or did not accord the estate of the deceased opportunity to be heard and thus was illegal, arbitrary, unlawful, unreasonable, fraudulent, unprocedural and contrary to Article 40 of *the constitution* of Kenya 2010 and therefore null and void.
 - b. An order of mandamus be issued compelling the 1st to 6th respondents to amend the adjudication register and records at the land registry Meru North to cancel the register for L.R Amwathi/Maua/7285 to reflect the estate of the deceased Fredrick Mugambi as the registered proprietor of L.R Amwathi/Maua/3457.
 - c. An order of permanent injunction do issue restraining the interested parties their agents, servants or anyone at their behest from entering, demolishing the structures on the property or in any other manner interfere with all that parcel of land No. Amwathi/Maua/3457 or Amwathi/Maua/7285 which is one and the same on the map of the area and land records belonging to the estate of Fredrick Mugambi.
 - d. A declaration that the inclusion of the interested parties as the registered proprietors of L.R Amwathi/Maua/7285 being a replacement of the original Amwathi/Maua/3457 in the name of the deceased FRedrick Mugambi was erroneous, unlawful and unconstitutional.
 - e. Exemplary damages for unconstitutional actions of the respondents, their servants or employees and for gross violation of the law.
 - f. A declaration that the estate of Fredrick Mugambi ought to be compensated by the interested parties or the 4th and 6th respondents in terms of the value and developments of L.R Amwathi/Maua/3457 in light of the violations of its constitutional right.
 - g. Costs of the petition and interests.
2. In support of the petition, the petitioners filed a supporting affidavit sworn by Bridget Kathambi Mugambi, the 3rd petitioner, on September 2, 2021. The petitioners have filed the petition as the legal representative of the estate of their deceased father, one Fredrick Mugambi and have annexed a Limited Grant of letters of administration *Ad Litem* issued on May 12, 2021, marked "BKMI"
3. The petitioners case is that their father was at all material times the registered owner of L.R. Amwathi Adjudication Section Maua/3457 as per the adjudication register and that the same was clearly adjudicated and allocated on the ground. The petitioners aver that their father developed the said property where he constructed ten (10) semi-permanent residential buildings which were occupied by tenants and their father as landlord. That the deceased connected the said property with electricity and water supply. That afterwards, and after the demise of the petitioners father, the interested parties herein chased out the tenants. That upon investigations, the petitioners discovered that another land was registered to replace the deceased's land on the map and ground. They aver that that other land was



LR. Amwathi/Maua/7285 which was initially in the names of the 1st and 2nd interested parties who later transferred it to the 3rd and 4th interested parties. A copy of the green card which is marked “BKM 2” has been annexed.

4. The petitioners state that through their sister, Lucy K. Mugambi they wrote a letter of complaint to the cabinet secretary, Ministry of lands on May 18, 2016 and the chief land Registrar wrote a letter dated January 17, 2017 to the District Land Registrar. The letters are annexed and marked “BKM 3” and “BKM 4” respectively. That in his response dated 20th April 2017 (annexture “BKM 6”) the District Land Registrar Meru North indicated that there were no records for LR Amwathi/Maua/3457 and the only record available was for LR Amwathi/Maua/7285. That the District Land Registrar further indicated that the Amwathi/Maua/Adjudication Section final registry index map (R.I.M) had never been supplied to the regional surveyor in Embu for Public access and stated that the said Adjudication Section remained a challenge.
5. The Petitioners aver that the Land Registrar appreciated the grave issues raised, but was not able to and had no power to assist to remedy the situation. It is the petitioners contention that it is clear that an illegality has been perpetrated by the interested parties with the cohorts of unscrupulous lands Officials to deny the estate of the deceased its constitutional rights by deleting its property from the land records and replacing it with another number which was unconstitutionally allocated to the interested parties, hence the filing of this petition.
6. Although the respondents and the interested parties were served they all did not enter appearance nor filed any responses. They also did not attend the hearing nor file submissions.
7. Pursuant to directions given by the court on May 17, 2022, the petition was canvassed by way of written submissions. In their submissions dated July 18, 2022 and filed on July 19, 2022, the petitioners through their advocate M/s Gikunda & Company advocates reiterated the facts in the petition and the affidavit in support. It was submitted that no due process was followed to deprive the deceased his property. The petitioners counsel added that the deceased was deprived any due administrative action as provided in law and *the constitution* as was held by the Supreme court in *Attorney General vs Zinj Limited* (Petition 1 of 2020) KECS 23 KLR (Civ) which upheld the court of Appeal decision where the Government purported to grant another lease on land that was already privately owned without compensation and held thus:

“Deprivation of property owned by an individual by the government where due process had not been followed cannot be said to amount to “compulsory acquisition” rather it was irregular and unlawful deprivation of property to which an affected party is entitled to both special (being the value of land) and general damages”
8. It was further submitted by counsel for the petitioners that in this petition, the deceased’s property is clearly identifiable on the ground which is the current LR Amwathi/maua/7285 which was superimposed on the deceased’s property L.R Amwathi/Maua/3457 which was fully developed by the deceased and had clear boundaries. The court was therefore urged to grant the prayers sought in the petition.
9. 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 petitioners are entitled to the reliefs sought.



10. In order for the petitioners to succeed in any constitutional petition, the law requires that the petitioners must demonstrate that the constitutional rights subject of the petition have actually been denied or violated or are threatened with denial or violation. In the case of *Benard Murage – v- 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”

11. The crux of the petitioners case is that the deceased’s right to property ownership as envisaged and protected under Article 40 of *the constitution* has been infringed and violated in that LR. Amwathi/Maua/7285 was superimposed on the deceased property LR. Amwathi/maua/3457. First, there is nothing to show that the deceased’s property is on the same ground as L.R No. Amwathi/Maua/7285. The petitioners have not exhibited any map to show the location of the deceased’s land vis-a-vis LR No. 7285. Secondly, the letter dated 13th October, 2010 only confirms that parcel No. 3457 Amwathi/Maua/Adjudication Section is demarcated and recorded in the name of the deceased. It is clear from the annexures exhibited by the petitioners (in particular annexure “BKM 6”) that the registry has no records for parcel No. Amwathi/maua/3457 unlike that of L.R Amwathi/Maua/7285 which had undergone numerous transaction. From the same letter, it is clear that the registry index map has never been supplied to the regional survey office, Embu for public access and that the adjudication records for the adjudication section in question has never been submitted.
12. In my view, the complaint raised in the petition is that of encroachment. It can in my view if proved to be correct that the interested parties have trespassed on the deceased’s property, then there exists an alternative remedy under Civil Law, which is not a constitutional issue. In my view there are no constitutional issues raised in this dispute.
13. The petition raises issues of ownership and trespass which is a private claim. It is also convenient to state that a constitutional question is an issue whose resolution requires the interpretation of a constitution or application of the articles of *the constitution*.
14. This court ought to discourage invocation of the constitutional process where there exists alternative statutory remedies in *John Harun Mwau vs Peter Gastrol & 3 others* (2014) eKLR, it was held:

“Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it ... It is an established practice that where a matter can be disposed of without recourse to *the constitution*, *the constitution* should not be invoked at all.”

From the facts before me I find that this petition does not raise constitutional issues at all and on this ground, the petition fails.

15. In the letter marked as annexure “BKM 3” and the submissions the petitioners have referred to an alleged map of 2015. However, no such a map has been exhibited. The alleged violation of right to property is in my view totally unfounded. I also find that no contravention of constitutional rights has been proved at all. The evidence tendered on behalf of the petitioners in my view do not demonstrate the alleged violation. To my mind the burden of establishing all the allegations rests in the petitioners who are under an obligation to discharge the burden of proof. It is immaterial that the case is undefended. In this case, it is my view that the petitioners have failed to discharge the burden of proof to the required standard.



16. 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 petitioners have failed to prove the alleged infringement of constitutional right to the required standard.

17. I find that the petition has no merit. I dismiss this petition with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF SEPTEMBER, 2022.

In presence of

C/A Mwenda

Gikunda Anampiu for the petitioners

No appearance for respondents

No appearance for interested parties

C.K YANO

ELC JUDGE

