



**Sheria Mtaani na Shadrack Wambui & 5 others v Kajiado County Assembly & 3 others
(Constitutional Petition E015 of 2024) [2024] KEHC 13715 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 13715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CONSTITUTIONAL PETITION E015 OF 2024**

SN MUTUKU, J

SEPTEMBER 26, 2024

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 2, 10, 19, 20,
21, 23, 27, 40, 57, 60, 165(2), 174, 184, 196, 201, AND PARAGRAPH 8
OF PART 2 OF THE FOURTH SCHEDULE OF THE CONSTITUTION**

AND

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

AND

**IN THE MATTER OF CONSTITUTIONAL AND LEGAL VALIDITY OF PART 2
OF THE EIGHTH SCHEDULE OF THE KAJIADO COUNTY FINANCE ACT 2023**

AND IN THE MATTER OF SECTION 2 AND 5 OF THE LAND ACT

AND

**IN THE MATTER OF THE DOCTRINE OF PUBLIC PARTICIPATION AND
UNFAIR DISCRIMINATION OF SMALL SCALE FREEHOLD LAND OWNERS**

BETWEEN

SHERIA MTAANI NA SHADRACK WAMBUI 1ST PETITIONER

OLKERI RESIDENTS ASSOCIATION 2ND PETITIONER

ACACIA ESTATE RESIDENTS ASSOCIATION 3RD PETITIONER

OLOOSURUTIA RESIDENTS ASSOCIATION 4TH PETITIONER

**RAPASI MEMUSI SAINA NGONG RESIDENTS ASSOCIATION 5TH
PETITIONER**

ALICE NAMALWA SITUMA 6TH PETITIONER

AND



KAJIADO COUNTY ASSEMBLY	1 ST RESPONDENT
COUNTY GOVERNMENT OF KAJIADO	2 ND RESPONDENT
THE ATTORNEY GENERAL	3 RD RESPONDENT
HON NGATHO KINUTHIA	4 TH RESPONDENT

RULING

Background

1. The Petition herein, filed under Certificate of Urgency, was placed before me on 10th September 2024. I directed the Petitioners to serve the Respondents and attend court on 18th September 2024 for directions. On 18th September 2024, the Petitioners, through their legal representatives, addressed this court on the issue of conservatory orders asking this court to grant the same as sought in the Notice of Motion dated 9th September 2024.
2. Counsel for the 1st and 4th Respondents, Ms Leboo, learned counsel, and 2nd Respondents, Mr. Nyaosi, learned counsel, sought time to file responses to the Petition and the pending applications before the issue of conservatory orders could be addressed. This court reserved the matter for a ruling to be delivered on 25th September 2024. After considering the matter, I made a conscious decision not to grant the conservatory orders before affording the Respondents a chance to respond to the pending applications. I made a brief ruling to the effect that directions would issue after the respondents filed their responses and addressed the court on the issues raised by the Petitioners' counsel.
3. By the time the court re-convened on 25th September 2024, the 2nd Respondent had filed a Notice of Preliminary Objection questioning the jurisdiction of this court to hear and determine the Petition. They had also filed a Replying Affidavit. I directed parties to attend court at 3.00pm on the same day, 25th September 2024 to address the court on the issue of jurisdiction raised in the P.O and to allow the respondents to submit on the issue of conservatory orders to enable this court determine the two issues together in one ruling.
4. When court reconvened at 3.00pm on 25th September 2024, and before Counsel for the 2nd Respondent could commence addressing the Court on the P.O, Mr. Shadrack Wambui, on behalf of all counsel appearing for the Petitioners. informed the court that he had an application to make. The Court allowed him to proceed and address the court.
5. Counsel referred this Court to prayer (a) of the Petition which is framed as follows: A declaration be and is hereby issued that the Kajiado County Act, 2023 is unprocedural, unconstitutional, null and void for being in violation of Articles 10, 24, 40, 57, 186 and 196 of *the Constitution*.
6. Counsel submitted that the Petitioners are requesting this Court to allow them to withdraw prayer (a) referred to above so that the remaining reliefs to be determined by the ELC. He submitted that the Petitioners are asking this Court to transfer this file to the ELC Kajiado for hearing and determination. He submitted that this Petition is a hybrid one where both the High Court and the ELC are seized of the jurisdiction to grant reliefs falling under both jurisdictions. He submitted there is no law that provides for the forum where such hybrid matters should be filed and referred this court to Mohammed Ali Baadi & others v. Attorney General & 11 others [2018] eKLR, one of the authorities the Petitioners are relying on to support the above submissions.



7. He submitted that counsel for the Petitioners have decided to abandon prayer (a) of the Petition and pursue the other reliefs in the Petition that touch on the land rates in the Kajiado County Finance Act, 2023.
8. Ms Leboo for the 1st and 4th Respondents raised issue concerning the other reliefs in the Petition, specifically prayer (b) and (c). She wanted to know what would happen to them. Other than that issue, counsel did not seem to have any objection to the matter being transferred to the ELC.
9. Mr. Nyaosi for the 2nd Respondent submitted that Counsel for the Petitioner was conceding to the 2nd Respondent's Preliminary Objection, though in a subtle way. He did not have any objection to the matter being transferred but submitted that he did not know of any law that allows this court to transfer the matter to the ELC, a court of equal status to it. He submitted that the appropriate remedy would have been to withdraw the Petition and file it in the right forum.
10. In a rejoinder, Mr. Shadrack Wambui submitted that the other prayers in the Petition are couched in alternative terms. He submitted that it is vital for the Petitioners to get things right from the beginning by having this Petition placed in the right forum for determination. Counsel referred this court to Attorney General & 2 others v. Okiya Omtata Okioti & 14 others [2020] eKLR in relation to the importance of filing a matter in the right forum.
11. He reiterated that the Petitioners have decided to withdraw prayer (a) of the Petition and pursue the issue of land rates provided for in the Kajiado County Finance Act 2023 and their constitutionality before the ELC. He submitted that he is not conceding the P.O raised by the 2nd Respondent but that they decided to be cautious to avoid being caught on the wrong footing.
12. He submitted that in the case of *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others (Petition No. E004 and E002 of 2023)* (Consolidated) [2024] KESC 3 (KLR) (21 February 2024) (Judgment), the High Court transferred the case to the ELRC to enable parties to access justice and that, had the court made any error in so transferring the case, the Supreme Court would have pronounced itself on the issue in the authority cited.
13. The 3rd Respondent was not represented and, although that office has been served with mention notices, the 3rd Respondent or any representative of that office has not attended court sessions as far as the court records show.

Determination

14. I have considered this matter. Other than questioning the law that allows this court to transfer the matter to the ELC, the Respondents have not opposed the application made by Mr. Shadrack Wambui.
15. I have read the Petition filed herein. To my mind, the reliefs sought in it are a mix of reliefs that cut across exclusive jurisdictions reserved for the High Court and the ELC by dint of Article 165(3)(b) and (d) of *the Constitution* in respect of the High Court and by the Environment and Land Court by dint of section 13 of the ELC Act.
16. Mr. Shadrack Wambui referred this court to Mohammed Ali Baadi case cited above where the Court in that case in reference to hybrid cases stated that hybrid cases are those cases with issues that cut across the exclusive jurisdiction reserved for different courts, for instance the High Court and the ELC or ELRC.



17. Counsel further referred to the same case, Mohammed Ali Baadi, where the Court stated as follows in paragraph 100:

“Supreme Court in *Republic v Karisa Chengo & 2 others* [2017] eKLR amplified and pertinently held that each of the Superior Courts established by or under *the Constitution* has jurisdiction only over matters exclusively reserved to it by *the Constitution* or by a statute as permitted by *the Constitution*. The holding in this case, however, does not resolve the knotted question of which court among the High Court and the two equal status courts under Article 162(2)(b) should be seized of jurisdiction in controversies in hybrid cases.”

18. I pose the following question: Is this Court seized of jurisdiction to transfer this Petition to the ELC? There is no straight answer. Decisions abound in favour of and against the issue. For instance, in *Kombo & 3 others v Wabende & 3 others; Joxxela Limited (Interested Party) (Civil Case 2 of 2021)* [2024] KEHC 439 (KLR) (17 January 2024) (Ruling), I transferred a matter wrongly filed before the High Court Kajiado to ELC Kajiado for hearing and determination following the decision of the Court of Appeal in *Daniel N. Mugendi v. Kenyatta University & 3 others* (2013) where it was held that:

“.....in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relation matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5) (b). And in order to do justice, in the event where the High Court, the Industrial court or the Environment and Land court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim....”

19. Yet, in *Sagalla Ranchers Limited v Mwadilo & another (Civil Suit 1 of 2018)* [2022] KEHC 14511 (KLR) (11 October 2022) (Ruling), another Court, relying on other authorities including *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] eKLR, held that:

“Based on the wisdom drawn from the above cited case law, and having held that this court has no jurisdiction hence should down its tools, I have no residual powers to enable me transfer this matter to ELC. The situation however would have been different had the two courts shared concurrent jurisdiction with ELC’S jurisdiction being predominant. Equally, if ELC were a division within the high court, then, this court would have exercised its jurisdiction to transfer the suit for hearing before the relevant division within the same high court.”

20. Further, in *Tajeu Ololmaitai & 2 others v Wanjiku Babu* [2021] eKLR, my brother, Justice Gikonyo was faced with the similar dilemma. Th good Judge cited the Court in *Abdulmajid Mohamed Adam vs. Nimish Shah T/A Flora Printers* [2017] eKLR, where the Court, while transferring a suit to the proper forum had this to say:

“...However, what does the expression “down tools” mean ”To me the learned Judge, R.O. Kwach, to be precise, meant and can only be taken to have meant that once jurisdiction is established to be lacking, the court cannot purport to deal with the matter further. It cannot



be taken to mean that I just down my tools, the pen, and fold the file ad infinitum. That could result in a large number of files that are just folded, never to be touched because the court has downed its tools... Being bound and guided by those very wise and well-founded words of the court of Appeal, I chose prudence over imprudence and order that, the appeal be and is hereby transferred to the Environment and Land court, Mombasa, for hearing and determination.”

21. The Judge transferred the Appeal wrongly filed before the High Court to the ELC and held that:

“Whereas this appeal was filed before the wrong court, I am prepared to deem the professional error- although it should be avoided- not to be so fundamental as to warrant a course that will occasion the appellant real trouble with the law, say, dismissal of the appeal; inextricable thereto is limitation of time which will impinge on the right of the party to seek relief in court. In the upshot, I direct that this appeal is hereby transferred to the Environment and Land Court for hearing and determination.”

22. The issues raised in this Petition are fundamental. This court was told that the Petitioners include elderly petitioners in our society. I am certain that it includes the young and the old and raise pertinent issues held dear by all the Petitioners. Without getting into the depth of the Petition, it is my considered view that the Petition is of a public interest nature affecting residents of this County and citizens of this Country who may own land in this County. Although I hold the view that the issue of jurisdiction is not a procedural technicality, in the name of substantive justice, and to facilitate the parties to this court to move with haste and have their dispute expeditiously determined, I am persuaded to allow the Petitioners’ application to have this matter transferred to the Environment and Land Court with immediate effect.

23. Having agreed with the Petitioners that the Petition filed herein is a hybrid one, I also allow the application to withdraw prayer (a) of the Petition so that what is left for determination before the ELC is the remaining prayers.

24. Consequently, this Petition is hereby transferred to the ELC Kajiado for hearing and determination. To fast the transfer of this matter, the Registrar of this Court is directed to forward this matter to the ELC Registry in Kajiado for processing and to urgently place the file before the Presiding Judge, ELC on or before Monday 30th September 2024, for directions.

25. Orders to issue accordingly.

DATED, SIGNED AND DELIVERED ON 26TH SEPTEMBER 2024.

S. N. MUTUKU

JUDGE

In the presence of:

Mr. Shadrack Wambui appearing with Mr. Nicholas Karanja, Mr. Festus Onyango, Ms Wanjika and holding brief for Mr. Danstan Omari for the Petitioners

Ms Nanetia Leboo appearing with Ms Anita Sialo, Mr. Kipambi Tele and Mr. Joseph Meribet for the 1st and 4th Respondents

Mr. Nyaosi appearing with Ms Yala and Ms Muriranja for the 2nd Respondent.

