



REPUBLIC OF KENYA



KENYA LAW
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**Tarus & 51 others v Attorney General & 4 others; Kebenei & 14 others
(Interested Parties) (Environment and Land Constitutional Petition
8 of 2020) [2023] KEELC 16953 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 8 OF 2020**

EO OBAGA, J

APRIL 20, 2023

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF ARTICLES 3(1), 19(1)(2), 21(1),
28,29,40 & 43 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA/
PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS/
PRACTICE & PROCEDURE RULE/RULES 1, 2, 3,4,10,111,20,21, 33**

AND

IN THE MATTER OF SECTION 18,37,38 & 43 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES 2010

AND

**IN THE MATTER OF ABUSE, THREAT TO ABUSE & INFRINGEMENT OF THE
PETITIONERS' HUMAN AND FUNDAMENTAL CONSTITUTIONAL RIGHTS**

AND

**IN THE MATTER OF A PORTION OF TITLE NO. KIPLOMBE/KIPLOMBE BLOCK
II (FORMERLY KNOWN AS LR. NO. 9723 (IR15449) SERGOIT RIVER FARM**

BETWEEN

ERICK KIBIWOTT TARUS 1ST PETITIONER

LUDIA SAMOEI 2ND PETITIONER

KELMAS INVESTMENT LIMITED 3RD PETITIONER



JAPHATE KIPKEMBOI MAGUT	4 TH PETITIONER
EZEKIEL RONO	5 TH PETITIONER
SERGOIT RIVER CATTLE DIP	6 TH PETITIONER
REGISTERED TRUSTEES, AIC CHURCH	7 TH PETITIONER
THE BORAD OF SERGOPIT RIVER FARM SCHOOL	8 TH PETITIONER
PAULINA CHUMA	9 TH PETITIONER
ELIJA CHEMAIYO	10 TH PETITIONER
LILIAN JERUTO KITUR	11 TH PETITIONER
STANLEY KIPTOO METTO	12 TH PETITIONER
WILFRED KIMALAT	13 TH PETITIONER
QUANDS ACHIM	14 TH PETITIONER
JOSHUA KIPROTICH MAGUT	15 TH PETITIONER
ROSA JERUBET BIWOT	16 TH PETITIONER
JEPLETING MITEI	17 TH PETITIONER
JOAN BEARNARD SICHARD	18 TH PETITIONER
GRACENTINI SICHARD	19 TH PETITIONER
SAMWEL KIPRONO SAMOEI	20 TH PETITIONER
PAUL KIPSANG MENGECH	21 ST PETITIONER
EDWARD KIPLAGAT SOI	22 ND PETITIONER
MARTHA ONYANGORE	23 RD PETITIONER
BERNATE ANYANGO	24 TH PETITIONER
MARY NEKESA SOGHO	25 TH PETITIONER
AUGUSTINE LELIT	26 TH PETITIONER
NORBART MANGI MUYA	27 TH PETITIONER
MONICA JERUTO RUTO	28 TH PETITIONER
NICHOLUS ROP KIPKEMBOI	29 TH PETITIONER
NELSON KIPRONO ORGUT	30 TH PETITIONER
BENJAMIN KUTO	31 ST PETITIONER
LINUS CHERUIYOT	32 ND PETITIONER
PAUL KIPKORIR SUM	33 RD PETITIONER
KIMUTWAL CHERUIYOT	34 TH PETITIONER
JOSEPH KOMEN	35 TH PETITIONER



SISUMA INVESTMENT	36 TH PETITIONER
BRI ROP	37 TH PETITIONER
DAVID KIMUREI MENGICH	38 TH PETITIONER
JOSEPH KIBET ROTICH	39 TH PETITIONER
PERES JEMELI KOIMUR	40 TH PETITIONER
FRANCIS OSANO OMWENGA	41 ST PETITIONER
DANIEL KOMEN	42 ND PETITIONER
JOSHUA KIPLETING SULAI	43 RD PETITIONER
JOHN KIPKEMBOI KOECH	44 TH PETITIONER
PROF GABRIEL MISANGO ANABWANI	45 TH PETITIONER
DAVID KIPTALAM BETT	46 TH PETITIONER
MARY OLOO SILA	47 TH PETITIONER
DR SILVANO KIPYEGO ROTICH	48 TH PETITIONER
EVERLINE JEPKEMBOI KEINO	49 TH PETITIONER
BARABARA LAGAI	50 TH PETITIONER
PROF MARTIN HENRY KIMUREI	51 ST PETITIONER
WILSON CHUMA	52 ND PETITIONER

AND

THE HON ATTORNEY GENERAL	1 ST RESPONDENT
NATIONAL LAND COMMISSION	2 ND RESPONDENT
CHIEF LAND REGISTRAR	3 RD RESPONDENT
ESTATE OF ESMAIL NURANI	4 TH RESPONDENT
ESTATE OF NYONGIO KIMITEI	5 TH RESPONDENT

AND

ZADRACK KEBENEI	INTERESTED PARTY
JAPHETH KIPKEMBOI MAGUT	INTERESTED PARTY
WILFRED KIPTUM KITUR	INTERESTED PARTY
GRACE M SICARD	INTERESTED PARTY
NERBERT MAINGI MUYA	INTERESTED PARTY
BENSON KIPCHUMBA CHERONO	INTERESTED PARTY
MARGARET JEMISTO TUITOEK	INTERESTED PARTY
JUDITH CHEBET KEMBOI	INTERESTED PARTY



LILIAN JERUTO KITUR	INTERESTED PARTY
ELIJAH CHEMAIYO	INTERESTED PARTY
WILFRED KIMALAT KITUR	INTERESTED PARTY
MARTHA ONYANGORE	INTERESTED PARTY
JOAN JEPKORIR KOMEN	INTERESTED PARTY
BENJAMIN KUTO	INTERESTED PARTY
NELSON ORGUT	INTERESTED PARTY

RULING

1. This is a ruling in respect of two preliminary objections filed by the 4th and 5th Respondents. The preliminary objection by the 4th Respondent raises the following ground: -
 1. The present suit drafted and filed as a constitutional Petition does not raise any constitutional issues and therefore calls for the invocation by this Honourable court of the doctrine of constitutional avoidance as espoused by the Supreme court in the case of *Communications Commissions of Kenya & 5 others – Vs- Royal Media Services Limited & 5 others (2014) EKLK*.
2. The 5th Respondents preliminary objection is based on the following grounds: -
 1. That the Petitioners Constitutional petition filed herein does not raise any constitutional issues as enshrined under to Articles 3(1) 21(1), 28, 19, 40 and 43 of the *Constitution* of Kenya as read with Rule 1,2,3,4,10,11,20,21 and 33 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedom, Practice and Procedure Rule)*.
 2. That the Petition is a replication to Eldoret HCC Petition No 3 of 2019 which has already been determined.
 3. That the petition is sub-judice as there is a similar cause of action vide Eldoret Environment & Land Cour No 40 of 2019 where Petitioners and the Defendants have fully defended the suit.
 4. That petition is an abuse of the court process and should be dismissed with costs to the 5th Respondent.
3. The parties were directed to file written submissions in respect of the two preliminary objections. The 5th Respondent filed submissions on October 19, 2021. The 4th Respondent did not file submissions but relies on the submissions of the 5th Respondent. The 1st Petitioner filed submissions on January 16, 2023. The 2nd to 52nd Petitioners filed submissions on October 28, 2022. the 1st to 15th Interested Parties filed their submissions on February 21, 2023.
4. I have gone through the submissions filed. There are two issues for determination in this matter. The first is whether the grounds raised in the preliminary objections meet the threshold of what a preliminary objection should be. The second is whether this suit is sub-judice.



5. A preliminary objection was defined in the case of *Mukisa Biscuit Manufacturing Co. Ltd – Vs- West End Distributors Ltd (1969) EA 696* as follows: -

' A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.'

6. The court in the *Mukisa Biscuit Manufacturing Co Ltd (Supra)* went on to state as follows: -

' A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'

7. Both the 4th and 5th Respondent have argued that the petition herein does not raise constitutional issues. This is not a pure point of law which will qualify as a preliminary objection. This is because the court will have to consider all the pleadings filed to ascertain whether the petition raises constitutional issues or not.

8. The issue of this petition being a replica of petition No 3 of 2019 is also not a pure point of law. In any case, petition No 3 of 2019 was struck out as it was filed in a court without jurisdiction to entertain it. Even if the 5th Respondent was to raise a point of res judicata, it will not succeed as the petition was not heard on merits.

9. The other grounds raised is that this petition is subjudice. The reason is that there is ELC No 40 of 2019 pending in court where the parties in this petition are also involved. A constitutional petition is a special way of raising matters which touch on public bodies. A civil case on the other hand involves disputes between individuals and at times public bodies. The two cannot be said to be the same. Therefore, even if the parties are the same and the subject matter is the same, it will depend on the reliefs sought in each of the two cases. This is the reason why it is not desirable to consolidate a constitutional petition with an ordinary civil suit. It is therefore not appropriate for one to raise the issue of subjudice. The two suits are better handled separately.

10. Whether the petition is subjudice or an abuse of the court process will require the court to examine the two suits carefully to ascertain whether there is abuse of the process of court or subjudice. I therefore find that the two preliminary objections have no merits. I proceed to dismiss both preliminary objections. Each party shall bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF APRIL, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Munene for Mr. Gathara for 2nd to 5th Petitioners.

Mr. Ondieki for Interested parties and for Ms. Barasa for 4th Respondent.



Ms. Kosgei for Mr. Omboto for 5th Respondent.

Court Assistant –Laban

E. O. OBAGA

JUDGE

