



REPUBLIC OF KENYA



**KENYA LAW**  
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**Saggaf & 3 others v Departmental Committee on Lands & 2 others; Mwashetani (Interested Party)  
(Constitutional Petition E065 of 2021) [2022] KEHC 10728 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10728 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E065 OF 2021**

**JM MATIVO, J**

**MAY 31, 2022**

**BETWEEN**

**MOHAMED MAULA SAGGAF ..... 1<sup>ST</sup> PETITIONER  
ABDILLAH S ALAWY ..... 2<sup>ND</sup> PETITIONER  
ALI ABAD ABUBAKAR ..... 3<sup>RD</sup> PETITIONER  
MKULU NASSIR KIBOGA ..... 4<sup>TH</sup> PETITIONER**

**AND**

**DEPARTMENTAL COMMITTEE ON LANDS ..... 1<sup>ST</sup> RESPONDENT  
SPEAKER OF THE NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**KHATIB MWASHETANI ..... INTERESTED PARTY**

**RULING**

1. This ruling disposes a notice of a preliminary objection dated December 17, 2021 filed by the Hon Attorney General essentially challenging this court's jurisdiction on grounds that this petition offends section 13 of the *Environment and Land Court Act* as read with Article 162(2) (b) and 165 (5) (b) of the *Constitution*. They also contend that the reliefs sought encroach of parliamentary business pursuant to Articles 94 and 95 of the *Constitution* and the doctrine of separation of powers.
2. In order to put the preliminary objection into a proper perspective, it is necessary to highlight, albeit briefly, the petitioners' grievances as disclosed in their petition dated November 24, 2021. The nub of their complaint is that Plot No W33/Wasini Island, Kwale County is private land. They claim that in 1908, the late Hassan Nassir, Mohamed Nassir, Ahmed Nassir who were sons of Nassir bin Alawy



applied to the recorder of titles for certificate of ownership for the aforesaid land and a demarcation Notice was issued in favour of M/s Hassan Nassir and Mohamed Nassir.

3. They claim that the said M/s Hassan Nassir Mohamed Nassir and Ahmed Nassir filed Mombasa High Court civil Suit No 727 of 1981, *A Saggaf Alawy & others v Attorney General* and *vide* a letter dated December 13, 1993, the PS Ministry of Lands & Housing instructed the Attorney General that the Ministry had admitted liability and advised the Attorney General to apply for cancellation of the titles with a view to restoring the titles to the plaintiffs. They aver that subsequently, the court found in favour of the plaintiffs and the court orders were gazette by the Land Registrar, Kwale District *vide* Kenya Gazette Notice No 1948 of 11/4/1997. It is their case that the court directed that the plaintiffs be put into possession. Further, their complaint to the National Land Commission was resolved in their favor.
4. Their contestation is that on October 6, 2021, Hon Khatib Mwashetani (MP) (the interested party herein) presented a petition relating to the said land to parliament and in their response to the petition, they explained *inter alia* that the said court orders did not relate to the entire land comprising of 6500 acres but only related to the subject land measuring 289 acres and that survey had been done, so, they were only waiting for the title. They contend that the petition before parliament is overtaken by events on account of the said court orders and the decision of the National Land Commission.
5. They aver that *vide* a letter received on November 23, 2021, the 1<sup>st</sup> respondent notified them of a hearing at parliament buildings, giving them only a 2-day notice. They contend that the issues on the said land were determined in the said case, therefore, the respondents' actions are unconstitutional and tantamount to overturning a court decision, and in violation of Articles 2, 40, 94 (4) 159,160 of Constitution, the political question doctrine, the judgment *in rem* doctrine, the Parliamentary Standing Orders and the *sub judice* rule. As a consequence of the foregoing, the petitioner prays for: -
  - a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have violated Articles 2, 10, 27, 40(1)(a) (b), 94(4), 159(1) and 160(1) of the Constitution.
  - b. A permanent injunction and or prohibition restraining the respondents by themselves and or their agents from interfering with the judgment in Mombasa HCC No 727 of 1981, *A Saggaf Always 7 others v The Hon Attorney General & others* and or any subsequent orders and or incidental processes (including survey and issuance of title deed) thereof.
  - c. An order of certiorari to quash the decision by the 1<sup>st</sup> and 2<sup>nd</sup> respondents by way of the letter dated November 18, 2021 or any subsequent letter and or means to discuss the issue of ownership or otherwise of Plot No 33/Wasini Island.
  - d. Costs of the suit.
6. Concurrent with the petition, the petitioners filed a notice of motion seeking orders to restrain the respondents from convening any meeting to discuss or in any manner interfere with the ownership of the said property.
7. In addition to the preliminary objection, the respondents filed grounds of opposition stating *inter alia* that this court lacks jurisdiction to hear this matter, that Article 119 of the Constitution and section 5 of the Petitions to Parliament (Procedure Act) Act<sup>1</sup> confer the National Assembly exclusive original jurisdiction to determine a public petition before this court intervenes, and that this court should exercise restraint in deference to the doctrine of separation of powers.

<sup>1</sup> Act No. 22 of 2012.



8. All the parties filed written submissions which they all highlighted in court. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in support of their preliminary objection submitted that the underlying dispute is whether the Respondents are mandated to investigate the public petition before the National Assembly under Article 119 of the Constitution, the Standing Orders and the Petitions to Parliament (Procedure) Act. They submitted that the underlying dispute centers on the interpretation of Article 119 of the Constitution and not whether the petitioners have good title to the land. He urged the court to refrain from exercising jurisdiction and allow the National Assembly to first exercise its mandate.
9. They also cited the doctrine of exhaustion and argued that courts must give deference dispute resolution mechanisms established by law. They cited the Supreme Court decision in Albert Chaurembo Mumba & 7 others v Maurice Munyao<sup>2</sup> which held that even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons/bodies/tribunals/quasi-judicial authorities. They submitted that Article 119 of the Constitution grants the National Assembly exclusive mandate to determine public petitions. They argued that the petition should await the outcome of the National Assembly before invoking this court's jurisdiction. (Citing Speaker of the National Assembly v Njenga Karume<sup>3</sup>).
10. They also cited the doctrine of ripeness and submitted that the issues raised in this petition are yet to crystalize for determination. To fortify their argument, they cited Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others<sup>4</sup> which held that the court ought not to determine issues which are not yet ready for determination or for academic questions or issues which have been overtaken by events. Additionally, they cited Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others<sup>5</sup> which underscored the need for courts to give other organs the space to perform their constitutional and statutory functions.
11. The Hon Attorney General (the 3<sup>rd</sup> respondent) supported the preliminary objection and relied on Samuel Kamau Macharia v KCB & 2 others. Also, he cited Articles 165 (5) and 162(2) (b) of the Constitution section 13 of the Environment and Land Court Act and argued that this court has no jurisdiction to entertain this matter. The AG also submitted that the orders sought encroach on parliamentary business under Articles 94 and 95 of the Constitution and relied on Justus Kariuki Mate & another v Martin Nyaga Wambora & another<sup>6</sup> and urged the court to dismiss the petition.
12. The petitioners opposed the preliminary objection. They referred to the often cited definition of a preliminary objection in Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969)<sup>7</sup> and submitted that the instant preliminary objection does not meet the threshold of the definition in the said case. He submitted that Parliament is trying to interfere and or overturn a court judgment. He cited this courts vast jurisdiction under Article 165 (3) (a) of the Constitution and relied on Nancy Makhokha Baraza v Judicial Service Commission & 9 others<sup>8</sup> in support of the proposition

<sup>2</sup> [2019] e KLR.

<sup>3</sup> [2008] 1KLR 425.

<sup>4</sup> [2016] e KLR.

<sup>5</sup> [2017] e KLR.

<sup>6</sup> [2017] e KLR.

<sup>7</sup> EA 696.

<sup>8</sup> [2012] e KLR.



that the constitution gives this court wide and unrestricted powers which allows it to make appropriate orders and grant remedies as the situation demands.

13. The petitioners also submitted that this court has power to inquire into the constitutionality of the actions of the speaker and other officers of the National Assembly and relied on Njenga Mwangi v The Truth, Justice and Reconciliation Commission & 4 others<sup>9</sup> which held that the court can inquire into unconstitutional actions on the part of speaker and officers of the National Assembly. They submitted that they hold a valid judgment and that parliament has no right to interfere with a court judgment. Further, they submitted that the petition does not fall under Article 162 of the Constitution in that there is no dispute on the land but rather the petitioners are challenging an illegal process undertaken by parliament to interfere with this court's judgment.
14. The uncontested facts of this case are that the 2<sup>nd</sup> respondent in the exercise of its constitutional and statutory mandate through the relevant house committee summoned the petitioners to appear before the committee following a petition presented to the National Assembly pursuant to the provisions of Petitions to Parliament (Procedure) Act. (A petition is defined by the said Act as- means a written prayer to parliament under Article 37 or 119 of the Constitution made in accordance with this Act).
15. The petitioners have clearly pleaded that they filed a response to the said petition. However, instead of attending the hearing before the committee as required, they approached this court riding on Article 165 of the Constitution, a provision which vests this court with immense jurisdiction, hence their contention that they are properly before this court.
16. The above facts brings into focus the principle of ripeness which prevents a party from approaching a court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of conduct alleged to be unlawful. The principle of ripeness was aptly captured by Kriegler J<sup>10</sup> in the following words: -

“The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness"... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. ...The time of this court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.”

17. Lord Bridge of Harwich put it more succinctly when he stated: -

“It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.”<sup>11</sup>

18. It is perfectly true that usually the court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually

<sup>9</sup> [

<sup>10</sup> In *Ferreira vs Levin NO & others; Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) at paragraph [199].

<sup>11</sup> In the case of *Ainsbury vs Millington* {1987} 1 All ER 929 (HL), which concluded at 930g: 13.



been infringed.<sup>12</sup> The requirement of a dispute between the parties is a general limitation to the jurisdiction of the court. The existence of a dispute is the primary condition for the court to exercise its judicial function.<sup>13</sup> Ripeness asks whether a dispute exists, that is, whether it has come into being.

19. Ripeness refers to the readiness of a case for litigation; "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."<sup>14</sup> The goal of ripeness is to prevent premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action.
20. The US Supreme Court fashioned a two-part test for assessing ripeness challenges in *Abbott Laboratories v Gardner*<sup>15</sup> as follows:-

“Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”<sup>16</sup>

21. The Parliamentary Committee is yet to hear the petitioners who admit they filed a reply. The committee is required to hear all the parties and present its report to the full house. The report may or may not be adopted by the house. At this point we cannot predict the outcome. It cannot be said there exists a justiciable controversy. A justiciable controversy refers to an existing case or controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory.<sup>17</sup>
22. Like justiciability doctrine, the ripeness doctrine defines the limits of court’s jurisdiction to adjudicate disputes. Ripeness concerns the timing of judicial intervention and prevents courts from entangling themselves in abstract disagreements by adjudicating disputes too early. Ripeness is a jurisdictional issue that may be raised at any time. Also, the question of ripeness can be considered on a courts own motion.
23. To determine whether a particular issue is ripe for judicial resolution, courts employ the tests in *Abbott Laboratories v Gardner*<sup>18</sup> which requires courts to evaluate whether a dispute is ripe. These are- (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court

<sup>12</sup> See *Transvaal Coal Owners Association v Board of Control* 1921 TPD 447 at 452

<sup>13</sup> *Nuclear Tests (Australia vs. France)*, Judgment, I.C.J. Reports 1974, pp. 270-271, para. 55; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 476, para. 58).

<sup>14</sup> *Texas v United States*, 523, US 296 (1998).

<sup>15</sup> 387 U.S. 136 (1967).

<sup>16</sup> *Abbott Laboratories vs. Gardner*, 387 U.S. 136 (1967), pp. 148-49.

<sup>17</sup> *Board of Optometry vs. Colet*, 260 SCRA 88, July 30, 1996; *Gozun vs. Liangco*; citing *Galarosa vs. Valencia*, 227 SCRA 728, 737, November 11, 1993; *Office of the Ombudsman vs. Judge Ibay*, 364 SCRA 281, September 3, 2001.

<sup>18</sup> 387 US 136.



consideration until later time.<sup>19</sup> A claim may be unripe if it is based upon future events that may not occur as predicted at all. If waiting to decide a case would put the court in a better position to resolve the dispute, such as when further factual development would help the court to adjudicate the case, the case may be unripe and therefore nonjusticiable. Ripeness challenges arise in a variety of contexts, including challenges to administrative agencies actions or policies or pre-enforcement challenges against criminal investigation or prosecution.

24. Thus, to determine whether the case is presently justiciable within the meaning of threat of violation of rights contemplated under Article 22, the court must assess whether from the facts presented a real and imminent breach of the rights or violation of the *Constitution* is disclosed and whether it would be prudent to decide the case at the present time. As stated above. The Parliamentary Committee is yet to hear the dispute. From the material before me, I find no real and imminent threat of rights to warrant court intervention at this stage. No decision had not been made. The effect is that this case was filed pre-maturely. It is not ripe for adjudication. On this ground alone this case is a non-starter and must fail. I dismiss it on this ground.
25. In any event, section 18 of the the *Parliamentary Powers and Privileges Act*<sup>20</sup> confers parliamentary committees with power to invite and summon witnesses. It reads (1) parliament or its committees may invite or summon any person to appear before it for the purpose of giving evidence or providing any information, paper, book, record or document in the possession or under the control of that person and, in this respect, Parliament and its committees shall have the same powers as the High Court as specified under Article 125 of the *Constitution*. The petitioners are simply regurgitating their case before the parliamentary committee. They should have waited for the final decision and if aggrieved challenge it in court. Having allowed the preliminary objection on the above ground, I see no reason to address the other grounds. Accordingly, I allow the preliminary objection and dismiss the petition dated November 24, 2021 with no orders as to costs.

Orders accordingly. Right of appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31<sup>ST</sup> DAY OF MAY 2022.

**JOHN M. MATIVO**

**JUDGE**

Mr. Mbarak for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Mutisya for the Petitioner

<sup>19</sup> See National Park Hospital Association, 538 US at 808.

<sup>20</sup> Act No. 29 of 2017.

