



**Chovu v Director of Criminal Investigations & 7 others; Awale Transporters Limited & 2 others (Interested Parties) (Constitutional Petition 219 of 2018) [2022] KEHC 14453 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14453 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION 219 OF 2018  
JM MATIVO, J  
OCTOBER 31, 2022**

**BETWEEN**

**MGANDI KEA CHOVU ..... PETITIONER**

**AND**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INTERIOR ..... 6<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY, FOREIGN AFFAIRS MINISTRY ..... 7<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 8<sup>TH</sup> RESPONDENT**

**AND**

**AWALE TRANSPORTERS LIMITED ..... INTERESTED PARTY**

**GOVERNMENT OF THE REPUBLIC OF RWANDA ..... INTERESTED PARTY**

**BAMBOO TWIST LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. When this Petition came up for hearing before me on June 17, 2022, the Petitioner's counsel drew the court's attention to an objection raised by Mr Makuto, counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents which was whether this Petition could stand since the Parliamentary report upon which



- the Petitioner's grievance is founded has never been tabled before the National Assembly for discussion and adoption. Counsel invited the court to determine the said issue first.
2. In order to put the said issue into a proper perspective, it is important to highlight, albeit briefly, the background to this suit. According to the Petitioner, he is a resident of Mazaras and one of the original occupiers of the properties known as MN/VI/1129-1132. He claims that the 1<sup>st</sup> Interested Party illegally occupies plot number LR No 3666 owned by the 2<sup>nd</sup> Interested Party and parcels Nos MN/VI/1128 to 1132. Additionally, he claims that the 1<sup>st</sup> Interested Party has offered the 2<sup>nd</sup> Interested Party plots numbers MN/VI/1129-1132 belonging to the 3<sup>rd</sup> Interested Party as alternative land.
  3. He avers that his ancestral graves are situated in the said plots and together with his family members they have agreed with the rightful owners that their rights as far as their ancestral graves are concerned shall not be infringed; that the issue of ownership has gone through various investigations and judicial process and it has been established that the 1<sup>st</sup> Interested Party does not own the land it claims. Further, that the then Municipal Council of Mombasa in August 2012 issued allotment letters to Samuel Charo Kazungu, James Nodoro, Andrew K Kirongo, Joseph Marwa & David Gatoke who have been paying rates, a position confirmed by the Senior Deputy Director of Surveys on December 3, 2014. Additionally, the 4<sup>th</sup> Respondent confirmed that LR No MN/VI/1128-1132 arose from subdivision of MN/VI/787 done in 1952.
  4. The Petitioner's core grievance as I glean it from the Petition is that the National Assembly Departmental Committee on Lands vide a report dated May 20, 2017 recommended that plot number MN/VI/3666 was not available for allocation to the 1<sup>st</sup> Interested Party since it belonged to the 2<sup>nd</sup> Interested Party and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were to investigate and prosecute those found culpable but the report has been ignored. He contends that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties' rights to property and a fair administrative action have been violated and perpetuated by the 1<sup>st</sup> Interested Party's continued encroachment on the land and the Respondent's failure to act on the recommendations of said Parliamentary Committee. As a consequence of the foregoing, the Petitioner prays for:-
    - a. A declaration that the Petitioner's rights have been violated by the 1<sup>st</sup> to 3<sup>rd</sup> Respondent's failure to act as recommended by the National Assembly Departmental Committee on Lands.
    - b. An order compelling the 1<sup>st</sup> to 3<sup>rd</sup> respondent to act as per the recommendations by the National Assembly Departmental Committee on Lands and restore the rule of law and faith of our neighbouring friendly nations and trading partners.
    - c. Any other relief that the court may deem fit to grant for a just determination of the issues raised herein.
    - d. Costs of the Petition be provided for.
  5. The 1<sup>st</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents filed a reply to the Petition dated February 28, 2022 stating:- (a) that the Petition is misconceived, vexatious and an abuse of court process; (b) that the Petition does not meet the tests in the *Anarita Karimi* case; (c) that the report relied upon by the Petitioner was not debated by Parliament; (d) that the Petition is imprecise and premature; (e) that the 1<sup>st</sup> Respondent has not been formally moved to undertake the investigations; (f) that the Petitioner filed the Petition for private gain even though the issues raised are matters of public interest.
  6. The 2<sup>nd</sup> Respondent filed a reply to the Petition dated April 11, 2022 stating:- (a) that the Petition is misconceived and an abuse of court process; (b) that the Petition does not meet the evidential burden; (c) that there is no disclosure that the 2<sup>nd</sup> Respondent was in receipt of the report of the National Assembly Departmental Committee of Lands or that the 2<sup>nd</sup> Respondent refused to undertake



- investigations or how he violated provisions of the Constitution; (d) that the Petition is not founded on factual basis; (e) that this court lacks jurisdiction to entertain this case nor does the Petition disclose any reasonable cause of action against the 2<sup>nd</sup> Respondent.
7. The 3<sup>rd</sup> Respondent filed grounds of opposition dated September 18, 2018 stating:- (a) that the Petition is misguided, misconceived an abuse of court process; (b) that the Petition is premised on generalities, conjectures and presuppositions as to when the 3<sup>rd</sup> Respondent violated the Petitioner's rights; (c) that the Petition contravenes Rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and in particular Rule 10 (2) (b) and (d); that the Petition does not disclose sufficient details on the alleged violations of Articles 22, 28, 40 and 47 of the Constitution; (e) prayers (a), (b), (c) of the Petition are not supported by factual basis; and, (f) that the prayers sought contravene the rule of law as envisaged under Articles 10(1); 10(2) and 162 (2) (b) of the Constitution.
  8. The 3<sup>rd</sup> Respondent also filed a Notice of Preliminary Objection dated October 16, 2018 objecting to this court's jurisdiction citing Article 162 (2) (b) of the Constitution and section 13 of the Environment and Land Court Act.
  9. The 5<sup>th</sup> Respondent filed grounds of opposition dated October 6, 2018 in opposition to the application only and not the Petition.
  10. Mr Makuto, counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents objected to the Petition on grounds that the case is not ripe for adjudication and urged the court to dismiss it. Mr Makuto's objection is premised on the doctrine of ripeness. He submitted that the Petitioner's Petition is anchored on a report by a Parliamentary Committee which is yet to be discussed and adopted by the National Assembly. That being the Position, Mr Makuto submitted that to the extent that the Petition is anchored on the said report, then the same is premature because unless and until the report is adopted by the whole house, it cannot be said to be a report of Parliament.
  11. Counsel for the 3<sup>rd</sup> Respondent relied his grounds of opposition referred to above and the Replying affidavit. The nub of his opposition to the Petition is two-fold. One, that it offends Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Article 162 (2) (b) of the Constitution. He argued that the Petition does not disclose the nature of the violations with specificity. Additionally, he submitted that the issues raised in this Petition fall within the realm of the Environment and Land Court and outside the ambit of this courts jurisdiction.
  12. The Petitioner's counsel conceded that the issue before this court is whether this Petition could stand considering that the Report had not been adopted by Parliament. He argued that the report can be used to prosecute, and that no prosecution has taken place since 2018.
  13. Mr Makuto's argument is an invitation to this court to pronounce itself on the question whether this Petition offends the doctrine of ripeness. As I address this issue, I must bear in mind a pertinent issue, which is before me is a constitutional Petition citing violation of rights. It is undeniable that in bringing a constitutional Petition, a Petitioner may not wait until the actual violation occurs. Indeed, this is the language of Article 22 of the Constitution. However, this provision applies where a litigant is citing alleged threat to rights. The Petitioner before me is citing breach of rights, so, this court must satisfy itself whether or not the dispute is ripe for determination.
  14. Like justifiability 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.

15. To determine whether a particular issue is ripe for judicial resolution, courts employ the tests in *Abbott Laboratories v Gardner*<sup>1</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 consideration until later time.<sup>2</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 non-justiciable. 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.
16. It is common ground that the report relied upon is yet to be discussed and adopted by the whole house. The report is dated May 20, 2017. This Petition was filed on August 31, 2018. By the said date, and even now, there is nothing to suggest that the report has been adopted by the National Assembly. This being the position, I find merit in Mr. Makuto's objection to this Petition that this dispute is not ripe for adjudication by this court. That being the position, I find and hold that this Petition offends the doctrine of ripeness. On this ground alone, this Petition is unripe for adjudication. Having so concluded, I find no reason to determine the objection to this court's jurisdiction or the merits of the Petition. The upshot is that this Petition is dismissed with no orders as to costs.

**SIGNED AND DATED AT MOMBASA THIS 25<sup>TH</sup> DAY OF OCTOBER 2022.**

**JOHN M. MATIVO**

**JUDGE.**

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

**OLGA SEWE**

**JUDGE.**

<sup>1</sup> 387 US 136.

<sup>2</sup> See *National Park Hospital Association*, 538 US at 808.

