



Musiara Limited v Narok County Government & 8 others; National Land Commission (Interested Party) (Environment & Land Petition E008 of 2022) [2023] KEELC 18077 (KLR) (13 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18077 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND PETITION E008 OF 2022**

**CG MBOGO, J
JUNE 13, 2023**

BETWEEN

MUSIARA LIMITED PETITIONER

AND

NAROK COUNTY GOVERNMENT 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

MOBILE EXPEDITIONS LIMITED 3RD RESPONDENT

MELTING POT SAFARIS LIMITED 4TH RESPONDENT

SENTINEL SAFARIS LIMITED 5TH RESPONDENT

NCHIWA MARA SAFARI CAMP LIMITED 6TH RESPONDENT

NGERENDE LODGES & CAMPS LIMITED 7TH RESPONDENT

HAMERKOP MIGRATION CAMP LIMITED 8TH RESPONDENT

AFRICA CONNECTIONS LIMITED 9TH RESPONDENT

AND

THE NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

1. Before this court for determination are two notice of motion applications dated 16th January 2023 and 24th February 2023 respectively.



2. The notice of motion application dated 16th January 2023 is filed by the 4th, 5th, 7th and 8th respondents/ applicants and is expressed to be brought under Rules 10 and 15 of Legal Notice Number 11 of 2013 and the inherent jurisdiction of the court seeking the following orders: -

1. That this honourable court be pleased to strike out the petition herein with costs for not disclosing causes of action against the said applicants.
2. That as an alternative to 1 above, this honourable court be pleased to order the petitioner to supply to the applicants under rule 10 (e) of legal notice no 117 of 2013 details/further and better particulars regarding the civil claim it has pleaded in its petition as follows: -

of paragraph 39;

1. The applicants request the petitioner/respondent to supply to them details/particulars of alleged portions of LR No 25807 or Mara/Koiyaki/2 (herein referred to as suit properties) which each of the applicants has allegedly trespassed on or unlawfully taken possession of under the grant and certificate of lease respectively given to it by the 1st respondent.
2. Petitioner to supply details of the alleged portions of LR No. 25807 or Mara/ Koiyaki/2 which were allegedly trespassed on/taken possession of by the applicants.
3. The petitioner to supply to the applicants' details of when the alleged lease or license were given by the 1st respondent to the applicants.
4. The petitioner to supply details or maps of its alleged parcels of land in the said LR No. 25807 or Mara/Koiyaki/2 which the applicants have trespassed on.
5. The petitioner to supply to the applicants' particulars of alleged structures which were unlawfully constructed and on what portions of the suit properties.
6. The petitioner to supply details of the respective claims and roles of the 1st and 2nd respondents in the alleged phenomenon of trespassing and claiming portions of the suit property.
7. The petitioner to supply details of the holders of the 2nd respondent under the Constitution who allegedly authorized the alleged trespass.

Of paragraph 42 of the petition;

1. The applicants request details/particulars of the alleged structures constructed illegally on the identified portions of the suit properties by them.
2. The applicants seek details/particulars of when the alleged illegal structures were constructed on its alleged land by the applicants.
3. The applicants seek details of the alleged holders of offices in the 1st respondent who purportedly deprived the petitioner of the suit properties.

Of paragraph 43 of the petition;

1. The applicants request details/particulars of decisions touching alleged issuance of a lease or license over the suit properties.
2. In addition, the applicants request details/particulars touching when the decisions were allegedly given/taken.



3. The petitioner to supply to the applicants' particulars of actions or moves of the respondents to unlawfully enter the suit properties made by the respondents specifying the actions of each of the respondents.
 3. That this honourable court be pleased to order the petitioner to furnish a security for cost.
 4. That the costs of this application be provided for.
3. The application is premised on the grounds inter alia that the 4th and 5th respondents/applicants are guaranteed by Article 48 and 50 of *the Constitution* of enjoyment of the rights to access justice and to a fair hearing and the courts of law facilitate the enjoyment of that right through the rule of pleading which requires a petitioner to supply details of its civil claim. Further, that a petition that does not disclose the particulars on which reliefs is based is null and void and must be struck out.
 4. The notice of motion application dated 24th February 2023 is filed by the petitioner and is expressed to be brought under rule 21 (2) of *the Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules*, 2013, and Article 35 of *the Constitution* seeking the following orders: -
 1. The 3rd, 4th, 5th, 6th, 7th, 8th and 9th respondents above named do produce the documents or instruments of title of their respective parcels of land in dispute herein as granted to them by the 1st respondent inclusive of the survey plan or sketch plan that demarcates the boundaries thereof.
 2. That the costs of this application be provided for.
 5. The application is premised on the grounds inter alia that the information and documents applied for herein are required by the petitioner to protect its right to fair hearing and determination of this case as guaranteed under Article 50 of *the Constitution* which is held or is in possession of the 3rd to 9th respondents and can only be accessed by the petitioner on the orders of the court.
 6. The application is supported by the affidavit of Dominic Grammaticas, the Managing Director of the petitioner sworn on even date. In the affidavit, the petitioner deposed that in its supporting affidavit to the petition, the petitioner produced two separate leases of the two properties that form the subject matter of the petition as evidence of ownership which are fixed and protected by law under the provisions of Section 18 and 19 of the *Land Registration Act*.
 7. The petitioner further deposed that the two leases also granted the petitioner exclusive camping rights in the concession area as more particularly described in the said leases and that land rights are acquired in this country through registered instruments of title which are protected by statute and *the Constitution*. Further, that the 3rd to the 9th respondents claim land rights over its parcels of land which they occupy and operate their respective businesses and the said respondents have not produced to this court copies of their respective instruments or documents of title registered under the law of this country together with the underlying survey plans or sketch plan to prove their claims of legal ownership of the parcels of land referred.
 8. The petitioner further deposed that the information and documents are in the exclusive possession of the 3rd to 9th respondents. Further, that the said documents are required to enable the petitioner protect its right to a fair hearing and determination of the case as guaranteed by *the Constitution*. Also, that the petitioner is unable to access the said documents or information unless provided by the respondents.



9. The 3rd respondent filed a statement of grounds of opposition dated 28th February 2023 in opposition to the application dated 24th February 2023 on the following grounds: -
1. That the petitioner's application dated 24th February 2023 does not disclose any cause of action against the 3rd respondent to warrant the orders sought.
 2. The petitioner is on a fishing expedition to obtain information that may incriminate all the respondents including the 3rd respondent in a view to revive its petition that does not disclose any cause of action against the respondents.
 3. The application seeks to shift the burden of proof of his petition to the respondents on a wrong interpretation of Section 112 of the Evidence Act which application is against the express provisions of Article 50 of *the Constitution*.
 4. The application does not disclose any rights infringed by the respondents including the 3rd respondent. Article 35 of *the Constitution* is only invoked by a party who has a cause of action and needs information held by another. Parties will only acquire rights capable of being protected if their originating motion is allowed. The nature and intent of the application before court is one seeking a remedy not capable of being enforced against a party brought to court for breach of a constitutional right.
 5. The petitioner's application does not satisfy the conditions for grant of the orders sought.
10. The 4th, 5th, 7th and 8th respondents/applicants filed a notice of preliminary objection dated 28th February 2023 challenging the application dated 24th February 2023 on the grounds that: -
1. The same does not lie as it is made in a petition that does not disclose a cause of action against all the respondents including the 4th, 5th, 7th and 8th respondents after the petitioner has declined to supply the details sought in the notice of motion dated 16th January 2023.
 2. The manifest object of the application is to fish from the 4th, 5th, 7th and 8th respondents' evidence to enable it breathe life into a petition which does not disclose a cause of action against the said 4th, 5th, 7th and 8th respondents.
 3. The application is based on a principle which is unknown to law namely that a party has a right to obtain from a proposed respondent or defendant, evidence on which it is to base a claim against him or it.
 4. The application is based on Section 112 of the Evidence Act which is itself based on assumption that a petitioner has pleaded a case which has come to trial; the petitioner has not pleaded a case which can proceed to trial and consequently has not satisfied a condition precedent to invocation of the said Section 112 of the Evidence Act.
 5. The burden of pleading a petition which discloses a cause of action against a respondent is on the petitioner alone and it cannot call upon a purported or proposed/ designed respondent to assist it in discharging that burden.
 6. Article 35 of *the Constitution* is premised on the view that a petitioner who invokes it has a cause of action and needs information held by another; it has no application where a party has no cause of action against another.
 7. The application offends the constitutional principle that no person shall be compelled to incriminate itself.



8. The application is escapist in nature as it is not made against the 1st and 2nd respondents who according to paragraph 39 of the petition, are the state organs which have injured it and are under constitutional duty to provide the information sought.
11. With regard to the application dated 16th January 2023, the petitioner filed grounds of opposition dated 6th March 2023 in opposition thereto on the following grounds: -
 1. That the application is misconceived and unsustainable in law.
 2. The law governing the pleadings and elements of a constitutional petition or cause of action is enacted and/or contained in *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013.
 3. The applicants cannot rely on their own breach of the law, and in particular, the law relating to the pre-trial due process, as enacted in *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, to claim that their right to fair hearing has been denied or is likely to be infringed if the reliefs prayed for in the application are not granted.
 4. As regards the mandatory requirements of the petition, Rule 10 and 11 of the above rules provides as follows:- “Rule 10-Form of petition
 - (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
 - (2) The petition shall disclose the following—
 - (a) the petitioner’s name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.
 - (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
 - (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court. (emphasis added)

Rule 11- Documents to be annexed to affidavit or petition.

- (1) The petition filed under these rules may be supported by an affidavit.



- (2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.” (emphasis added)
5. The application does not invoke or make any reference to the above applicable law and by reason thereof, the issue of failure by the petitioner to disclose a cause of action under the said law does not or cannot arise for determination as prayed in the application.
 6. Similarly, the application does not invoke or make any reference to the above applicable law and the issue of a request for particulars under the above law does not or cannot arise for determination as prayed in the application.
 7. The application is a non-started and misconceived in law as it does not state or provide the law relied upon by the applicant to sustain it.
 8. The petition filed herein by the petitioner complies with the above mandatory provisions of the law as stated in Rule 10 of the said Rules.
 9. The applicant’s right to fair hearing or trial include the right to pre-trial due process and procedure as prescribed under the said *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* which give the applicants the following rights to exercise under rule 15 in their defence to the petition:-

“Reply to a petition.

- (1) The Attorney-General or any other State organ shall within fourteen days of service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.
 - (2) (a) A respondent not in the category of sub rule (1) shall within seven days file a memorandum of appearance and either a—
 - (i) replying affidavit; or
 - (ii) statement setting out the grounds relied upon to oppose the petition.
 - (b) After filing either of the documents referred to in sub rule (2)(a), a respondent may respond by way of a replying affidavit or provide any other written document as a response to the petition within fourteen days.
 - (3) The respondent may file a cross-petition which shall disclose the matter set out in rule 10(2).”
10. In a binding decision made by the Court of Appeal in *Mumo Matemu versus Trusted Society of Human Rights Alliance & Others* [2013] eKLR, the court decided that one of the guiding principles applicable to Constitutional cases as follows: -“procedure is also a handmaiden of just determination of cases.”
 11. Relying on the above binding decision, the pre-trial due process of the law or procedure prescribed in the said rule 15 for the applicants to follow and comply is mandatory and not discretionary.
 12. The applicants’ attempt in the present application to circumvent the above mandatory provisions of the law and the pre-trial due process of the law or procedure prescribed therein is misconceived, misleading and unlawful.



13. The case relied upon by the applicants being Civil Appeal No. 227 of 2005 *M.R.S Kantaria versus S. R. Kantaria* does not apply to the present proceedings as it was decided before the enactment of [the Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#).
14. In any event, ground (e) relied upon by the applicants relates to divorce and Election Petitions and it has nothing to do with the present Constitutional Petition which seeks to protect violation of constitutional rights to ownership and enjoyment of land.
15. The applicants have no powers to create their own law and impose it upon the petitioner and this honourable court to comply.
16. The application be dismissed and costs of the application to be awarded to the petitioner.
12. The 1st respondent filed a replying affidavit in response to both applications which was sworn by John Mayiani Tuya on 3rd March 2023. The 1st respondent deposed that it agrees with the application dated 16th January 2023 and prayed that the same be allowed.
13. Regarding the application dated 24th February 2023, the 1st respondent deposed that the petitioner is engaging in a fishing expedition which is meant to vex it, and, in this case, it should be the petitioner to supply details and particulars of its claim and not require the party it seeks to sue to supply it with the said documents. Further, that the petition discloses no particulars upon which the reliefs sought ought to be granted which is escapist in nature.
14. The 1st respondent further deposed that the application seeks production of documents to be used in a petition which has not disclosed the full facts and the constitutional provisions which offends the constitutional principle of self-incrimination.
15. Both applications were canvassed by way of written submissions. The 4th, 5th, 7th and 8th respondents filed their written submissions dated 2nd April, 2023. The 4th, 5th, 7th and 8th respondents opted to abandon prayer 2 of their motion. They wish to take away from the court the jurisdiction to grant it and they place reliance in the Court of Appeal decision in *Nandwa versus Provincial Insurance Company of East Africa* (1995-1998) EACA 288.
16. The 4th, 5th, 7th and 8th respondents further submitted that the petition has contravened the mandatory provisions of Legal Notice Number 117 of 2013 and that the seriousness of these violations become clear when one considers decisions of both the Court of Appeal and this court regarding petitions to enforce the bill of rights. They relied on the case of [Bethwell Allan Omondi Okal versus Telkom \(K\) Limited \(Founder\) & 9 Others](#) [2017] eKLR.
17. They went on to submit that the instant petition is as bad as the petition in which the Court of Appeal dealt with more particularly in paragraphs 51 (a), (c), (e), (f), (g) and (h), 39 to 44. Further, that the petitioner alleges that its right under Articles 27, 40 and 64 of [the Constitution](#) does not give particulars to enable the applicants know the case which is pleaded against them. Reliance was placed in the case of [Anarita Karimi Njeru versus Republic](#) [1979] eKLR and the 4th, 5th, 7th and 8th respondents urged this court to reach a similar decision and strike out the petition for not giving details of the claim made against them as it was in the cases of *Dodhia versus National & Grindlays Bank* (1970) EA 195 and [James Kimwetich Kulei versus County Government of Uasin Gishu & 2 Others](#) [2021] eKLR.
18. The 4th, 5th, 7th and 8th respondents further submitted that the petitioner has put itself by not providing details of its claim in the same position as a party who is abusing the court by invoking a process which requires that it supplies particulars of its claim. They relied on the case of [Cefa Enterprises](#)



- Limited versus Benedict Kyalo Kimuyu & 3 Others* [2020] eKLR. They further submitted that the application dated 24th February 2023 offends the principle under Article 50 (2) (I) of *the Constitution* which prohibits a person from being required to give self-incriminating evidence and urged this court to dismiss the same because it is made in an incompetent petition.
19. The petitioner filed written submissions dated 19th April 2023. With regard to the application dated 16th January 2023, the petitioner submitted that following the decision by the applicants to abandon prayer 2 of their motion, its grounds of opposition to the prayer succeeds and the petitioner is entitled to costs in accordance with the principle of law that costs follow the event and are awarded to the successful party. The petitioner relied on the case of *Kenya Pipeline Company Limited versus Duncan Nderitu Ndegwa & Another*, Civil Appeal No. 235 of 2020.
 20. The petitioner further submitted that the applicants did not make any attempt to submit on prayer no. 3 and is equally abandoned by the applicants. On prayer no. 1, the petitioner submitted that the applicants can only succeed on this ground if they appreciate the definition of a cause of action and its elements and demonstrate how those elements are missing or absent in the present petition. The petitioner relied on the case of *Auto Garage & Others versus Motokov* [1971] E.A 514 and submitted that it is plain and clear that the petitioner pleads that it has constitutional and statutory legal rights to the land in dispute, that those rights have been violated and that the respondents are the parties in breach.
 21. The petitioner further submitted that even as the applicants seem to abandon the cause of action argument and allege non-compliance with Rule 10 and 15 of the Mutunga Rules, the same does not assist the applicants or improve their situation. That the petition pleads and sets out the legal foundation relied upon in support of the petition, there is a summary of facts, that the petition sets out the violations of *the Constitution* relied upon and goes on to plead the enabling provisions of *the Constitution* which have been violated by the respondents.
 22. The petitioner submitted that it is inconceivable and an abuse of the court process for the applicants who are unable to challenge or dispute the petitioner's evidence of facts, to now turn around and allege that they do not know the facts which the petitioner is relying on in support of the grievances against them.
 23. With regard to the application dated 24th February 2023, the petitioner submitted that to invoke Article 50 (2)(j) of *the Constitution* in the present case is an abuse of the court process and meant to mislead this court. Further, that in paragraph 19 of their submissions the applicants admit that they hold evidence which if they disclosed as prayed, will prove the petitioner's grievances as pleaded in the petition which admission kills the application dated 16th January 2023.
 24. The petitioner further submitted that the correct position is that the applicants have no option in the present application (24th February 2023). Further, that the information or evidence that the petitioner has applied for in the application is required for the exercise or protection of the petitioner's constitutional rights to its property as pleaded in the present petition.
 25. The 1st respondent filed written submissions dated 3rd April 2023 and filed in court on 20th April 2023. The 1st respondent submitted that Article 50 of *the Constitution* guarantees it the right to a fair hearing and access to justice and that this court should move to protect this right by requiring the petitioner to supply the details of its claim as they have not done so. The 1st respondent relied on the case of *M.R.S Kantariia versus S.R. Kantaria*, Civil Appeal No. 227 of 2005.
 26. The 1st respondent further submitted that the objective of the petitioner is to vex the 1st respondent and such an application which does not disclose the particulars of which the reliefs sought is based



should be considered null and void. Further, that this petition raises issues of public land which is a matter of great public importance, and this court should not open a Pandora's box where anybody can sue someone and obtain favourable orders without disclosure of particulars upon which his relief is sought. Further, that pleadings are not a formality and they are essential in order to frame issues for determination by the court and to enable the parties know exactly what case they are expected to meet. Reliance was placed in the case of *Anarita Karimi Njeru versus Republic* (1976-1980) 1 KLR 1272.

27. The 3rd respondent filed written submissions dated 26th April 2023. The 3rd respondent submissions are similar to that of the 1st respondent and there is no need to reproduce the same.
28. I have carefully analysed and considered both applications, the replying affidavit, grounds of opposition the notice of preliminary objection, the written submissions and authorities cited by the parties herein and the issues for determination are as follows: -
- i. Whether the petition ought to be struck out for not disclosing causes of action against the applicants.
 - ii. Whether the application dated 24th February 2023 is merited.
29. I will begin with the application dated 16th January 2023. The 4th, 5th, 7th and 8th respondents sought for orders that the petition be struck out for not disclosing causes of action against them. This application was supported by the 1st and 3rd respondents. More importantly, is the fact that the 4th, 5th, 7th and 8th respondents abandoned prayer 2 of their application leaving the court to decide on the rest of the prayers in the application.
30. In *D.T Dobie & Company (Kenya) Ltd versus Muchina* 1982 K.L.R 1, the late Madan JA (as he then was) said the following about the court's power to strike out a pleading: -

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross – examination in the ordinary way.”

The Judge then concluded as follows: -

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.” (Emphasis mine)

31. In *Crescent Construction Co. Ltd versus Delphis Bank Ltd* 2007 eKLR, the Court of Appeal stated as follows on the same issue: -

“However, one thing remains clear, and that is the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time honoured



legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.” (Emphasis added)

32. In determining whether or not the petition discloses a cause of action or is otherwise frivolous and vexatious, the court cannot go beyond the parties’ own pleadings. I have perused the petition dated 21st December 2022. In paragraphs 39 and 40 of the petition, the petitioner contends actions of unlawful trespass and possession of a portion or portions of the certificate of lease by the 2nd to 9th respondents which arose from the decision of the 1st respondent contained in paragraphs 41-46. The petition goes on to plead the enabling statutory provisions violated.
33. My analysis of the above is that the claims against the respondents are specific and are clear and it is possible for the respondents to defend themselves on these claims.
34. On prayer 3 of this application, the 4th, 5th, 7th and 8th respondents did not submit on this issue. This court presumes that the prayer was abandoned as well and will therefore, not proceed to determine the same.
35. I have also carefully analysed and considered the application dated 24th February 2023 and the supporting affidavit accompanying the same. I do note that the petitioner herein has not made any averments to the effect that they sought these documents i. e. instruments of titles and survey plan or sketch map and were not supplied the same. There is nothing to show that the petitioner requested for the said documents and, was denied and, this would call for the intervention of this court.
36. The application in my view is premature at this stage since the respondents are yet to file their responses to the petition.
37. In the circumstances, this court declines to grant the orders sought in the applications dated 16th January 2023 and 24th January 2023. Each party to bear its own costs. The respondents are hereby directed to file and serve their responses to the petition together with any documents they intend to rely on within 21 days from today. The petitioner will have 7 days therefrom to respond if it so wishes. Mention on 17th July 2023 to confirm compliance of these directions and to take a hearing date. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 13TH DAY OF JUNE, 2023.

HON. MBOGO C.G.

JUDGE

13/6/2023

In the presence of:

CA:T.Chuma

