



REPUBLIC OF KENYA



**Mlewa & another v Githinji & 14 others (Petition 18 of 2022)
[2023] KEELC 18947 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18947 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 18 OF 2022
EK MAKORI, J
JULY 19, 2023**

BETWEEN

KAZUNGU MWATETE MLEWA 1ST PETITIONER

KALUME YAA BAYA 2ND PETITIONER

AND

ROBERT MUREITHI GITHINJI 1ST RESPONDENT

NATHAN KAHARA MURIITHI 2ND RESPONDENT

STEPHEN KINYANJUI MURIITHI 3RD RESPONDENT

ABRAHAM MUUGU NG'ANG'A 4TH RESPONDENT

CORNEL OMONDI OMOGAH 5TH RESPONDENT

**REGISTERED BOARD OF TRUSTEES CATHOLIC DIOCESE OF
MALINDI 6TH RESPONDENT**

DR JOSEPH BRADLEY WAWERU GITARI 7TH RESPONDENT

NICODEMUA KIRIMA KARIITHI 8TH RESPONDENT

REV FR JOSEPH OMOGA 9TH RESPONDENT

ABRAHAM NG'ANG'A MUGU 10TH RESPONDENT

GIULIO RUBENS CONSTRUCTION COMPANY LTD 11TH RESPONDENT

REV FATHER ALOYSIUS NGOMA 12TH RESPONDENT

FRANCIS MBUGUA KIMARI 13TH RESPONDENT

LAND REGISTRAR, KILIFI COUNTY 14TH RESPONDENT

HON ATTORNEY GENERAL 15TH RESPONDENT



RULING

1. A Preliminary Objection has been taken up by the 5th, 6th, and 7th Respondents. The other Respondents support the same.
2. The 5th, 6th and 7th Respondents' Preliminary Objection is:
 - i. That this court does not have jurisdiction to entertain the matter as the whole suit is time-barred and in contravention of provisions of Sections 7 and 17 of the *Limitation of Actions Act* (Cap 22 Laws of Kenya).
 - ii. That this court does not have jurisdiction to entertain the matter as the whole suit is time-barred and in contravention of provisions of Section 4 (4) of the *Limitations of Actions Act* (Cap 22 Laws of Kenya).
 - iii. That the issues raised in the Petition are a fabrication of an ordinary suit that is christened to be constitutional in nature. The Petition raises matters of fraud that are ordinarily raised in ordinary suits.
3. The Petitioners reiterated that the current Petition is grounded under the *Constitution* and should proceed as such and that the Preliminary Objection should be dismissed with costs.
4. The respondents submitted that Section 7 of the Limitations of Actions Act (Cap 22) provides that:

“An action may not be brought by any person to recover the land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.
5. The Respondents averred that the 1st Petitioner sold and transferred parcel No. Kilifi/Jimba/42 to the 1st Respondent who subsequently became the sole proprietor of the said parcel on May 25, 1982 - items Nos 1, 2 & 3 in the 5th, 6th & 7th Respondents' List of Documents. The 1st Respondent later on caused parcel No. Kilifi/Jimba/42 to subdivide into three portions, Kilifi/Jimba/472, Kilifi/Jimba/473, and Kilifi/Jimba/474 which he bequeathed the Respondents as follows - Kilifi/Jimba/472 to the Catholic Diocese of Malindi, sold and transferred Kilifi/Jimba/473 to one Francis Mbugua Kimari and Kilifi/Jimba/474 to Rev. Father Aloysius Ngona. The said sub-divisions have been subdivided several other times and many third parties registered as the new owners.
6. It was submitted that the 1st Respondent was registered as the owner of the parcel No. Kilifi/Jimba/42 way back in 1982. That the Petitioners were well aware that the 1st Respondent had been registered as the new proprietor and the title deed issued in his name. This can be seen in paragraph 13 of the Supporting Affidavit dated 13th June 2022. This is also so because the 1st Petitioner instituted a case against the 1st Respondent at the tribunal in the year 2005.
7. The Respondents stated that it thus follows that any claim over parcel No Kilifi/Jimba/42 that the Petitioners had, arose the moment the 1st Respondent was registered as the proprietor of the same that is in 1982 hence the Petitioners' cause of action arose in 1982. As per the provisions of Section 7 of the *Limitation of Actions Act*, the Petitioner could only institute the instant Petition within a period of Twelve (12) years from the year 1982. The Petitioners' limitation time lapsed in the year 1994. The instant petition having been filed in 2022, forty (40) years after the cause of action arose and Twenty-Eight (28) years after the limitation of time had expired. The Petition was filed in contravention of



Section 7 of the Limitations of Actions Act and this court has no jurisdiction to hear the same hence the prayer that it should be struck out with costs to the Respondents.

8. The Respondents quoted the case of *Edward Moonge Lengusuranga v James Lanaiyara & Another* [2019] eKLR where the Court in striking out the Plaintiff's suit for being filed 14 years after the date the cause of action arose held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is Statute barred the court has no jurisdiction to entertain the same.
9. To bolster this point the Respondent quoted the case of *Sohanlaldurgadass Rajput & Another v Divisional Integrated Programmes Co. Ltd* [2021] eKLR where the Court struck out a plaint for being filed out of time.
10. The Respondent further averred that Section 26 of the *Limitation of Actions Act* provides:

“Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”
11. It is the submission by the Respondents that the Petitioners found out about the purported fraud in the year 1982, immediately after the 1st Respondent was registered as the owner of the suit property. This is admitted in paragraph 13 of the Petitioners' Supporting Affidavit. This is also seen from the fact that the 1st Petitioner instituted Tribunal case No. 6 of 2005 against the 1st Respondent way back in the year 2005.
12. The Respondents contended that assuming the Petitioners found out about the supposed fraud in the year 2005 when they instituted the Tribunal case, still the Petition will be time-barred as the 12 years limitation from 2005 lapsed in the year 2017 hence it is the submissions by the Respondents that the Petition was filed out of time and should be struck out with costs to the Respondents.
13. The Respondents further stated that the provisions of Section 7 of the Limitations of Actions Act do not only apply to matters that have been instituted by way of a Plaint but also to Petitions. In the case of *La Marina Limited v Nathan Kabara & 2 Others* [2020] eKLR Olola J. In dismissing a similar Petition like this one held:

“Limitations of actions by the law were intended to bar claimants from instituting claims that are stale and protecting defendants against unreasonable delay. In this respect, I agree with the 1st Respondent's submission that the issue of limitation goes to the jurisdiction of a Court to entertain a claim, and therefore where the matter is statute-barred, the Court has no jurisdiction to entertain the same”.
14. To prop this point further, the Respondents submitted that where the Court in striking out a petition and in dismissing an argument by the Petitioners that there is no statutory period prescribed for the commencement of constitutional petitions, held that irrespective of the fact that the matter was filed as a constitutional petition, still the Petitioners were required to explain the issue of delay.
15. Whether the issues raised in the Petition are a fabrication of an ordinary suit that is debuted to be constitutional in nature. The Respondents contended that the Petition raises matters of fraud that are ordinarily raised in normal civil suits. The Petitioners' claim is mainly based on fraud. The Petitioners fault how the 1st Respondent was registered as the proprietor of Parcel No. Kilifi/Jimba/ 42. They



have particularized fraud supposedly committed by the Respondents in paragraph 25 of the Petition. The Petitioners claim that the 1st to 14th Respondents colluded unlawfully and fraudulently interfered with the record of the suit property. Issues of fraud are only and rightly ventilated upon by production and assessment of evidence which can simply be done through an ordinary land matter and not a constitutional petition hence the petition does not meet the threshold of a constitutional petition thus should be struck out with costs to the Respondents.

16. To reinforce this point the Respondent referred the court to the case of *Naitore M'iburi & Another V Attorney General & 2 Others; Sebastian Kaaria (Interested Party)* ELC Petition No. 8 of 2018 where the court held that ordinary land suits pleading right to ownership, deprivation by fraud, misrepresentation or corruption need to be ventilated in normal civil courts.
17. On the other hand, the Petitioners in opposing the Preliminary Objection argued that the Petition herein seats pretty as a Constitutional Petition and is protected under Article 20(2) of the *Constitution*, which provides for the protection of every citizen's bill of rights.
18. That the Statute of Limitations does not apply to Constitutional Petitions, significantly where the right infringed or threatened to be infringed falls within the ambit of the right to ownership of property under Article 40 of the *Constitution*.
19. That the claim by the Petitioners is founded on failure by the 14th Respondent to enforce an award made by a Tribunal in a matter filed in 2005 in Land Dispute Case No 6 of 2005 Which was later filed for adoption in court in Malindi Civil Case No 42 of 2006 and the award adopted as the judgment of the court on November 28, 2006. That the Tribunal found the transfer of the land from the 1st Petitioner to the 1st Respondent was null and void and the Tribunal proceeded to annul the transfer but that the 14th Respondent has failed to enforce the same in hence this petition to protect the Petitioners rights under Article 40 of the *Constitution*. That the decree in that matter was issued on October 20, 2020 and therefore Limitation of Actions does not apply.
20. The Petitioners submitted that striking out a claim is such a draconian measure that the law and authorities abhor the decisions in *Madison Insurance Ltd v Augustine Kamanda Gitau* [2020]eKLR, *Yaya Towers Ltd v Trade Bank Ltd (in Liquidation)* Civil Appeal No 35 of 2000 are quoted to fortify the assertions by the Petitioners.
21. The Petitioners further submitted that the 1st Respondent had no good title to pass given the Decree by the Tribunal under the aegis of nemo dat quad non habet. The subsequent purchasers therefore do not hold good titles and that is why this matter should go to full trial for all the Defendants to show how they acquired the titles they hold. That they cannot be purchasers for value without notice. The case of *Arthi Highway Development Ltd v West End Butchery Ltd v 6 others* [2016] eKLR supports the Petitioners' assertions.
22. The Petitioners further argued that the 1st Respondent working then as an Adjudication Officer abused his office in the acquisition of the land in issue to the detriment of the 1st Petitioner herein.
23. On whether this ought to have been filed as an ordinary suit rather than a Constitutional Petition, the Petitioners stated that the Petition is secured under Article 40(6) of the *Constitution*, which does not support property acquired corruptly or unlawfully.
24. The Petitioners affirmed that the current Petition hinges on Article 259 of the *Constitution* on how to draft Constitutional Petitions. The Petition has also achieved the threshold as laid in the case of *Mohammed Shally Sese(Suing as the Administrator of the Estate of Late Shali Sese) v Edward Mzee Karezi & 8 others* [2022]eKLR on what to plead in Constitutional Petitions.



25. It is the Petitioners’ strong conviction that the current Petition has set out the rights which stand to be infringed and that it should be heard on merit.
26. After carefully analyzing the material and submissions placed before me, the issues for the determination are whether the claim to be enforced herein stands statutorily barred. Whether what we have is a normal suit disguised as a Petition and who should bear the costs. The issues are intertwined and will be resolved in tandem.
27. For a Preliminary Objection to be achieved, as held by Law JA. In *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* [1969] thus:
- “...so far as I’m aware, 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 to the 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.”
28. A Preliminary Objection can be raised at any time in the proceedings but it is better raised at the earliest possible time because it has a bearing on disposing of a matter. The point of law raised in this Preliminary Objection is that the Petition is statutorily barred and or that it’s a normal suit clad as a petition.
29. The twin issues to me can be addressed by answering the question of how a constitutional petition is supposed to be crafted. Is it all matters that fall to be considered constitutional?
30. To fall within the threshold of a Constitutional Petition *Anarita Karimi Njeru v Republic* [1980] KLR 154 [1979] eKLR. Trevalyan J. and Hancox J. stated as follows:
- “We would however again stress that if a person is seeking redress from High Court on a matter which involves a reference to *the Constitution* it is important (if only to ensure that justice is done to his/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
31. The Petitioners have pleaded what right they think has been infringed in the *Constitution* as the right to own property under Article 40 of the *Constitution* and proceed to plead that by fraud they have been deprived of that right to own property and seek declarations as such. They also say that there is a Decree in their favour that has not been enforced and wants this court to ‘order’ for its enforcement. So many petitions are filed in this court based on Article 40 of the *Constitution* and this court has no difficulty with that. The problem is whether the manner the petition is couched will achieve the declarations sought.
32. The Petitioners referred me to the case of *Naitore M’iburi & Another v Attorney General & 2 Others; Sebastian Kaaria (Interested Party) ELC Petition No.8 of 2018* where the court held that:
- “In this particular case, the interested party is the registered proprietor of the suit land since the year 2002. The rights of such a registered proprietor of land are protected and anchored under the statute primarily section 25 and 26 of the *Land Registration Act*. The impeachment of such a title can only be as provided under section 26 1(a) & (b) of the aforementioned Act on grounds of fraud, misrepresentation illegally, and corrupt scheme. This would then classify the dispute as one of ownership to be dealt with by ordinary courts



and not in a constitutional petition. This is hence a matter where evidence needs to be adduced and tested as a land matter. The petitioners cannot, therefore, claim that they have rights which need to be protected via this petition.”

33. What follows then from the foregoing is that whereas the Petitioners have brought a Petition for declaration of the right to ownership of property under Article 40 of the *Constitution*, the Petition is couched like a normal civil suit claiming ownership of land and deprivation of the same based on fraud.
34. Besides, the Petitioners claim that there is a decree in Malindi Civil Case No 42 of 2006 that adopted the Land Disputes Tribunal’s award. No reasons have been proposed by the Petitioners why they have not followed the clear roadmap to enforce the decree as laid under the repealed Land Disputes Tribunal Act rather than embarking on a fresh journey of restarting the claim afresh and christening it a Constitutional Petition.
35. Under the Repealed Land Disputes Tribunal Act there was an elaborate procedure for the adoption of awards, enforcement, and appeals as stated in the case of *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others* [2015] eKLR where the Supreme Court of Kenya had this to say on the adoption of decisions by Land Disputes Tribunals and Land Disputes Appeal Committee :

“...The High Court held that it indeed had jurisdiction to nullify an award of a tribunal if such an award was made outside the tribunal’s jurisdiction. It set out the mandate of the tribunal thus: to deal with disputes of a civil nature, concerning the division of land, or the determination of boundaries to land, including land held in common; a claim to occupy or utilize land; or trespass to land. However, the Court held that its jurisdiction is only exercisable where such decision of the tribunal has not transmuted into a judicial determination, through adoption as a Judgment of the Court... even if the declaration was to issue with regard to the Tribunal’s award, it would have no effect as the decree that emanated from the lower Court’s Judgement had not been challenged by the plaintiff. The learned Judge further held that, upon an award becoming a Judgement of a Court of competent jurisdiction, it can only be varied, vacated, set aside, or reviewed by the same Court, or by an appellate Court in appropriate proceedings ...the award should have been appealed to the Lands Appeals Committee constituted for the Province, in accordance with Section 8(1) of the Lands Disputes Tribunals Act...Alternatively, the plaintiff could have commenced judicial review proceedings in the nature of certiorari, to quash the award... The Court of Appeal...dismissed the appeal, upholding the High Court’s position...the Appellate Court observed...“The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The appellant instead chose to file the suit for declaratory orders and compensation...”

36. The applicants have not demonstrated what steps they have taken to have the award implemented before making a call to this court for declaratory orders. The Applicants have also not explained why an award made sometime in the year 2005 by the defunct Land Disputes Tribunal took up to 2020 to adopt.
37. This then brings me to the next front, which is the doctrine of constitutional avoidance, when a party has a remedy provided under the legislation that party needs to follow that path and exhaust it before



petitioning a Constitutional Court. See *KKB v SCM & 5 others* [Constitutional Petition 014 of 2020] [2022]KEHL 289 [KRR] thus:

“Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments that the court will entertain The doctrine of avoidance was fortified in *Sports and Recreation Commission v sigittarious Wrestling club & another* in which Ebrahim J.A. said the following:

“.....courts will not normally consider a constitutional question unless the existence of a remedy depends upon it: if the remedy is available to a Petitioner under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.”

38. The original title in this matter has passed many hands. The Petitioners largely relied on the limitation of action to bring up the Preliminary Objection; I agree that the issue of limitation will also need to be addressed as stated in the case of - *James Kanyiita Nderitu V Attorney General & Another* [2019] eKLR where it was held that:

“Promulgation of the 2010 Constitution is not an act that extends or revives old causes of action. Promulgation neither founds a cause of action nor is it an absolute excuse for each and every delay in instituting proceedings for causes of action which arose and were known to exist. Delay in filing a petition or any cause of action must be explained independently of the promulgation of the 2010 Constitution.

A constitutional petition, or for that matter judicial review proceedings, is not meant to circumvent the law on limitation of actions. Consequently, constitutional petitions filed in delay alleging violation of the Bill of Rights is to be considered on a case-by-case basis taking into account the explanation and merits of delay. In *Josephat Ndirangu vs. Henkel Chemicals (EA) Ltd* [2013] eKLR, the trial court correctly held that litigants should not avoid the provisions of an Act by going behind statute and seeking to rely directly on constitutional provisions. The primary legislation should not be circumvented. In *Peter Lubale Lubullellah vs. Teachers Service Commission*, Petition No.145 of 2016 on the issue of circumvention of the primary legislation it was aptly stated as follows:

“To name the matter herein as a Petition and claim constitutional violations, the facts appurtenant thereto are clear. The cause of action arose in employment where the petitioner is seeking a benefit out of his employment and or service with the Respondent. Where a memorandum of Claim was filed or a petition, the cause of action does not change due to the name assigned to the pleadings. Even where there is no challenge to the claims made by the respondent, it is obvious, the claim is for gratuity payment for the employment period of the petitioner is filed way out of time as required under section 90 of the *Employment Act, 2007*.” (Emphasis supplied)”

39. The issues I have addressed will require a civil court to follow the trail of the acquisition of the titles disclosed and not in the manner proposed by the Petitioners. The Preliminary Objection succeeds. The petition is hereby struck out with costs.



**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS
19TH DAY OF JULY 2023**

E.K. MAKORI

JUDGE

