



REPUBLIC OF KENYA



KENYA LAW
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**Mutava v Kazungu & 2 others (Environment & Land Petition
26 of 2022) [2023] KEELC 19943 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19943 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION 26 OF 2022

EK MAKORI, J

SEPTEMBER 22, 2023

**IN THE MATTER OF: THE ALLEGED INFRIDGEMENT OF THE
PROVISION OF ARTICLES 2(1),2(2),2(4),3.10,22,23,26,27,28,29(D)
AND (F),40,258 AND 259(1) OF THE CONSTITUTION OF KENYA.**

AND

**IN THE MATTER: THE ENFORCEMENT OF THE SUPREMACY
AND DEFENCE OF THE CONSTITUTION AS PER ARTICLES**

2(1) AND 3 OF THE CONSTITUTION.

AND

**IN THE MATTER OF: THE CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLE 40
OF THE CONSTITUTION REGARDING THE PROPERTY RIGHT.**

AND

**IN THE MATTER OF: THE CONTRAVENTION OF THE
FUNDAMENTAL RIGHT AND FREEDOM UNDER ARTICLE 47**

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**OF THE CONSTITUTION REGARDING THE RIGHT TO FAIR
ADMINISTRATIVE ACTION.**

AND

**IN THE MATTER OF: UNDERMINING THE PRINCIPLE OF FAIR
AND NATURAL JUSTICE**

AND

IN THE MATTER OF: THE PRINCIPLE OF LEGITIMATE



EXPECTATION.

**IN THE MATTER OF: MOMBASA HIGH COURT SUIT NO.307
OF 2003 (O.S)**

**BETWEEN KENGA KAZUNGU =VS=MWENDA KATANA,
ALBERT KATANA & THE DISTRICT LAND REGISTRAR, KILIFI
AND ALL OTHER ENABLING PROVISIONS OF THE LAW.**

BETWEEN

KENGA KAZUNGU MUTAVA PETITIONER

AND

JULIUS KATANA KAZUNGU 1ST RESPONDENT

ALBERT KARISA KATANA 2ND RESPONDENT

THE REGISTRAR OF LANDS KILIFI 3RD RESPONDENT

RULING

1. The Petitioner moved this Court through Notice of Motion and Petition both dated 10th November 2022. The petition seeks declaratory orders as well as orders to issue a permanent injunction against the Respondents restraining them from interfering with Petitioner's quiet and peaceful enjoyment and restraining the Respondents from subdividing, selling, leasing, or creating any other property rights upon the suit property.
2. The Petitioner is said to be the paternal uncle to the 1st and 2nd Respondents herein who are the sons of his late brother, Katana Kazungu. The Petitioner and the 1st and 2nd Respondents have lived on the suit property together.
3. The suit property in contention is settlement scheme plot no. Kilifi/Ngerenyi 629, which is registered in the name of the Petitioner's brother and the father to the 1st and 2nd Respondents, Katana Kazungu (deceased).
4. The 1st and 2nd respondents contended that the suit property had been allotted to their father who allowed the Petitioner to live on the suit property when the petitioner was undergoing hardship.
5. On the other hand, the petitioner claims that the suit property was allocated to his late father, the grandfather to the 1st and 2nd respondents. The land is a family property that both his family and the family of his late brother lived on.
6. The petitioner had previously approached the ELC Court at Mombasa in ELC OS No 307 of 2003, which was heard and determined. The judgment was delivered, dated on the 1st July 2021, in which the Court dismissed the Petitioner's case.
7. The Respondents raised a Preliminary Objection that this matter is res judicata given the findings of Mombasa ELC OS No 307 of 2003 involving the same subject matter and parties. The Court directed both the Preliminary Objection and the application dated 8th February 2023 to be heard



simultaneously. The Court also directed parties to file written submissions to dispose of the two motions.

8. 1st and 2nd Respondents submitted that Section 7 of the *Civil Procedure Act* bars filing of a suit(s) when the parties to the suit have had a suit filed in a competent Court and the said suit heard and determined on merits. That it is not in dispute that the Plaintiff filed case No.307 of 2003 (O.S) in the High Court of Mombasa which case was against Mwenda Katana, Albert Katana, and District Land Registrar, Kilifi which suit was heard and determined by the ELC, Mombasa. The Plaintiff's prayers in that suit are similar to the prayers herein though the petitioner wants the Court to believe that his constitutional rights have been infringed. The 1st and 2nd respondents urged the court to find that the suit herein is an abuse of the Court process and bad in law.
9. The 1st and 2nd respondents submitted that the application lacks merit and does not meet the principles in the well-known case of *Giella v Cassman Brown* [1973] E.A 358. Primarily, the petitioner has no chance of succeeding in this case having filed Mombasa ELC OS No 307 of 2003, which was dismissed after a hearing on merit. Moreover, the petitioner had filed a Notice of Appeal thus, he did appeal against the judgment of the ELC OS No.307 of 2003. There is no evidence that the petitioner withdrew the Notice of Appeal filed in ELC OS No.203 of 2003. 1st and 2nd defendants submitted that the plaintiff is circumventing the Court process by filing this suit instead of prosecuting his appeal against the judgment of the court in ELC OS No.307 of 2003.
10. The 1st and 2nd respondents think the petitioner will not suffer any inconvenience if the orders are not granted. It is admitted by the petitioner that he is in occupation of the portion of the land, which is in the name of the 1st and 2nd respondent's father. There is no averment that the sale of the portion of land sold by the 1st and 2nd respondents is the same portion occupied by the petitioner.
11. The 1st and 2nd respondents concluded that the petitioner can be compensated by way of damages in case he succeeds in this case, but whose chances of success are nil as submitted.
12. The 3rd respondent submitted that the petitioner, in this case, has no locus standi or capacity to institute this matter. Due to the lack of said capacity; the suit is incompetent and should be struck out. The definition of locus standi is well enunciated in the case of *Alfred Njau v City Council of Nairobi* [1983] KLR 625 where the Court of Appeal held that:

“...Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”
13. Also in the case of *Julian Adoyo Ongunga v Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015*. The Court further buttressed the critical nature of locus standi, especially in cases that involve the property of a deceased person stating thus:

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”



14. That the Petitioner admitted in various paragraphs that the suit property belonged to deceased persons. The specific paragraphs of the Petition read together with the Supporting Affidavit dated 10th February 2023 to that effect.
15. The 3rd responded averred then that the suit land belonged to the deceased person who is the Petitioner's brother and therefore the petitioner cannot sue in any matter touching on the suit property for he has not obtained the Grant of Letters of Administration and unless he gets the said letters of administration, he does not have the locus standi to prosecute this suit.
16. This position was stated in the case of *Sisilia Nyakoe & another v Attorney General & 4 others* [2021] eKLR where Onyango J. held:

“..... it is a matter of law that anyone who wishes to approach a court claiming a beneficial interest in a property registered in the name of a deceased person must be clothed with the authority to do so, which essentially means that he must first and foremost obtain Grant of Letters of Administration.”
17. It was averred that the petitioner is devoid of requisite locus standi to institute and maintain the petition over the suit property.
18. Whether there is a properly framed constitutional petition the 3rd respondent stated that the precision threshold in framing of issues in a petition is a fortified principle anchored in the celebrated case of *Anarita Karimi Njeru v Republic (No1)*-[1979] KLR 154 as echoed in *Pyaralal Mhand Bheru Rajput v Barclays Bank and Others Civil Case No. 38 of 2004* and *Mumo Matemo v Trusted Society of Human Rights alliance* [2014] eKLR.
19. The 3rd respondent further stated that the import of the above-cited cases is that if a person is seeking redress from the High Court on a matter that involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and how they are alleged to have been infringed.
20. From the foregoing, it is contended that the petitioner apart from citing omnibus provisions of *the Constitution*, the petition provided neither particulars of the alleged complaints, the manner of alleged infringements, nor the jurisdictional basis of the action before the court. Such failure to draft the petition with precision as to show the specific infringement and the manner especially that the 3rd respondent has played a part in it makes the petition itself moot as against the 3rd respondent and that the contraventions in the petition are purely between the petitioner and the 1st and 2nd respondents.
21. In addition, it is urged that the petitioner's prayers and orders are targeted against the 1st and 2nd respondents, and in no way directed against the 3rd respondent.
22. On the other hand the petitioner averred that the Preliminary Objection lacks merit and does not meet the threshold of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] E.A 696. Moreover, based on what has been raised the petition cannot be struck out summarily on the ground that the petition raises constitutional issues which need to be addressed.
23. Whether this suit is res judicata, the petitioner thinks that the current petition is not similar to the *Mombasa ELC OS No 307 of 2003*. The *Mombasa* case was not a constitutional petition it was a civil case that sought that the suit land be divided between the two conflicting families – that of the petitioners and the respondents. The current petition arose from ultimatums to evict the petitioners from the suit land. That the former suit had the potential of conferring proprietary rights while the



petition has the potential to protect fundamental rights from threat and infringement as held in the case of *Ali Mohammed Kijui & Another v Registrar of Titles Mombasa and Another* [2019] eKLR.

24. The petitioner is well aware that his proprietary rights can be resolved via a civil suit but this petition was filed because the petitioner had been held hostage and on the verge of eviction.
25. The Mombasa judgment did not conclusively determine the issues raised. The suit in Mombasa suffered technical hitches because it was dismissed for lack of capacity. The property was registered in the name of a deceased person.
26. Unfortunately, the situation in the estate has not changed. The estate has no legal representative up to date. Had letters been taken, it could have been easier to approach the Mombasa court for review and resolve the issues once and for all.
27. Upon the delivery of the Mombasa judgment, the respondents embarked on the eviction of their uncle and selling of the property in question.
28. That until the respondents take out letters of administration, they cannot evict. That is why the constitutional petition has been filed to safeguard the interest of the petitioner.
29. That this suit has been filed as a panacea and to bring harmony until the legal representative is found.
30. On the merits of the pending application, the Petitioner averred that an eviction notice had been issued and displayed to the court as annexure KKM-10 and that annexure KKM- 12 the petitioner provided evidence of beacons being erected on the suit land. That the land had gone through adjudication and was found to be family land. Therefore, the court should issue conservatory orders until the issues are resolved.
31. That whereas the Court cannot resolve all the issues raised, it can protect the rights of the petitioner pending the resolution of those issues.
32. Further the respondents are intermeddling with the estate of a deceased person in contravention of Section 45 of the Succession Act.
33. I have reviewed the material and submissions placed before me. The issues that stand out for the determination of this court are whether the Preliminary Objection is merited and has achieved the threshold as required by the law. Whether the pending application for the conservatory and injunctive orders is sustainable. What are the final orders that commend issuance?
34. A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....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.

At page 701 paragraphs B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the 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....”

35. In this petition, the Preliminary Objection raised is to the effect that this suit is res judicata having been heard and determined in Mombasa ELC OS No. 307 of 2003, Besides, an issue has been raised that the petitioner has no locus standi to propagate the current suit for want of letters of administration and suing persons without capacity since the land in question is registered in the name of a dead person. That the current petition does not meet the threshold of a constitutional petition.
36. On whether this matter offends the doctrine of res judicata. In Mombasa ELC OS No. 307 of 2003 reported as *Kenga Kazungu v Mwenda Katana & 2 others* [2021] eKLR in analyzing the issues raised in the matter Yano J. held as follows:

As the 1st defendant was the legal representative of the estate of the registered owner of the suit land, if any orders were to be given, it would have been against the 1st defendant. However, the evidence on record is clear that the 1st defendant passed on and the suit against her was in any event withdrawn. There was no order for substitution of the 1st defendant that was made. Therefore, the 2nd defendant in my view has no capacity or locus standi to defend the suit. Legal capacity of a party is everything and without it, the suit against the 2nd defendant is incompetent.

25. In the result, the Court finds that it cannot and would not grant the orders against the 2nd defendant who has not been shown to hold the suit land in his name in any capacity. There was no evidence adduced indicating that the suit land was ever registered in the name of the 2nd defendant or that the 2nd defendant has been holding the said parcel of land in trust for the plaintiff as pleaded.

26. Although the defendants in this case did not tender any evidence and their case was closed, the onus was still upon the plaintiff to prove his case on a balance of probabilities. In as much as the plaintiff's evidence was not challenged, the plaintiff is challenging title to the suit property which title is in the name of the deceased person and yet the legal administrator of the estate of the deceased has not been sued. In the absence of letters of administration, the Court cannot hold the 2nd defendant liable to find that the suit land is held in trust for the plaintiff.

Accordingly, and in light to the above, I find that the plaintiff's case against the 2nd and 3rd defendants has no merit for the reason that the plaintiff has sued the 2nd defendant who is not the legal representative to the estate of Mwenda Katana (deceased) or Katana Kazungu (deceased), and for failing to prove the alleged trust.”

37. The petitioner in this matter acknowledged that the situation obtained in ELC OS No. 307 of 2003 is the same as stated in this petition that we are dealing with a suit property registered under deceased persons and the respondents are not personal representatives of the estate of the deceased this can be seen from the various averments by the petitioner as follows:

“The Parcel of land known as Kilifi/Ngerenya/629 happens to be registered in the name of the father to the 1st & 2nd Respondents who was the eldest son in the family and as such the property was registered under his name as the trustee for his siblings (paragraph 21).



The Petitioner states that the suit land originally belonged to the Petitioner's father (deceased) who acquired two parcels of land during the colonial era. (Paragraph 43).

"In 2001, the elder brother Kazungu Katana passed away leaving behind sons with the eldest being the 1st & 2nd Respondents.....(Paragraph 52)"

38. From the foregoing averments from the petitioner, whereas ELC OS No 307 2003 could not have been decided on merit due to failure to sue the proper estate of the deceased, this petition is a reincarnation of the Mombasa suit – same subject matter, same parties with same facts – we are still dealing with a property registered in the names of deceased persons. Locus standi and or capacity remain a germane question, which a constitutional petition cannot cure.

39. This Court is being asked to issue conservatory orders to preserve the suit property until a Legal Representative of the deceased is found. The petitioner has not stated at all why the Legal Representative has not been found or why letters of administration have never been obtained since 2003.

40. It is my considered view that even if we go to full trial in this petition the result will be as it obtained in Mombasa ELC OS No 307 of 2003. This is what is called the classically game of musical chairs – why can't the petitioner invoke the law on citations set out in Part VI of the Probate and Administration Rules (P&A Rules) to have the estate of the deceased patriarchs distributed if at all the petitioner believes he is a beneficiary? Isn't this the route provided where there is reluctance in taking out letters of administration as held in Josiah Muli Wambua – deceased, Nairobi Succession Cause No. 2557 of 2012 [2014] eKLR. where Musyoka J stated the following in paragraph 9 of his ruling:

"In intestacy, citation issue only in cases where no petition has been lodged in court. Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court in that behalf. The Citor should not be a person who has himself already applied for the grant, for the Citor should only apply for grant after the citee fails to so apply."

41. On the question of whether the petition meets the threshold of bringing up petitions, I will agree that the current petition does not meet the threshold of bringing up constitutional petitions. The authorities cited by the 3rd Respondent are germane in Anarita Karimi Njeru v Republic (No1)-[1979] KLR 154 the Court stated as follows:

"... if a person is seeking redress from the 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 case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and how they are alleged to be infringed."

42. As submitted by the 3rd Respondent this Petition is an omnibus and therefore lacks reasonable precision as it fails to demonstrate how the Petitioner's rights have been infringed by the not 3rd Respondent but also by the 1st and 2nd Respondent and as such it is incapable of proper adjudication. The petition only seeks conservatory orders to await certain unforeseeable acts in the future of fishing for a legal representative – which act has never happened since 2003.



43. In the case of *Pyaralal Mhand Bheru Rajput v Barclays Bank And Others* Civil Case No. 38 of 2004, the Court stated thus:

There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long-established and different judicial principles which counsel needs to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."

44. Further the Court of Appeal reiterated this position in *Mumo Matemo v Trusted Society of Human Rights alliance* [2014] eKLR, thus:

"...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court... The procedure is also a handmaiden of just the determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in the framing of issues in constitutional petitions is an extension of this principle"

45. The current petition is grounded on quicksand. It is similar to or a replica of *Mombasa ELC OS No 307 of 2023* that resulted in naught on the issue of lack of a Legal Representative. I need not discuss the merits of the pending application dated 10th November 2022 as it collapses in limine. I see the pending petition taking the same trajectory and it is hereby struck out with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS
22ND DAY OF SEPTEMBER, 2023**

E. K. MAKORI

JUDGE

