



Muchira v Wainaina & 3 others (Sued in their capacity as the officials of Safari Park Gardens Residents Association) (Environment & Land Petition E072 of 2024) [2025] KEELC 1472 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E072 OF 2024
TW MURIGI, J
MARCH 13, 2025**

BETWEEN

BERTHA WAWIRA MUCHIRA PETITIONER

AND

PAUL WAINAINA 1ST RESPONDENT

JOSEPH NGUNJIRI 2ND RESPONDENT

JANE GATHACHA 3RD RESPONDENT

ANTHONY MAINA 4TH RESPONDENT

SUED IN THEIR CAPACITY AS THE OFFICIALS OF SAFARI PARK GARDENS RESIDENTS ASSOCIATION

JUDGMENT

1. The Petitioner Bertha Wawira Muchira filed a Petition dated 5th September 2024 seeking the following orders:-
 - a. A declaration that the refusal and neglect of the Respondents to allow the tenants residing in the Petitioner’s developed parcel to access or exit the premises is arbitrary, highhanded, unlawful and a violation of the Constitutional principles and the rule of law.
 - b. A declaration that the Respondents conduct and management of the Safari Park Gardens was in violation of the Petitioner’s freedom of association as guaranteed under Article 36 by:
 - i. Forcing the Petitioner to comply with their rules and regulations despite not involving her in the public participation process of making them.



- ii. Stating that the association rules must be adhered to by everyone as long as the person is a resident of Safari Park Gardens.
 - iii. Not allowing the residents to have their own security arrangements and providing the Respondents as the only solution.
- c. A declaration that the Respondents conduct and management of the Safari Park Gardens was in violation of the Petitioner's rights and freedoms as guaranteed under Article 28, 29 and 39 by:
- i) Detaining one of the Petitioner's tenants who had a flight to Kinshasa and humiliating her until she could part with Kshs. 5000 which amounted to an attack on her human dignity and a cause of psychological trauma.
 - ii) Denying access to the Petitioner and her tenants also violated their freedom of movement and choice of residence.
- d. An order of mandamus compelling the Respondents to allow the Petitioner and her residents access to their residence and further not use the barricades as an impediment to the enjoyment of protection to the right to property.
- e. Costs of the Petition be provided for.
- f. Such other remedies that the Court may deem just.
2. Alongside the Petition, the Petitioner filed a Notice of Motion of even date seeking the following orders:-
- a) Spent.
 - b) That pending the hearing and determination of this application inter partes, there be and is hereby issued a prohibitory order preventing the Respondents from continuing with their discriminatory and unconstitutional acts of barricading a public road and demanding levies to access and use the same.
 - c) That pending the hearing and determination of the application inter partes, there be and is hereby issued an order of Mandamus to either allow the residents of Safari Park Gardens to use the public road by facilitating their entry through removal of the barrier or the opening of the gates to allow them ingress and egress.
 - d) that this court be pleased to issue such other orders as are fit in the interest of justice.
 - e) That the costs of the application be provided for.
3. The Petition is supported by the Petitioner's affidavit sworn on even date.

Petitioner's Case

4. The Petitioner averred that she is the legal owner of Plot No. B 17 situated within Safari Park Gardens Estate having acquired the same in the year 2010. She further averred that after she discovered that the service charge was not being accounted for and that the rates charged were different for different tenants, she requested for a meeting to have the issued clarified but the same was denied. That the Respondents through their guards set up barriers on the main road leading to Safari Park Gardens to deny her tenants entry into and exist out of the estate.



5. She further averred that the Respondents guards detained one of her tenants and forced her to surrender Kshs 5000/= in exchange for their freedom. She contended that the Respondents did not involve her in the decision making process contrary to the spirit of public participation. She further contended that the Respondents violated her right under Article 36 of the Constitution by forcing her to comply with the rules and regulations.
6. She further contended that the actions of denying her entry and exist of the estate gate through the public road amounts to violation of her freedom of movement and choice of residence. The Petitioner is apprehensive that if the orders sought are not granted, she will suffer irreparable loss as her tenants will move out of her property.

The Respondents Case

7. The Respondents opposed the Petition through a replying affidavit sworn by Paul Wainana on 25th September 2024. He averred that Safari Park Garden Residents' Association was registered on 12th May 2015 following a meeting convened by plot owners living within the estate. He further averred the Petitioner was amongst the founding members of the Association that formulated the rules and regulations which govern the conduct of its members and officials.
8. He went on to state that during the first meeting in which the Petitioner was in attendance, members agreed that roads, drainage, security and water were the top areas of concern. That after noting that some plot owners like the Petitioner were not residing within the estate, members agreed that the owners of the plots would inform their tenants about the Association's rules and regulations.
9. That having experienced the good work the Association had done using the service charge of Kshs. 1000, members agreed to adjust the same to Kshs. 1500 per household. The deponent stated that no complaints have been registered in the Annual General Meetings held by the Association. He stated that the Petitioner who has been a member since the year 2015 and attends most of the meetings, has never raised any complaint regarding the services offered by the Association.
10. He averred that on 8th August 2024, the Petitioner stormed the estate through Gate B and harassed the guards, insulted residents and ransacked the Residents' Association office. That after the matter was reported to the police, the Petitioner was summoned and thereafter wrote a demand letter to the Association alleging that she had been detained by the Association and demanded that her tenants be granted access and exist from the estate.
11. He denied the allegations that estate residents were being denied entry into or exist out of the estate. He asserted that the rules are clear to the effect that residents who fail to pay the service charge are subjected to self-service including opening and closing the gate for themselves and picking up visitors from the gate. In his view, that does not amount to violation of their dignity or their freedom of movement. He further stated that the Association does not collect cash and that all payments are made to a designated bank account. In addition, he stated that the financial reports are availed during the Annual General Meeting.
12. That despite agreeing to the Rules and Regulations, the Petitioner has incessantly besmirched the Association and its officials and dissuaded her tenants from paying the service charge. That the Petitioner sought to collect money from 12 households and only to remit for one household. The deponent noted that the Petitioner instructed her tenants to pay the service charge to her directly and not to the association. He further noted that such tenants do not benefit from the services of the guards at the gate. He deposed that there is no barrier on the road but there were gates to ensure and provide security to the residents.



13. The deponent denied the allegations that the Petitioner was forced to join the Residents' Association and added that she was free to exit the Association. He contended that the Petitioner must adhere to the rules and regulations as long as she is a member of the Association. He denied the Petitioner's allegations that her rights and those of her tenants were violated. He further contended that the Petitioner was forum shopping as she had filed and withdrawn Milimani Constitutional Petition Number E448 of 2024 *Bertha Wawira Muchira v Paul Wainaina & 3 Others*. He asserted that the Court lacks jurisdiction to hear and determine this Petition as it offends the doctrine of constitutional avoidance.
14. In conclusion, the deponent urged the court to dismiss the Petition with costs.

The Response

15. The Petitioner filed a further affidavit dated 2/10/2024 in response to the replying affidavit. She denied the allegations that she was forum shopping and added that she had withdrawn her other suit as at the time when service of the instant Petition was effect.
16. She reiterated that the accounts provided show that different households were paying different charges with some paying nothing. She contended that her demands for accountability led to her removal from the Residents' Association Whatsapp group and mistreatment of her tenants. In this regard, she annexed an affidavit sworn by her tenant one Latifah Amani in support of her Petition.
17. The Respondents filed a further replying affidavit sworn by Josephat Matheka, the Residents' Association's Security Manager. He averred that on 10th April 2024, a cab driver wanted to pick one Latifah Amani from the estate. That the cab driver was not allowed in since she had service charge arrears of Kshs. 5,000. That the cab driver was instructed to ask Latifah to open the gate for him. The deponent further averred that Latifah approached the gate in the company of her cousin and paid the outstanding amount to the Residents' Association's bank account number on her own accord. He denied the allegations that they detained Latifah or her cousin as alleged.
18. The Petition was canvassed by way of written submissions.

The Petitioner's Submissions

19. The Petitioner filed her submissions dated 4th December 2024.
20. On her behalf, Counsel identified the following issues for the court's determination:-
 - a. Whether the rules of the Association as presented undermine the Residents Constitutional rights?
 - b. Whether the Respondents are using their authority in an ultra vires manner and blocking a public road?
 - c) Whether the Petitioner is entitled to the orders sought.
21. On the first issue, Counsel submitted that the bylaws containing the regulations are unconstitutional and should not be allowed to operate. Counsel submitted that clause 3 of the bylaws provides that each resident shall pay the service charge determined by the Manager from time to time monthly in advance, excludes any chance for public participation leaving the residents at the mercy of the Manager. That clause 3(d) provides that:- "those residents who are in arrears with their service charge for over two months will not receive services. Their water supply may be cut off and they will not be allowed to drive



- into the estate and their cars cannot be parked in the drive way” clearly shows that the Respondents block the residents out of their houses due to arrears which is a clear violation of their right to property.
22. It was further submitted that the Respondents action of blocking the road cannot be justified as they have not adduced any evidence to show that the road leading into Safari Park Gardens is a public road.
 23. It was further submitted that the Petitioners right to information was violated by the Respondents as they denied her access to the Association’s financial records.
 24. With regards to the second issue, Counsel submitted that the Respondents acted ultra vires their mandate by instructing the gatemen to detain the Petitioner’s tenant by refusing to allow them to leave or go back to their houses. It was submitted that the Association records show that the Chairperson does not pay the service charge while the 4th Respondent has huge arrears yet they are oppressing the residents.
 25. On the third issue, Counsel urged the court to protect the Petitioner’s rights enshrined in the Constitution.
 26. On costs, Counsel submitted that the Petitioner has proved her case and is therefore entitled to costs.

The Respondents Submissions

27. The Respondents filed their submissions dated 19th December 2024.
28. On their behalf Counsel identified the following issues for the court’s determination:-
 - i. Whether the Petition is properly before the court?
 - ii. Whether the Petitioner’s tenant’s right to dignity has been violated?
 - iii. Whether the Petitioners right to freedom of association has been infringed?
 - iv. Whether the Petitioner’s freedom of movement has been contravened?
 - v. Whether the Petitioner’s right to property has been infringed?
29. On the first issue, Counsel submitted that the Petition herein offends the doctrine of constitutional avoidance as it does not disclose any constitutional issue. Counsel contended that the Petitioner’s grievances should have been handled by the Residents’ Association Committee as provided under Article 14 of the Association Rules and Regulations. Counsel submitted that the Petitioner did not raise her complaint through the complaint mechanism provided under the rules before approaching this court. To buttress this point, Counsel relied on the case of *KKB v SCM & 5 others* [2022] KEHC 289 (KLR).
30. With regards to the second issue, Counsel submitted that the Petitioner has not met the legal threshold for the grant of the orders sought. It was argued that while the Petitioner claimed that her tenant had been detained, the tenant swore an affidavit stating that it was her cousin who was denied entry/exit until the Kshs. 5000 were paid. It was further argued that neither the Petitioner’s tenant nor her cousin were detained as the tenant voluntarily paid the outstanding amounts to the requisite bank account in lieu of opening the gate for herself.
31. On the third issue, Counsel submitted that the Petitioner was not forced to join the Residents’ Association as she was amongst the founding members who came up with the rules and regulations. Counsel further submitted that the Petitioner has not communicated her decision to leave the association. It was further noted that the Petitioner is aware that services are only provided to residents



- who have paid the service charge. It was submitted that the issue of different amounts being paid by different households for security charges was not backed by evidence as the list produced by the Petitioner shows that each household is charged Kshs. 1500 per month.
32. On the fourth issue, it was submitted that the claim that there was no public participation is unfounded as the Residents' Association hold AGMs where members can air their views.
 33. On the fifth issue, Counsel submitted that the allegations that the Petitioner freedom of movement was violated is baseless as firstly, there are no barricades and secondly, the establishment of the two gates was agreed upon at an AGM that the Petitioner attended but did not raise any objection.
 34. On the right to property, Counsel submitted that the Petitioner has not particularized the manner of limitation as required by the law. To buttress this point, Counsel relied on the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR).
 35. Concluding his submissions, Counsel urged the court to dismiss the Petition with costs.

Analysis And Determination

36. Having considered the Petition, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the Petitioners rights under Article 28, 29, 36, 39 and 40 were violated by the Respondents.
37. Article 22(1) of the Constitution grants every person the right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
38. When a party institutes a Constitutional Petition contending that there has been a violation of its rights and fundamental freedom, the right must be clear and unequivocal, the violation must be discernible and the Respondent must be identified to have been the violator.
39. In the case of Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272 the court laid down the substantive test to be applied when making a finding on whether the alleged violation formed the basis of the Petitioner's complaint as follows: -

“We would, however, again stress that 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 the manner in which they are alleged to be infringed.”

40. This position was reaffirmed by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR where it was held that: -

“(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended



petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

44. We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case.”

41. Further, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR held that: -

“(349) ...Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

42. The Petitioner alleged that her tenant (Latifah Amani) right to dignity was violated by the Respondents.

43. Article 28 and 29 of the Constitution are closely intertwined. Article 28 provides as follows:-

Every person has inherent dignity and the right to have that dignity respected and protected.

Article 29 provides that:-

Every person has a right to freedom and security of the person , this includes the right not to be-

- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.

Article 1 of Universal Declaration on Human Rights states that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

44. The right is also guaranteed under the Africa Charter on Human and Peoples rights and the International Covenant on civil and political rights (ICCPR) and the international Covenant on Economic, Social and Cultural rights.

45. The Petitioner contended that her tenant was detained and humiliated by the Respondents guards who demanded Kshs. 5,000/= in exchange for her freedom. She further contended that as a consequence



of the said actions, her tenant suffered psychological trauma. In this regard, the Petitioner annexed an affidavit sworn by Latifah Amani who averred that her cab driver was denied access into the estate. That upon inquiry the guards demanded for Kshs. 5000/= or they would detain her cousin Abel. That out of desperation and humiliation she paid the money because she could not afford to miss her flight. The Respondent insisted that the tenant paid the service charge arrears to the association's bank account. In this regard the Respondents annexed an Mpesa message which shows that Kshs. 5000/= was credited to the Association's Bank Account. As rightly submitted by the Respondents, no evidence was adduced to show that the guards detained Latifah or her cousin.

46. From the foregoing it is clear that Kshs 5000 was paid to the Association's Bank account. The record shows that the gatemen refused to open the gate for the cab driver because the tenant had not paid the service charge which she subsequently paid. The court can safely agree with the Respondents that the payment was with regards to the service charge. The Petitioner did not adduce any evidence to show that her tenant was detained or humiliated by the Respondent's guards.

47. The Petitioner alleged that her freedom of association was violated by the Respondents.

Article 36 of the Constitution provides that:-

1. Every person has the right to freedom of association which includes the right to form, join or participate in the activities of an association of any kind.
2. A person shall not be compelled to join as association of any kind.

48. The Petitioner alleged that the Respondents violated her freedom of association by forcing her to comply with the rules and regulations.

49. The Petitioner did not deny the assertion by the Respondents that she was amongst the founding members who came up with the rules and regulations. The Petitioner did not adduce any evidence to show that she was compelled to join the Association. Similarly, the Petitioner did not adduce any evidence to show that the Respondents have declined her application to exist the Association.

50. The Petitioner alleged that the Respondents violated her freedom of movement by denying her and her tenants entry into and exist out of Safari Park Gardens.

51. Article 39 of the Constitution provides that:-

Every person has the right to freedom of movement

- (2) Every person has the right to leave Kenya.
- (3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.

52. The right to freedom of movement is also guaranteed in various international instruments including, UDHR, ICCPR and ACHPR. 51. The Petitioner contended that the Respondents have put up barriers on the main road leading to Safari Park Gardens with the sole intention of harassing her and her tenants.

53. The Respondent denied the allegations that they had put up barriers on the main public road and maintained that members had agreed to put up gates within the estate to ensure and provide security to the residents. In this regard the Respondents produced photographs showing two gates within the estate. The Petitioner did not demonstrate to this court that the Respondents have put up barriers on the public road. From the evidence adduced by the parties, it is not in dispute that any tenant who does not pay service charge is not entitled to services like opening and closing the gate. From the



foregoing, I find that the Petitioner has not demonstrated that her right to movement was violated by the Respondents.

54. The Petitioner alleged that her right to property was violated by the Respondents.

Article 40 of the Constitution provides that:-

1. Subject to Article 65, every person has the right either individually or in association with others to acquire and own property-
 - (a) of any description; and
 - (b) in any part of Kenya.
2. Parliament shall not enact a law that permits the state or any person-
 - (a) to arbitrarily deprive a person of property of any description or any interest in or right over any property of any description or
 - (b) to limit or in any way restrict the enjoyment of any right under this Article on the basis of the grounds specified or contemplated in Article 27(4).

55. Apart from citing Article 40 of the Constitution, the Petitioner did not specify which sub article has been infringed. Similarly, the Petitioner did not avail pleadings specifying the nature of the complaint and the infringement. It is well settled that the pleadings in a Constitutional Petition must be precise to enable the other party to be able to respond.

56. The Petitioner also introduced Articles 35 and 165 of the Constitution in her submissions. The Petitioner did not plead on their infringement and is therefore estopped from invoking the same.

57. The Petitioner contended that the Petition is the only way to fight the discrimination and duress that she and her tenants are facing. The Respondents contended that the Petitioner should have sought to settle the matter by way of the Residents' Association Rules.

58. In the case of *Dhow House Limited v Kenya Power and Lighting Company* [2022] KEHC 11840 (KLR) the court held that:

In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause. The exceptions to the application of the doctrine of constitutional avoidance are: - (a) where the constitutional violation is so clear and of direct relevance to the matter; (b) in the absence of an apparent alternative form of ordinary relief, and, (c) where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.

59. Elsewhere the Supreme Court in the case of *Communications Commission of Kenya & 5 others v Royal Media Service & 5 others* (2014) eKLR held that:-

The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*,



1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

60. From the pleadings, the respective affidavits and the documents on record, I find that the Petition herein does not meet the legal threshold of a Constitutional Petition. The gravamen of the Petition is the Petitioner’s dissatisfaction with the Residents’ Association’s rules and regulations. This is a matter that can be dealt with under the Association’s Rules or if the Petitioner feels like she will not get a fair hearing before the Residents’ Association, then a civil suit would be more suitable.
61. In the end, I find that the Petition does not disclose any violation of the Petitioners rights under the Constitution. Consequently, the Petition is hereby dismissed. Each party to bear its own costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF MARCH, 2025.

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T. MURIGI

JUDGE

IN THE PRESENCE OF:-

Ochieng for the Respondent

Ahmed – Court assistant

