



Konde (Suing in his own capacity and on behalf of 150 other Residents of Majaoni Village) v National Land Commission & 24 others (Petition 19 of 2022) [2023] KEELC 22388 (KLR) (29 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22388 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

PETITION 19 OF 2022

EK MAKORI, J

NOVEMBER 29, 2023

IN THE MATTER OF: ARTICLES 2 (1) & (4), 30, 10, 19, 20, 21, 22, 23, 27, 28, 29, 40, 48, 50, 159 AND 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ALLEGED VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 2, 22 (1) AND (2), 23, 165 (3) (B) AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: RULE 3 & 17 OF THE CONSTITUTION OF KENYA PROTECTION OF RIGHTS AND MALINDI ELC PETITION NO. 19 OF 2023 RULING 1 FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION PRACTICE AND PROCEDURE RULES 2012

AND

IN THE MATTER OF: ARTICLE 2, 3, 6, 7, 8, 9, 10, 13 (1), 17, 25 AND 26 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

IN THE MATTER OF: ARTICLE 1, 2, 3, 4, 7 (A) AND 23 OF THE AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS

BETWEEN

**KARISA GONA KONDE PETITIONER
SUING IN HIS OWN CAPACITY AND ON BEHALF OF 150 OTHER
RESIDENTS OF MAJAONI VILLAGE**

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT



THE HONOURABLE ATTORNEY GENERAL	2 ND RESPONDENT
THE REGISTRAR OF LANDS KILIF COUNTY	3 RD RESPONDENT
INUKA PROPERTIES LIMITED	4 TH RESPONDENT
SETTLEMENT FUND TRUSTEES	5 TH RESPONDENT
THE ESTATE OF RONALD GIDEON NGALA	6 TH RESPONDENT
ESTHER R. NGALA	7 TH RESPONDENT
RUTH K FARRA	8 TH RESPONDENT
JIMMY FURAHA CHOME NGALA	9 TH RESPONDENT
ZAIDUN JEROBON ALIAS ZAITUN NGALA	10 TH RESPONDENT
NOAH K. NGALA	11 TH RESPONDENT
GRACE K. NGALA	12 TH RESPONDENT
ELIZABETH T. NGALA	13 TH RESPONDENT
JAPHETH M. NGALA	14 TH RESPONDENT
WILLIAM SIRYA NGALA JEROBON	15 TH RESPONDENT
DAVID A. NGALA	16 TH RESPONDENT
MARGARET K. MANASSE	17 TH RESPONDENT
DOROTH Z. TUHANI	18 TH RESPONDENT
PRISCILLAH K. MDOE	19 TH RESPONDENT
PAUL K. NGALA	20 TH RESPONDENT
GEORGE K. NGALA	21 ST RESPONDENT
JANET K NGALA	22 ND RESPONDENT
BENDERA VIDZO NGALA	23 RD RESPONDENT
NEEMA NGALA	24 TH RESPONDENT
ZAITUN NGALA ALSO KNOWN AS Z Aidun	25 TH RESPONDENT

RULING

1. On 19th June 2023 the 6th, 8th, 9th, 10th, 11th, 12th, 13th, 17th, 18th, 19th, 20th, 21st and 25th respondents filed a Preliminary Objection in the following manner:
 - a. That the petitioners' petition has failed the test of specificity established in the celebrated case of Anarita Karimi v Republic (No.1)[1979] 1 KLR 154.
 - b. That the petitioners' petition dated 8th May 2023 is fatally defective and should be struck out in limine.
2. It was supported by the 4th respondent herein.



3. The Court directed parties to file written submissions on the matter.
4. The 6th, 8th, 9th, 10th, 11th, 12th, 13th,17th,18th,19th 20th,21st and 25th respondents averred that the petitioners quoted several fundamental rights provisions of *the Constitution* allegedly violated in the matter of Article 2(1) & (4), 30), 10, 19,20,21, 22,23,27,28,29,40,48,50,159 and 165 and in the matter of alleged violation of the fundamental rights and freedom under Article 2,22(1), and (2).23,165(3) (b) and 258 of *the Constitution* of Kenya 2010.
5. The respondents submitted that in terms of protective rights perhaps the applicant in this petition was left with Articles 27 (on Equality and Freedom from Discrimination), 40 (Right to Property) 48(Access to Justice), and 50(Right to Fair Trial).
6. The Respondents contended that the threshold set out in the *Anarita Karimi v Republic (No.1)[1979] 1 KLR 154*, is such that the petition has to state with reasonable precision the specific provisions of *the Constitution* and the rights allegedly violated. The Petitioners must also state the manner of infringement.
7. That in the petition, as further submitted by the respondents there is no mention of the violation of their rights under Articles 28, 29, 40, 48, and 50.
8. The only mention in paragraphs 17, 18, and 19 of the petition is that their forefathers and forefathers of 17 other families were employees of a white settler in 1949. This is an admission that the suit property is private.
9. The respondents further stated that the government had promised to buy this land from one Mr. Sidney Horse's farms. This never happened.
10. Further, the government made statements to the effect that such a purchase was to happen. It did not happen. Therefore their legitimate expectation cannot attach as it cannot be proved it was competently and lawfully made (see *Canada (Attorney General) v Mavi [2011]2 S.C.R 504*, *Communication Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR*. Besides, legitimate expectation cannot be equated to a constitutional violation.
11. The Respondents stated, that an allegation that former Minister Ngala grabbed the land could not be substantiated, many years after he left office. In any event, the claim seems to be based on historical injustice rather than a constitutional petition grievance.
12. The respondents have cited the cases in *Godfrey Paul Okutoyi and Others v Habil Olaka & Another [2018] eKLR* and *Grays Jepkemoi v Zakayo Chepkonga Cheruiyot [2021]eKLR*, *Tran-Nzoia Chigano Grain Growers Farmers Co-operative Society Limited v Hon. Attorney General and Others [2016] eKLR*, *Arhur Juguna Kamau v Eunice Wangari Karanja & Land Registrar [2018]Eklr*, *Khamasi Juma Zaharo & Another v Cannon Assurance Company LTD and 4 Others[2022]eKLR* and *Simeon A. Oloo & 19 Others v Lake Basin Development Authority [2022]eKLR* - all discussing on constitutional avoidance.
13. The petitioners contended that the petition has achieved the threshold as laid in the *Anarita Karimi* Case as the specific provisions of *the Constitution* have been highlighted.
14. The land that is subject to this petition remains intact. If there were any subdivisions, the same must have been fraudulent, illegal null, and void.
15. From the material before me, what is to be decided is whether the Petition herein raises constitutional issues. Whether then the preliminary objection is germane and the issue of costs attendant thereto.



16. The confines of consideration of a Preliminary Objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is commanded to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. On page 700 Law JA stated:

“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 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.”

On page 701 Sir Charles Newbold, P added:

“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...”

17. The following conditions must be met for a preliminary objection to be acknowledged: First and foremost, it must raise a clear legal issue; second, it is argued under the presumption that all of the facts presented by the opposing party are true; and third, it cannot be brought if any facts need to be established or if the exercise of judicial discretion is being requested. If a legitimate Preliminary Objection is granted, the lawsuit ought to be dismissed.
18. From the material I have, the land described as Plot No. 1 of Mazrui Reserve No. 2 Portion No. 5 lying North of Kilifi town, Majaoni – Mtondia in Kilifi County and measuring 862 acres has a history that traces back to 1949. The land had and has been privately owned with traceable title documents. The applicants in their petition averred that they have been living on the said land albeit being owned by one Mr. Sidney Horse who acquired title to it in the year 1949. Their forefathers worked for this settler and had a portion where they were settled.
19. Since independence and with the Ndungu Report there have been promises to settle landless people. The President of the Republic of Kenya visited the land and promised to have them settled in the respective portions they occupied when Mr. Horse declined to let go of the land.
20. Mr. Ngala the then Minister of Land was also well aware of the plight of the petitioners. The petitioners allege that in the year 1964, the land was given out for settlement for the benefit of the petitioners under the SFT Programme. Unfortunately, it was fraudulently conveyed to the name of the 6th respondent contrary to the spirit of the SFT Programme.
21. In 2023, the land was transferred to Inuka Properties Ltd a well-known land-buying company in the coast region. It is this act, that the petitioners fear, will deprive them of the land hence the petition.
22. When one looks at the petition holistically it is based and hinged on a plea on historical injustices that dates back to 1948 when the land was acquired by Mr. Horse who later, it will seem passed it over to the former Minister Mr. Ngala and thereafter Inuka Properties Ltd who have subdivided the landed and sold the same as a land buying and selling company.
23. The petitioners also seem to buttress their claim under the doctrine of adverse possession claiming to have stayed on the land for over 12 years uninterrupted.



24. They also claim fraudulent and illegal transfers in the history of ownership of the land.
25. Their claims which are well documented in the petition will seek they be declared the owners of the land in question. Under Section 7 of the [Land Act](#), land title can be acquired in the following manner:

“Methods of acquisition of title to land Title to land may be acquired through— (a) allocation; (b) land adjudication process; (c) compulsory acquisition; (d) prescription; (e) settlement programs; (f) transmissions; (g) transfers; (h) long term leases exceeding twenty-one years created out of private land; or (i) any other manner prescribed in an Act of Parliament.”

26. An issue then has been raised that the petitioners have approached the Court in the wrong manner. If their claim is pegged on historical injustices they ought to have approached the National Land Commission to exercise its mandate under Section 15 (1) of the [National Land Commission Act](#) and Article 67 (3) of [the Constitution](#). A historical land injustice is defined in section 15(2) of the [National Land Commission Act](#) to mean a grievance which was occasioned by a violation of a right in land based on any law, policy, declaration, administrative practice, treaty or agreement; resulted in displacement from their habitual place of residence; occurred between June 15, 1895, when Kenya became a protectorate under the British East African Protectorate and August 27, 2010, when [the Constitution](#) of Kenya was promulgated; has not been sufficiently resolved and subsists up to the period specified under paragraph; meets the criteria set out under subsection 3 of that section. Whereas this Court has jurisdiction to hear such a claim – it has not been shown that the petitioners have attempted this route and failed to be redressed or turned away.

27. If it is a claim on the land based on the doctrine of adverse possession, it is brought through Originating summons.

29. This leads to Constitutional avoidance. This means that the petitioners can address their grievances in other forums rather than invoking the Constitutional jurisdiction of this Court in this manner. If it is a claim attacking and impeaching the title(s), the petitioners should file a plaint highlighting particulars and for specific orders of cancellation of title(s), and whether that legitimate expectation can be said to have accrued legally.

28. This leads to Constitutional avoidance. This means that the petitioners can address their grievances in other forums rather than invoking the Constitutional jurisdiction of this Court in the manner they have done in this petition. See - *Anarita Karimi v Republic (No.1)*[1979] 1 KLR 154:

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

29. As echoed in *Godfrey Paul Okutoyi and Others v Habil Olaka & Another* [2018], where the Court held:

“It is now an established principle of law that anyone who wishes the court to grant relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of



infringement, and the jurisdictional basis for it. This was stated in the case of Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154 where the Court stated;

“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.” (see also Meme v Republic & another [2004] 1 KLR 637)

50. This principle was emphasized by the Court of Appeal in Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR, where it stated that:

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just 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 framing of issues in constitutional petitions is an extension of this principle”

30. The position was also verbalized in the case of Grays Jepkemoi v Zakayo Chepkonga Cheruiyot [2021]eKLR:

“Although I have in my foregoing discussion adverted to grounds (c) and (d) of the preliminary objection that there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court. See the case of Abraham Kaisha Kanziku -vs- Governor of Central Bank & others (2006) eKLR.

15. In the case of Godfrey Paul Okutoyi & others -vs- Habil Olaka & Another (2018) eKLR Chacha, J on the issue of there being an alternative remedy in lieu of constitutional remedies at paragraph 65 stated:-

65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom.



Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

16. In the case of Bernard Murage -vs- Fine Serve Africa Ltd & others (2015) eKLR the Court stated:-

“Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.

17. In the case of Patrick Mbau Karanja -vs- Kenyatta University (2012) e KLR Lenaola, J (as he then was) expressed himself as follows in regard to when the Constitutional interpretative mandate of the Court may be invoked:-

“I should only say this as I conclude; in Francis Waithaka -vs- Kenyatta University Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie.

Further, the Court also cited with approval, the decision in Teitinnang -vs- Ariong (1987) LRC (const.) 517 where it was held as follows:-

“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. *The Constitution*, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by *the Constitution* under the fundamental rights provisions are owned by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of *the Constitution* no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

18. Lenaola, J went on to observe as follows after citing the above case:-

“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature



should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights”.

19. I fully associate myself with the sentiments expressed by Chacha, J and Lenaola, J in the above-referenced cases and I agree that matters that do not call for the Court’s Constitutional interpretative mandate under the Bill of Rights provisions of *the Constitution* should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights. There ought to be a clear delineation of constitutional matters and the ordinary civil suits. In the present matter, the Petitioner has predicated her petition on the sale agreement dated 2nd August 2012 which she claims the Respondent breached. This was a private Commercial contract. The enforcement of the terms of the contract cannot invite the invocation of violation of Constitutional provisions requiring enforcement by way of a Constitutional Petition. There exists sufficient statutory legal provisions that govern enforcement of private commercial contracts and the petitioner ought to have invoked the jurisdiction of the ordinary Civil Court.”

31. I need not pontificate on more authorities on this issue. The petition as crafted does not meet the threshold set in the Anarita Karimi Case (supra). The petitioners are simply seeking to be declared landowners. The land in question is private. It has been subdivided and transmitted to several individuals. The petition as crafted and filed cannot resolve the issues raised ranging from historical injustice, adverse possession, legitimate expectation, and fraudulent and corrupt manner of the acquisition and transfer of the suit property – all interlaced as a Constitutional petition.

32. The upshot is that the Preliminary Objection as raised and dated 19th June 2023 is germane and is hereby allowed with the effect that the entire petition is hereby struck out with cost.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 29TH DAY OF NOVEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of:

M/s Wekesa for the Petitioners

Mr. Hamisi for 6th, 8th, 9th, 10th, 11th, 12th, 13th, 17th, 20th, 21 and 25th Respondents

Ms Gathoni for 4th Respondents

