



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC PETITION NO. 11 OF 2018**

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS AS ENshrINED UNDER ARTICLES 19, 20, 21, 22, 23, 40, 47, 67, 68 OF  
THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF: THE ENFORCEMENT OF THE RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012**

**AND**

**IN THE MATTER OF: THE LAND REGISTRATION ACT NO.3 OF 2012**

**AND**

**IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012**

**BETWEEN**

**1. KHAMASI JUMA ZAHARO**

**2. SIMON JAMBI MWANGALA.....PETITIONERS**

**- VERSUS -**

**1. CANNON ASSURANCE COMPANY LIMITED**

**2. NATIONAL LAND COMMISSION**

**3. CHIEF LAND REGISTRAR**

**4. COUNTY SURVEYOR KILIFI COUNTY**

**5. THE HON. ATTORNEY GENERAL.....RESPONDENTS**

**RULING**

**I. PRELIMINARIES**

**1. The 1<sup>st</sup> Respondent raised an objection by filing a Notice of Preliminary Objection dated 14<sup>th</sup> June 2019 and filed in court on 18<sup>TH</sup> June,**

2019. They objected the competence of this suit on the following grounds:-

*a) That the Petition herein contravenes the provisions of Rule 10 Sub - rule 2 (e) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules) 2013 (Hereinafter referred to as "The Mutunga Rules") and also fails to meet the requirements set out in "Anarita Karimi Njeru – Versus - The Republic (1976 - 1980) eKLR" and upheld in "Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & 5 others (2013) eKLR" requiring that constitutional petitioners be pleaded with reasonable precision as it does not state the alleged constitutional provisions violated and the acts or omissions complained of with reasonable precision. Apart from citing omnibus provisions of the Constitution, the Petition provides neither particulars of the alleged complaints of the manner of alleged infringements.*

*b) That the Petitioner's claim for ownership of 10 acres of Plot No. MN/III/13 Msumarini Kilifi by the way of the petition herein violates the principles of constitutional avoidance as set by "the Supreme Court of Kenya in Communication Commission of Kenya – Versus - Royal Media Services Ltd & 5 others (2014) eKLR".*

*c) That the Petition herein is an abuse of the process of court.*

## **II. SUBMISSIONS**

2. On 6<sup>th</sup> October, 2021 in the presence of all the parties in Court, directions were taken to the effect that the said filed Preliminary Objection be canvassed by way of written Submissions. Pursuant to that, all parties complied and the Honorable Court reserved a day for a ruling.

### **A. THE 1<sup>ST</sup> RESPONDENT'S WRITTEN SUBMISSIONS**

3. The Learned Counsel for the 1<sup>st</sup> Respondent, the law firm of Messers. Daly Inamdar Advocates filed submissions on 8<sup>th</sup> December in favour of the Preliminary Objection. The Learned Counsel submitted mainly on two limbs. Firstly, on the issue of Constitution pleaded to be with reasonable precision:- The argued that the Petitioners had failed to frame their case with precision as required under Rule 10 (2) (d) of the Mutunga Rules. They Submitted that although the Petition refers to several provisions being Articles 19, 20, 21, 22, 23, 40, 47, 67 & 68 of the Constitution of Kenya, the Petitioners provided little or no particulars as to the allegations and the manner of the alleged infringements. For instance, according to the Learned Counsels the Petitioners claim to have been in occupation of the Plot No. Land reference MN/II/13 Msumarini, Kilifi (Hereinafter referred to as "The Suit Land") since the time immemorial. It was critical that such an issue was not pleaded vaguely as it was done in the Petition as it laid the jurisdictional basis of the Petitioners' entire claim. The lack of particulars as to when they first came into occupation of the suit property was prejudicial to the 1<sup>st</sup> Respondent.

4. Further to this, the Learned Counsel submitted that the claim that 1<sup>st</sup> Respondent had failed to allocate and subdivide the suit property as per the decision of the 2<sup>nd</sup> Respondent, thereby infringing on their right to property as envisaged under Article 40 of the Constitution failed to provide specific particulars of the purported decision to have been enumerated. On this point they relied on the case of "**Anarita Karimi Njeru – Versus – Republic (1976 – 80) eKLR 1272**" and "**Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**" which held that Constitutional Petitions must be pleaded with reasonable precision.

5. Secondly, the Petition filed contrary to the doctrine of Constitutional avoidance:- The Learned Counsel submitted that the Petitioners claim was a plain land claim that could be sufficiently addressed through ordinary civil proceedings and ought not to come as a constitutional issue. This doctrine was to the effect that where a dispute was one which could be determined under another area of law other than under the Constitution, then was best be determined and pure Constitutional issues left to be determined as such. To buttress on this point they relied on the High Court case of "**Jorum Kabiru Mwangi & 2 Others – Versus – Co – Operative Bank of Kenya, Kawangware Branch (2016) eKLR**". For these reasons, they urged court to dismiss the Petition with costs.

### **B. THE PETITIONERS' WRITTEN SUBMISSIONS**

6. On 29<sup>th</sup> September 2021, the Learned Counsel for the Petitioners, the law firm of Messrs. Marende, Ncheza & Company filed written submissions in opposition of the Notice of Preliminary Objection. The Learned Counsel submitted that the Petition had met the threshold required of a Petition as set in the case of **Anarita Karimi**. In doing so they referred the Court to the decision of "**Northern Nomadic Disabled Person's Organisation (Nondo) – Versus – Governor County Government of Garisssa & another (2013) eKLR**".

7. The Learned Counsels further submitted that the Petition had with reasonable degree of precision made stipulation on what provisions of the Constitution had been infringed by the Respondents as enumerated in the Petition particularly paragraphs 6, 7, 8 and 9 of the Petition. These included Articles 19, 20, 21, 22, 23 and 40 of the Constitution of Kenya. The Learned Counsel emphasized that the Petition had met the threshold and was properly filed. It ought to be determined on its merit by this court which has a constitutional mandate to hear and remedy any constitutional infringement. To support their contention they heavily relied on several decisions of "**Republic – Versus – Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya, HCMA No. 13 of 2008**" and another" by Odunga J in the case of "**Peter Kyalo – Versus - Alfred Mutua, Governor, the County Government of Machakos & 6 others Petition No. 10 of 2018**", where he stated, "*the courts have recognized that unlawful interference with citizen's rights give rise to a right to claim redress and it the Petitioners have a right they must of necessity have the means to vindicate it and a remedy of they are injured in the enjoyment or exercise of it.*"

They urged court to dismiss the Preliminary objection with costs and the matter to proceed and be determined on its merit.

## **III. ANALYSIS AND DETERMINATION**

8. I have read the written submissions by all parties herein, the numerous precedents cited on this issue and the relevant provisions of the law

with regard to the raised Preliminary Objection by the 1<sup>st</sup> Respondent dated 14<sup>th</sup> June, 2019.

9. In order to arrive at a just, fair and an informed decision, the Honorable Court has framed the following four (4) salient issues for determination. These are:-

- a) *Whether the Preliminary Objection raised by the 1<sup>st</sup> Respondent herein dated 14<sup>th</sup> June, 2019 meets the well established fundamental threshold of a Preliminary Objection set out in law and precedents.*
- b) *Whether the Petition is the appropriate avenue for the Petitioners to ascertain their claim.*
- c) *Whether the Petition is an abuse of the court process.*
- d) *Who will bear the Costs of the Preliminary Objection.*

**ISSUE No. a) Whether the Preliminary Objection raised by the 1<sup>st</sup> Respondent herein dated 14<sup>th</sup> June, 2019 meets the well established fundamental threshold of a Preliminary Objection set out in law and precedents.**

10. According to the Black Law Dictionary a Preliminary Objection is defined as being:

*“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”*

The above legal proposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd – Versus- West End Distributors Limited. [1969] E.A. 696*. Where Lord *Charles Newbold P.* held *that a proper preliminary objection constitutes a pure points of law*. The Learned Judge then held that:-

*“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”*

11. I wish to cite the case of *Attorney General & Another –Versus- Andrew Mwaura Githinji & another [2016] eKLR:-* as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia:-*

- (i) *A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.*
- (ii) *A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and*
- (iii) *The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.*

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the 1<sup>st</sup> Respondent are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. Indeed, under this sub-heading on the one hand, while the court fully concurs with the position taken by 1<sup>st</sup> Respondent on to raise and defend the objection on law. For these reasons, therefore, I find that the objection raised by the 1<sup>st</sup> Respondent was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to *Mukisa Biscuits Manufacturing Co. Limited (Supra)*. Applying the above test, the matters raised by the 1<sup>st</sup> Respondent in their preliminary question are clearly pure points of law that I shall proceed to consider them and determine them accordingly.

**ISSUE No. b). Whether the Petition is the appropriate avenue for the Petitioners to ascertain their claim.**

12. Undoubtedly, and as founded herein above, Preliminary objection ideally ought to be on matter of pure law, however, this honorable Court feels it imperative to first and foremost embark on a brief excursion of facts on the case. From the pleadings, the suit land which measures approximately 206 is the subject matter. The conflict arises as there were squatters and other 125 other families. As a result, there has existed a protracted dispute between them and the 1<sup>st</sup> Respondent over the ownership of the Suit land. The Petitioner claims that it took the intervention of the National Land Commission, the 2<sup>nd</sup> Respondent, acting as a Mediator to hear the alleged disputes with a view of resolving it. Subsequently, as per a letter dated 16<sup>th</sup> December, 2015 by the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> respondent entered into an agreement terms and conditions stipulated thereof to settle at least 125 families by giving them each a quarter of an acre each totaling to 32 acres and five acres to be given to two families. These two families are the Petitioners herein. The Petitioner claims that although the 1<sup>st</sup> Respondent

herein has partly fulfilled the obligation of the afore stated agreement, it has breached on the contractual obligations by failing to settle the two families. And that is the main pith and substance of this Petition – a breach of contract by the 1<sup>st</sup> Respondent.

13. As a matter of course, the Constitution of Kenya under Article

259 (1) provides a guide on how it should be interpreted as such:-

***This Constitution shall be interpreted in a manner that:-***

***a) Promotes its purposes, values and principles;***

***b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***

***c) Permits the development of the law; and***

***d) Contributes to good governance.....”***

This Court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided.

Further, it is important to fathom that the Constitution is “a living instrument having a soul and consciousness of its own” . It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

14. A Petition ought to follow the principles laid down of drafting Constitutional Petitions. Based on the principles set out in the edit of The Court of appeal case of *the Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another (2013)eKLR* provided the standards of proof in the Constitutional Petitions as founded in the case of *Anarita Karimi Njeru –Versus - Republic [1980]KLR 154 [1979] eKLR. Trevalyan J (as he then was) and Hancox J (as he then was)* 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.”***where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

***“Constitutional violations must be pleaded with a reasonable degree of precision.....”***

Further, in the *“Thorp – Versus – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR* said in the year 1876 and which hold true today:

***“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing”.***

***In other words, cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assists in that regard and are a tenet of substantive justice, as they give fair notice to the other party.....”***

15. In direct application of these set out principles for filing a Constitutional Petition to this case, the Honorable Court wishes to address itself on two broad issues. Firstly, has the Petition filed by the Petitioners herein pleaded with reasonable precision as founded in the **Anarita Karimi (Supra)**. To respond to this query, the honorable court and which indeed totally concurs with the 1<sup>st</sup> Respondent, is not satisfied at all that the Petitioners have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and pleading for the prayers sought. From the admission by the Petitioners, clearly the cause of action is allegedly on a breach of Contract arising from the agreement entered between the 1<sup>st</sup> Respondent and the Petitioners as contained in the letter dated 16<sup>th</sup> December, 2015 by the 2<sup>nd</sup> Respondent.

16. The Petitioners claims that the 1<sup>st</sup> Respondent violated and infringed the provisions of Articles 19, 20, 21, 22, 23, 40, 68 and 69 of the Constitution of Kenya among others but does not provide the specific particulars of the ostensible violation, infringement or denial of these fundamental rights. The Honorable Court insists that the Petitioners therefore ought to have specifically set out the provisions in the Bill of Rights that have been allegedly violated; provide the particulars of the alleged violations; and provide particulars in which the 1<sup>st</sup> Respondent has purportedly infringed the rights. The Petitioners have not provided the particulars of the alleged violations. For example the Petitioners have mentioned Article 40 on the right to property, but have not provided evidence and factual basis to show the violation.

17. Secondly, is whether the Petition filed contrary to the Doctrine of Constitutional Avoidance. this Honorable Court as a matter of course, again strongly agrees with the 1<sup>st</sup> Respondent on this legal substratum and ratio. Principally, from the facts adduced the Petitioners claim is that they had acquired rights over the suit property, Land Reference R NO. MN/III/13 Mzumarini Kilifi, and have prayed court to direct the 3<sup>rd</sup> Respondent issue them with a title deed. They claim that there existed an agreement duly entered between then them and the 1<sup>st</sup> Respondent and being mediated by the 2<sup>nd</sup> Respondent and though partially fulfilled there is a breach of Contract under the law of contract as

governed by the Laws of Contract Cap. 23 of the Laws of Kenya. The 1<sup>st</sup> Respondent has vehemently objected to the Petition on the ground that the Petitioners claim of land could be remedied in civil law as opposed to a Constitutional Petition.

18. The Court cannot agree with them more with the 1<sup>st</sup> Respondent on this contention. In saying so, the Honorable Court holds that consequently these are not properly laid down Constitutional issues to be brought under Constitutional Petition. It is important for litigants to recognize that even where a case raises infringement of fundamental rights and freedoms, court will not normally consider a constitutional question unless the existence of a remedy depends on it. In other words, this is the meaning of the Doctrine of Constitutional avoidance which is well and truly alive in our realm. It means that where a dispute is one which can be determined under another area of law other than under the Constitution, then it is best dealt and determined there as the pure constitutional issues are left to be determined as such. That is the case in this Petition by the Petitioners herein refer to the case of **“Jorum Kabiru Mwangi & 2 Others (Supra).** The Honorable Court emphasizes, If the remedy sought can be granted under other legislative provisions, the court ought to decline to determine it. **Lenaola J in UHURU MUGAI KENYATTA – Versus - NAIROBI STAR PUBLICATIONS LIMITED [2013] eKLR,** held that **“I need say no more. Where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG – Versus - S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions. The complaint in this case is not so serious as to attract Constitutional sanction.”**

**ISSUE No. c). Whether the Petition is an abuse of the court process.**

19. Now turning to the issue under this sub - heading as to whether the Petition is an abuse of the court process. When faced with such a question, the court ought to examine the purpose for which the Petition is made in order to determine whether it is an abuse of the court process. From the facts pleaded in the Petition and evidence in support of the application, and fairly summarized herein, the Petitioners have admitted being squatters who were to be allegedly allocated five (5) acres of land each by the 1<sup>st</sup> Respondent as seen in the 2<sup>nd</sup> Respondent’s letter to the 1<sup>st</sup> Respondent dated 16<sup>th</sup> December 2015. However, in the subsequent letter from the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent, the Petitioners refer monetary compensation to land allocation.

20. Be that as it may, and in as much as they may be entitled to that relief, there is an avenue available to the Petitioners to seek monetary compensation or otherwise from the 1<sup>st</sup> Respondent. I dare say, a civil claim is an alternative remedy that can afford the Petitioner adequate redress to all the grievances raised in the Petition and even warrant the prayers sought. The Petitioners attempt to give their grievances a constitutional complex by arguing that their rights to property and fair administrative action has been infringed must fail on arrival. The Honorable Court seeks the support on this legal assertion from the case of **Four Farms Limited - Versus - Agricultural Finance Corporation (2014)eKLR** it was held that, **“where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some other feature which makes it appropriate to take that course. As a general rule, there must be some feature which, at least, arguably indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in absence of such a feature would be a misuse, or abuse of the court’s process.”**

21. The Petitioners have not properly defended their Petition. They have not demonstrated nor told this court why and how a remedy in the civil suit would be less effective than a constitutional relief, and certainly this court cannot find any! This Court finds that the Petition does not reveal any special or unique features that would make a constitutional relief more suitable as opposed to an ordinary civil suit initiated by either a Plaint or Originating Summons under the common law. On the contrary, the provisions the Laws of Contract, Cap. 23, the Land Act No. 6 of 2012 and the Land Registration Act of 2012, and other enabling provisions of the Laws of Kenya have both prescribed clear procedures for seeking redress, the Petitioners ought to have followed the legislative provisions and not use the Constitution as substitute for litigating ordinary civil disputes. By and large, this Petition is a total abuse of the due and court’s process, for disguising as constitutional Petition for redress of violation of fundamental rights when it is in fact an ordinary civil dispute for ownership and possession of the Suit Property. For these reasons, the Petition cannot succeed.

**IV. DETERMINATION**

22. Ultimately, and based from the elaborate and detailed analysis herein, this Honorable Court is left with no alternative but to allow the Preliminary objection dated 14<sup>th</sup> June 2019 and filed in court on 18<sup>TH</sup> June, 2019 raised by the 1<sup>st</sup> Respondent.

23. Consequently, the Petition filed by the Petitioners dated 2<sup>nd</sup> May 2021 be and is hereby dismissed. I direct each party to bear its own costs.

**IT IS ORDERED ACCORDINGLY.**

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2022**

**HON. JUSTICE L. L. NAIKUNI (JUDGE)**

**ENVIROMNENT AND LAND COURT**

**MOMBASA**

**In the presence of:**

a) M/s. Yumna, the Court Assistant.

b) Non Appearance for the Petitioners.

c) Mr. Kinuthia Advocate for the 1<sup>st</sup> Respondent.