



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**ELC PETITION NO E013 OF 2020**  
**ANTHONY NGURE MURUGU..... PETITIONER**  
**VERSUS**  
**KENYA RAILWAYS CORPORATION .....RESPONDENT**  
**RULING**

1. The Respondent herein filed a Preliminary Objection dated 3<sup>rd</sup> November, 2020 in which he averred as follows:

- a. **The Petition has been commenced pre-maturely as these proceedings were commenced without the Petitioner issuing a written notice of at least one month as required under Section 87(a) of the Kenya Railways Corporation Act.**
- b. **The Petition herein does not seek interpretation of any constitutional rights or issues and does not seek declarations on any fundamental constitutional questions of law instead it is a civil claim disguised as a Constitutional Petition which ought not to have been brought to court by way of a petition.**
- c. **The Petitioner herein has asked the court to make factual findings on issues of termination of lease agreement and alleged loss of business which cannot be achieved or litigated through a Constitutional Petition but can only be properly determined through a substantive civil suit where viva voce evidence will be heard and tested in cross-examination.**
- d. **There is no matter of public interest raised in the Petition that warrants or justifies the use of this procedure to articulate the Petitioner's grievances and the reliefs sought are lawfully available through the filing of a substantive civil suit.**
- e. **The present Petition has been filed with grave infractions to well set principles in *Re Mumo Matemu vs Trusted Society of Human Rights Alliance* and in *Re Annarita Karimi Njeru* on the contents and framing of a Petition.**
- f. **As such the Petition has been filed contrary to the mandatory provisions of Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.**

2. The Preliminary objection was canvassed by way of written submissions.

**Submissions**

3. In support of the Preliminary Objection, the Respondent's advocate submitted that the Petition is premature for failure by the Petitioner to issue a mandatory one months' notice as provided for under **Section 87 (a)** as read together with **Section 83(1)** of the **Kenya Railway Corporation Act**. Reliance was placed on the decisions in *Everose Chemtai Obwaka vs Kenya Railways Corporation*[2008] eKLR, *Peter Nzioka Mani & Anor vs Kenya Railways Corporation* [2012] eKLR and *Jisaidie Development Network vs Kenya Railways Corporation*[2008]eKLR where courts struck out suits for having been commenced before the issuance of the mandatory notice under **Section 87(a)** of the **Kenya Railways Corporation Act**.

4. It was submitted by the Respondent's advocate that the Petitioner's claim being one for damages as a result of having been asked to relinquish the premises pursuant to the Respondent's mandate under **Section 13** of the Act, legal proceeding could only have been commenced after issuance of the mandatory notice; that alternatively, the claim for damages ought to have been forwarded to the Respondent for compensation failing which the same should have been presented to an arbitrator pursuant to **Section 83(1)** of the Act and that as a result of the foregoing, this court has no jurisdiction to entertain the matter as espoused by the case of *Owners of Motor vehicle Lillian S' vs Caltex oil(Kenya)Ltd* [1989]1 KLR 1.

5. According to counsel, the Petition has not been pleaded with a reasonable degree of precision pursuant to **Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** and as articulated by the court in **Anarita Karemu Njeru vs The Republic(1976-1980)KLR** where the court emphasized that constitutional petitions must be pleaded with a reasonable degree of precision. Counsel also relied on the decision of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (supra)**.

6. It is the Respondent's counsel's submission that this is an ordinary civil claim that can be determined without the need to have recourse to the Constitution and that the Petition has been brought contrary to the principle of law that states that disputes that can ordinarily be dealt with in normal civil proceedings ought not be instituted by way of Petitions as espoused by the courts in **Leonida Aloo Odhiambo vs Attorney General & another[2020] eKLR**, **Patrick Mbau Karanja vs Kenyatta University (2012) eKLR** and **Boniface Mwangi vs Resident Magistrates Court at Milimani & 2 Others [2015] eKLR** and that the Petition as filed is devoid of merit and ought to be dismissed.

7. The Petitioner's counsel submitted that **sections 83(1) and 87(a) of the Kenya Railways Corporation Act** are inconsistent and contradictory to the provisions of **Articles 22 and 23 of the Constitution**; that by virtue of the inconsistency thereof, the impugned sections are null and void and that the Petition involves forced and violent eviction of the Petitioner from his business premises without a prior court order contrary to **Articles 10, 19, 20 and 21 of the Constitution of Kenya** and various international instruments as well as the principles on evictions as set out by the Supreme Court in **Petition No.3 of 2018-Mitubell Welfare Society and the Kenya Airports Authority and 4 others**.

8. It was submitted on behalf of the Petitioner that the Petition has set out the alleged violations of the Petitioner's constitutional rights and the manner in which they were violated with reasonable precision as evinced by the Respondents lengthy response to the same and that the Preliminary Objection lacks merit.

### **Analysis & Determination**

9. Having considered the pleadings and submissions herein, the court finds that the main issues for determination are;

i. Whether the Preliminary Objection is merited?

ii. Whether the Petition meets the legal threshold of a Constitutional Petition?

iii. Whether the Petition offends the mandatory provisions of Section 87(a) as read together with Section 83(1) of the Kenya Railway Corporation Act?

10. The gist of the Respondent's objection is two-fold. First, that this court does not have jurisdiction to hear and determine the Petition because the same is a civil dispute disguised as a constitutional matter; and that this court sitting as a constitutional court has no jurisdiction to determine the same and that in any event, the Petition as framed contravenes the principles established in the cases of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** and **Anarita Karimi Njeru vs The Republic (1979) eKLR** and violates **Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**.

11. Secondly, it has been argued by the Respondent that the Petition offends the mandatory provisions of **Section 87 (a)** as read with **Section 83(1) of the Kenya Railways Corporation Act, Cap 397**.

12. It is settled that a preliminary objection is founded on law and not fact. The essence of a preliminary objection was succinctly set out by the Court of Appeal in the *locus classicus* case of **Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696 at 700** wherein Law, JA stated that:

**“...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.”**

13. In the same case, Sir Charles Newbold P. added at page 701 as follows:

**“A preliminary objection is in the nature of what used to be a demurrer. 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 is the exercise of judicial discretion.”**

14. The Supreme Court addressed its mind on this issue in the case of **Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR** wherein it stated:

**“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”**

15. It is apparent from the foregoing that a Preliminary Objection should raise pure points of law, argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. Further, the Preliminary Objection should be capable of disposing off the suit or the application.

16. The question of whether this Petition meets the threshold for constitutional Petitions is a proper preliminary question. Indeed, the determination of this issue requires a plain reading of the pleadings which are already on record.

17. The question of whether this court sitting as a constitutional court can entertain this Petition and whether this suit is statutorily barred by virtue of having been brought contrary to **Section 87 (a)** as read with **Section 83(1)** of the **Kenya Railways Act** are questions touching on the jurisdiction, and falls within the definition of a Preliminary Point of law.

18. The Petitioner instituted this suit pursuant to the provisions of **Article 22 and 23 of the Constitution** which empowers any person to institute a suit claiming violation and/or threatened violation of their rights and freedoms as set out in the Bill of Rights. The Petitioner alleges that the Respondent contravened his rights as protected by **Articles 10,19,21,28,29,31,40 and 47 of the Constitution**.

19. Whereas this court has jurisdiction to hear and determine constitutional questions on matters concerning the environment and land, the court must, before embarking on such determinations, answer the question of whether or not the matter before it raises constitutional issues if at all.

20. Indeed, as was held by the Court of Appeal in ***Gabriel Mutava & 2 Others vs Managing Director, Kenya Ports Authority (2016) eKLR***:

**"Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes."**

21. **Rule 10(1)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** provides as follows;

**"10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.**

**(2) The petition shall disclose the following— (a) the petitioner's name and address; (b) the facts relied upon; (c) the constitutional provision violated; (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community; (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition; (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and (g) the relief sought by the petitioner."**

22. **Rule 4** thereof provides that where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

23. As correctly stated by the Respondent, the court in ***Anarita Karimi Njeru vs Republic (1979) eKLR*** set out the legal threshold for a Constitutional Petition thus;

**"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."**

24. This principle was restated by the Court of Appeal in the case of ***Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR*** as follows:

**"(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. At the very least, the 1<sup>st</sup> Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior Court below to lament that the petition before it was not the "epitome of precise, comprehensive or elegant drafting, without remedy by the 1<sup>st</sup> respondent.**

**It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the constitution of Kenya and the Ethics and Anti-corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case."**

25. From the foregoing, it is indisputable that for a constitutional Petition to be sustainable, it must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation.

26. Tied together with the above is the principle of constitutional avoidance which precludes the court from determining ordinary civil issues disguised as constitutional questions. The doctrine of constitutional avoidance was addressed by the Supreme Court in the case of

Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR where the court held as follows:

“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. 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.” ....

[258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”

27. The question of what constitutes a constitutional question was discussed at length in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others [2002] 23 ILJ 81 (CC)* in which the court citing the Constitutional Court’s observations in *S vs Boesak [2001] (1) SA 912 (CC)* stated thus;

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of ....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State..., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,... is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”

28. The Court has had a chance to look at the issues raised in the Petition. The Petition is founded on **Articles 10,19, 20, 21, 22, 23, 28, 29, 31, 40 and 47 of the Constitution**. The Petitioner contends that it had a lease agreement with the Respondent; that during the pendency of the lease, the Respondent forcefully evicted the Petitioner from the premises and that the Petitioner has suffered losses emanating from the said forceful eviction.

29. In the Petition, the Petitioner is seeking for the sum of Kshs 10,000,000 for loss of business and general damages for violation of his rights. According to the Petitioner, the forceful eviction constituted cruel, inhumane and degrading treatment contrary to **Articles 10, 19, 20, 21, 28 ,29, 31,40 and 47 of the Constitution** and that the evictions having been carried out forcefully and without issuance of notices pursuant to the letter of offer violated his rights under the Constitution.

30. In response to the Petition, the Respondent has averred that the suit premises was gazetted as a Transit Shed Area for purposes of implementation and revitalization of the Nairobi City Railway Project thus frustrating the lease and discharging the parties’ obligations thereunder; that contrary to the Petitioner’s assertions, he was not evicted from the premises but was requested to relinquish the same and that the premises had in any event been leased subject to it being yielded back to the Respondent for purposes of railway activities.

31. The alleged constitutional violations as set out by the Petitioner all revolve around the purported forceful eviction carried out without notice. It is trite that the Petitioner is entitled to all the rights and fundamental freedoms enumerated under the Constitution and the conventions ratified by the country. Whether the eviction of the Petitioner from the suit property, if at all, was done contrary to the Constitution and the conventions can only be determined after trial.

32. Indeed, the issue of forceful evictions without adequate notice has been found by the Supreme court of Kenya in the *Mitu-Bell Welfare Society vs The Kenya Airports Authority and others (2021) eKLR* case to revolve around the right to housing as guaranteed under **Article 43 (1)** of the **Constitution**, amongst other rights. That being so, and without going into the merits of the Petition, it is the finding of this court that the Petition meets the constitutional threshold established in the *Anarita Karimi Njeru* (supra) case.

33. The Respondent contends that this Petition as instituted is fatal as it offends the mandatory provisions of **Section 87(a)** as read together with **Sections 83(1)** of the **Kenya Railways Corporation Act**. **Section 87 (a)** of the Act provides as follows:

“Where any action or other legal proceedings is commenced against the corporation for any act done in pursuant or execution, or intended execution, of this Act or any public duty or authority or in respect of any alleged neglect or default in execution of this Act or of any such duty or authority, the following provisions shall have effect-

(a) the action or legal proceeding shall not be commenced against the corporation until at least one month after notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the plaintiff or his agent; and

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case a continuing injury or damage, within six months next after the cessation thereof.”

34. The above section prohibits the commencement of any proceedings against the Respondent unless a thirty days' notice is issued where the cause of action leading to the filing of the suit against the Respondent was an act done by the Respondent pursuant to its mandate under the Act.

35. The Respondent herein is a statutory body established under the **Kenya Railways Corporation Act**. The dispute is with regard to the alleged eviction of the Petitioner before termination of the Lease Agreement. Under **Section 13(2) (h)** of the Act, the Respondent has the power to sell, let or otherwise dispose of any property, moveable or immoveable, which in the opinion of the board is not necessary for the purposes of the corporation

36. It is not disputed that no notice was served on the Respondent prior to the filing of the Petition. The question that arises is whether the Petitioner's failure to serve the aforesaid notice on the Respondent makes this Petition fatal. The court thinks not. Whereas the court appreciates the reasoning in the cases of *Everrose Chemutai Obwako(supra)* and *Jisaidie Development Network(supra)* in striking out the suits for failure to comply with the above provisions, the same would not hold up in light of the constitutionally guaranteed right to access to justice set out in the 2010 Constitution.

37. Indeed, the Court of Appeal while considering this question in the case of *Joseph Nyamamba & 4 others vs Kenya Railways Corporation [2015] eKLR* cited with approval the reasoning of Majanja J in *Kenya Bus Services Limited and Anor vs Minister of Transport & 2 Others [2012] eKLR* where he discussed the import of **Section 13A** of the **Government Proceedings Act** which, much like the impugned **Section 87(a)**, requires notice before filing of a suit against the Government *vis a vis* the right to access justice. In the *Kenya Bus services* case, (supra) Majanja J posited as follows:

**“By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism .... Article 48 must be located within the Constitutional imperative that recognizes as the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. Article 48 therefore invites the Court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.**

**Viewed against the prism of the Constitution, it also becomes evident that section 13A of the GPA provides an impediment to access justice. Where the state is at the front, left and centre of the citizens life, the law should not impose hurdles on accountability of the Government through the Courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirements for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding that section 13A of the Government Proceedings Act as a mandatory requirement violates the provision of the Article 48.**

38. Indeed, this court sitting in Machakos also rendered an opinion on the same issue in the case of *Catherine Njeri Majani vs Kenya Railways Corporation & Another [2021] eKLR* wherein it stated as follows:

**“Considering the provisions of Article 48 of the Constitution which requires the state to ensure access to justice for all persons, and the pronouncement of the superior courts on the applicability of Section 87 (a) of the Kenya Railways Corporation Act, it is my finding that the failure by the Plaintiff to issue to the 1<sup>st</sup> Defendant a thirty (30) days' notice, if at all, is not fatal to the suit”.**

39. The upshot of the foregoing is that the failure by the Petitioner to issue a notice to the Respondent before institution of this suit is not fatal. The Respondent's objection on this ground fails.

40. **Section 83(1)** of the **Kenya Railways Act** provides as follows:

**“(1) In the exercise of the powers conferred by sections 13, 15, 16 and 17, the Corporation shall do as little damage as possible, and where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Corporation or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.**

**(2) Nothing in this section shall be construed as entitling any person to compensation-**

**(a) for any damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section; or (b) for any damage suffered as a result of the user of any works authorized under this Act unless such damage results from negligence in such user.”**

41. It is clear that the above provision prohibits bringing of a suit or action for recovery of damages arising out of the corporation's execution of its mandate under **Sections 13, 15, 16 & 17** of the Act. **Section 13** sets out the Respondent's general powers; and **Section 15, 16 & 17** deals with its powers to enter property for purposes of *inter alia* surveying, preventing accidents and altering pipes. According to the said section, compensation for such damage is to be agreed between the corporation and the injured and in default an arbitrator be appointed by the Chief Justice.

42. Whereas the court appreciates the exhaustion doctrine which mandates the use of internally laid down procedures for dispute resolution

before having recourse to the courts, the court is of the opinion that the dispute herein being one of breach of contract and alleged violations of rights is not within the scope of matters envisioned under the impugned section. Consequently, the Respondent's objection to the suit on this ground fails.

43. For those reasons, the Preliminary Objection dated 3<sup>rd</sup> November, 2021 is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH, 2022**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

Mr. Ngoge for the Petitioner

Ms. Rotich for the Respondent

Court Assistant - Okumu