



**Nyamwanga v Alfredy & 4 others (Environment & Land Petition
E003 of 2024) [2025] KEELC 3585 (KLR) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3585 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND PETITION E003 OF 2024
FO NYAGAKA, J
APRIL 23, 2025**

BETWEEN

LIANDER ODERO NYAMWANGA PETITIONER

AND

OPERE JOHN ALFREDY 1ST RESPONDENT

GRACE ACHIENG ONGORO 2ND RESPONDENT

HOMA BAY SUB COUNTY 3RD RESPONDENT

THE LAND REGISTRAR HOMABAY COUNTY 4TH RESPONDENT

THE HON ATTORNEY GENERAL 5TH RESPONDENT

RULING

Brief Facts

1. The 2nd Respondent filed a Notice of Motion application dated 9th February, 2025. She brought it under Section 3A of the *Civil Procedure Act*, Section 3[8] of The *Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013*, Order 2 Rule 15 and Order 51 Rule 1 of the *Civil Procedure Rules*. She sought the following orders;
 - a. That the Honourable Judge be pleased to dismiss this constitutional petition.
 - b. That cost of this application and the petition be provided for in favour of the respondents
2. The application was based on five grounds. Firstly, the Petition offended the doctrine of Constitutional avoidance. Secondly, the petition did not disclose a reasonable constitutional cause of action as against the Respondents. Thirdly, the petitioner's claim was frivolous and vexatious as he sought to benefit from his indolent actions and fourthly, the Court did not have jurisdiction to entertain his claim. Lastly, that the Petitioner will not suffer any prejudice if the orders sought are not granted.



3. The application was supported by the affidavit of Grace Achieng Ongoro the 2nd Respondent which she swore on 9th February, 2025. She stated that the Petitioner filed Homa-Bay *CM ELC Case No. E10 of 2023*, over the same parties and cause of action. She also stated that in response to the said suit and an application that had been filed therein, she filed a Preliminary Objection and grounds of opposition. She deposed that after considering the preliminary objection and upon advice by the Court, the Petitioner withdrew his suit which was time barred. She also deposed that the Petitioner filed the present petition in order to circumvent statutory provisions and confer jurisdiction upon this Court and yet the competent Court to hear the matter is the Magistrate's Court. She stated that in the suit filed before the Magistrate Court, the Petitioner disclosed that the portion of land that he had sold measured 0.14 Ha and the Court ordered a survey which confirmed that the said portion indeed measured 0.14Ha. The suit herein does not therefore constitute a constitutional petition and the Petitioner ought to have filed an application to extend time to file the suit before the lower Court.
4. The application was opposed by the Petitioner who filed a Replying Affidavit sworn on 18th February, 2025. He deposed that he is the registered owner of land parcel No. Kanyada/Kanyango/Kalanya/3792 which measured 0.19 Ha. He was registered as the owner during the land adjudication exercise but upon publication of the final adjudication register for Kanyango/Kalanya adjudication section on 7th June, 1991, land parcel No. Kanyada/Kanyango/Kalanya/3792 which measures 0.19 Ha was erroneously registered as measuring 0.05 Ha. He lodged an objection to have the same rectified on the register. On 31st July, 1991 he disposed a portion of land measuring 0.05 Ha from his parcel of land to John Onditi Atiang. The said John Onditi Atiang also lodged an objection to have the portion he purchased to be excised from the Petitioner's portion of land and have the same registered in his name. He had no issue with the objection and therefore land parcel No. Kanyada/Kanyango/Kalanya/3792 was sub-divided and John Onditi Atiang was registered as the owner of land parcel No. Kanyada/Kanyango/Kalanya/4725 measuring 0.05 Ha while he remained to be the registered owner of land parcel No. Kanyada/Kanyango/Kalanya/3792 which now measured 0.14 Ha.
5. He deposed that on 7th June, 1993 he disposed off a portion of land parcel No. Kanyada/Kanyango/Kalanya/3792 measuring 0.14 Ha to the 1st Respondent. He waited for the register for his parcel of land to be created before transferring the said portion to the 1st Respondent. He remained in occupation of a portion of land parcel No. Kanyada/Kanyango/Kalanya/3792 measuring 0.09 Ha. Sometime in the year 1998, the 1st Respondent sold a portion of the land he had purchased from the Petitioner measuring 0.05 Ha to Cassian Juma Nyanjwa now deceased. They lived peacefully on the land until sometime in the year 2021 when the said Cassian Juma Nyanjwa [deceased] tried to evict him from his portion of land parcel No. Kanyada/Kanyango/Kalanya/3792 measuring 0.09 Ha. He conducted a search on land parcel No. Kanyada/Kanyango/Kalanya/3792 and got all the objection proceedings and adjudication records. The 4th Respondent supplied him with a certificate of official search which showed that the 3rd Respondent had registered land parcel No. Kanyada/Kanyango/Kalanya/3792 and stated that it measured 0.05 Ha. The register for land parcel No. Kanyada/Kanyango/Kalanya/3792 was never rectified to reflect the correct acreage and there is therefore an error on the acreage. Despite selling a portion of land parcel No. Kanyada/Kanyango/Kalanya/3792 measuring 0.05Ha to the 1st Respondent and having not executed any transfer documents, his name was struck off from the adjudication register for the suit parcel after the 1st Respondent lodged objection proceedings. The 1st Respondent was registered as the owner of land parcel No. Kanyada/Kanyango/Kalanya/3792 in 1993.
6. He deposed that the adjudication register was published on 7th June, 1991 and therefore objection proceedings could only be lodged within six months. The objection proceedings that were lodged in the year 1993 were lodged out of time and were therefore unlawful. The subsequent transfer of land parcel No. Kanyada/Kanyango/Kalanya/3792 to Cassian Juma Nyanjwa [deceased] in 1998 were also



unlawful. He also deposed that Cassian Juma Nyanjwa [deceased] transferred his interest to the 2nd Respondent and his petition before this Court challenged the ownership of the 1st and 2nd Respondents over the suit parcel as it was based on objection proceedings that were filed out of time. In his petition he sought for a declaration that the objection proceedings lodged by the 1st Respondent and Cassian Juma Nyanjwa were lodged out of time and they were therefore unconstitutional. The said remedy could only be granted by this Court and that the actions of the 3rd Respondent infringed on his right to own property as provided for under Article 40 of the Constitution of Kenya.

7. He admitted that he filed *Homabay ELC Case No. E010 of 2023* which was dismissed. On 21st July, 2024 this Court issued orders for the land surveyor and the County land registrar to visit the suit parcel and prepare a report. The said report was prepared and the 2nd Respondent did not raise any issue as to the jurisdiction of this Court. He urged the Court to hear and determine this matter and define his interest in the suit parcel.

The 2nd Respondent's Submissions

8. Counsel for the 2nd Respondent relied on the cases of *Consumers Federation of Kenya v Toyota Motors Corporation & 4 others* [2020] KEHC 9618 [KLR], *COD & another v Nairobi City Water & Sewerage Co. Ltd* [2015] eKLR, *Consumers Federation of Kenya v Toyota Motors Corporation & 4 others* [2020] KEHC 9618 [KLR] and submitted that even though the petition was filled with numerous alleged infringements of the Constitution, nothing specific had been set out.
9. Counsel relied on Rule 3[8] of the *Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013*, the case of *Meme v Republic* [2004] eKLR and urged the Court to allow her application as prayed.

The Petitioner's Submissions

10. Counsel for the Petitioner filed his submissions dated 28th February, 2025. He reiterated the averments in the Petitioner's Replying Affidavit and submitted that the 2nd Respondent was seeking to have the Petition struck out on the ground that it offended the doctrine of Constitutional avoidance. Counsel relied on the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR and submitted that the *Land Adjudication Act* does not provide for a mechanism for challenging objection proceedings lodged out of time. He also submitted that the Constitution conferred the Environment and Land Court with powers to hear and determine any dispute relating to land and therefore the petition was properly before this Court.
11. Counsel relied on Article 162[2][b] of the *Constitution*, Section 13[1] & [2] of the *Environment and Land Court Act*, the case of *Omwoyo v Attorney General & 4 Others* [2024] eKLR and while setting out the prayers sought in the petition submitted that this Court had jurisdiction to hear and determine the petition.
12. On whether the Petition disclosed a constitutional cause of action, Counsel for the Petitioner relied on the case of *Anarita Karimi Njeru v Republic* [1979] 1 KLR 154, *Kevin Turunga Ithungi v Hon. Justice Fred Ochieng & others* [2015] eKLR and submitted that the petitioner met the threshold set out in the *Anarita Karimi* case [*supra*]. He also submitted that paragraph 61 of the Petition contained the particulars of the violations of his rights under Article 40[1] of the *Constitution* of Kenya. It was Counsel's submissions that the application under consideration ought to have been filed at the earliest opportunity but it was filed after the Petitioner's application dated 21st March, 2024 had been heard and the Court scheduled the matter for mention for compliance and to fix a date for hearing.



13. Counsel relied on Rule 3[8] of the *Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules*, the case of *Wachira Karani v Bildad Wachira* [2010] eKLR and urged the Court to exercise its inherent power and do justice to the parties by hearing and determining this matter on merit. He therefore prayed that the 2nd Respondent's application be dismissed with costs.

The 3rd to 5th Respondents submissions.

14. Counsel for the 3rd to 5th Respondents filed submissions dated 3rd March, 2025. Counsel relied on the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR as was cited in *Almer Farm Limited v National Land Commission & 2 others* [2021] KECA 469 [KLR] and submitted that the Petitioner's claim is time barred. Counsel also relied on the case of *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* Pet. 14A, 14B & 14C of 2014 of [2014] eKLR and submitted that the Petitioner's claim is based on an alleged fraudulent transaction which ought to have been brought to Court within the timelines set out under Sections 7, 9 and 26 of the *Limitation of Actions Act*. It was Counsel's submissions that the alleged infringement happened in the year 1993 and he discovered it in the year 2000. He therefore had up to the year 2012 to file a suit. He relied on the case of *James Kanyिता Nderitu v Attorney General & another* [2019] eKLR in support of his submissions. Counsel concluded his submissions by urging the Court to strike out the Petition.

Analysis and Determination

15. I have considered the application, the response thereto and the submissions. The issues that arise for determination are whether the application is merited and who is to bear the costs of the application.
16. The 2nd Respondent contended that the Petitioner's petition ought to be dismissed as it offends the doctrine of Constitutional avoidance. The 2nd Respondent also contended that the issues raised in the petition did not disclose any reasonable constitutional cause of action as it instead raises a civil law cause of action with remedies in the civil Court. It was the 2nd Respondent's contention that the Petitioner had initially filed a suit before Magistrate's Court to wit *Homabay CM-ELC Case No. E10 of 2023* which he withdrew as it was statute barred. It was also the 2nd Respondent's contention that instead of seeking for enlargement of time to file the suit, the Petitioner opted to file the Constitutional petition herein.
17. In response the Petitioner contended that his Petition raised constitutional issues as he was challenging the 1st and 2nd Respondents ownership of the suit parcel. He also argued that they were registered as owners after they lodged objection proceedings after the time period within which they were to do so had lapsed. Therefore, his right to own property under Article 40[1] of the *Constitution* was violated.
18. The 3rd to 5th Respondents submissions were in concurrence with the 2nd Respondent's submissions. They submitted that the Petitioner's claim was statute barred and he therefore filed the present petition to circumvent the statute of limitation. The 3rd to 5th Respondents also invoked the doctrine of constitutional avoidance and urged the Court to strike out the Petition.
19. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [Petition 14, 14A, 14B & 14C of 2014 [Consolidated]] [2014] KESC 53 [KLR] [29 September 2014] [Judgment] discussed the principle of Constitutional avoidance as follows;

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“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. Mblungu*, 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.”

257. 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]].

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.”

20. The doctrine of constitutional avoidance fundamentally provides that where there exists a legal recourse through which a legal dispute can be resolved, a Court sitting as a constitutional Court does not have jurisdiction to hear and determine the said legal dispute. The party should rely on and use the proper forum to resolve the dispute. This is irrespective of whether the time to approach that other forum is spent, by the time he raises the issue. This is because it was upon the party who should have used that other forum to have done so within the time allotted and not to subtly clothe the wolf in sheep’s skin, that is to say, baptize the issue as a constitutional one in order to circumvent the time he squandered by not invoking in time the power of that other forum. The passage of time to the extent of it being time barred to raise it in that other form does not make the issue evolve from what it was to a constitutional one.
21. In the present case the Petitioner has in great detail set out the basis of his Constitutional Petition. Basically, the Petitioner contended that he was the registered owner of land parcel No. Kanyada/Kanyango/Kalanya/3792 which measured 0.19Ha. He also contended that soon after registration he realized that the final adjudication register showed that the suit parcel measured 0.05 Ha and yet the land measured 0.19Ha. He lodged an objection challenging the indicated acreage. It was determined. He further contended that he sold portions of the suit parcel with one of the portions being eventually registered in the name of Cassian Juma Nyanjwa [deceased] who tried to evict him in the year 2021. It was his contention that when he later conducted a search he found out that the suit parcel was still registered as measuring 0.05 Ha instead of 0.19Ha. He also found out that the suit parcel was registered in the name of the 1st Respondent in the year 1993 after objection proceedings were lodged. He denied being aware of the said objection proceedings and contended that they were not lodged within the required period of six months. The suit parcel was then transferred to the name of Cassian Juma Nyanjwa [deceased]. At paragraph 36 of his Affidavit, the Petitioner stated that he is challenging the 1st and 2nd Respondents ownership of the suit parcel as their registration was based on objection proceedings that were filed out of time.



22. It is this Court's view that the Petitioner essentially admitted that the dispute in this matter is essentially one of ownership. The issue of ownership is one which the law provides for being taken up through the institution of a suit to be adjudicated upon by the Court sitting in its civil jurisdiction as provided for and not as a constitutional one through a constitutional petition.
23. In the case of *Bamaftah & another v Cabinet Secretary, Ministry of Lands, Public Works and Housing and Urban Development & 7 others* [Environment and Land Constitutional Petition E012 of 2023] [2023] KEELC 21412 [KLR] [7 November 2023] [Ruling] the Court held as follows;
- “...Fundamentally, and without any iota of doubt or contradiction, the Petition raises issues which are purely matters of ownership over the suit land and other such related issues which to me are civil in nature and whose remedies ought to be found and fall squarely onto ordinary readily to be redressed in a civil Court. The Petitioner ought to have filed a civil suit as opposed bypassing the same and coming to the constitutional Court.
48. Having found that there exists a remedy in civil law, which the Petitioner ought to have pursued, this Court must refuse to be bogged down by a matter which is so plainly provided for under statute...
- Having considered the foregoing, I find and hold that the Petitioner's claim which is founded on issuance of the Certificate of Title and the ownership of land... Accordingly, the Petition is not properly laid before this Court as a constitutional issue. As such, this Court invokes the doctrine of avoidance and declines jurisdiction.”
24. It is my view that the predominant issues and on which the whole dispute herein rests are firstly, whether the registration of the 1st and 2nd Respondents were owners of the suit parcel based on objection proceedings that were filed out of time and secondly what the correct or approximate measurement or size of the suit parcel was. It is my view that the said issues are purely civil in nature, and the proper forum for their resolution is a civil suit.
25. Consequently, invoking the jurisdiction of this Court sitting as a Constitutional Court does not hold hence it does not the jurisdiction to hear and determine the Petition.
26. The upshot of the foregoing is that the 2nd Respondent's application dated February 9, 2024 is merited and the Petition dated March 21, 2024 is hereby struck out.
27. Each party to bear their own costs.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 23RD DAY OF APRIL 2025.

HON. DR. IUR NYAGAKA
JUDGE

