



**Wanje & 6 others v Mwarogo & 3 others (Environment & Land Petition
46 of 2021) [2022] KEELC 2700 (KLR) (17 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 46 OF 2021**

NA MATHEKA, J

MAY 17, 2022

BETWEEN

**PASCAL KAZUNGU WANJE 1ST PETITIONER
RONALD SAFARI WANJE 2ND PETITIONER
CHARLES BETI DOLOJI 3RD PETITIONER
KITSAO PASCAL WANJE 4TH PETITIONER
JUMWA WANJE DOLOJI 5TH PETITIONER
KADZO WANJE DOLOJI 6TH PETITIONER
RAPHAEL KAHINDI WANJE 7TH PETITIONER**

AND

**MASHA MRAMBA MWAROGO 1ST RESPONDENT
LAND ADJUDICATION OFFICER, KILIFI COUNTY 2ND RESPONDENT
LAND REGISTRATION OFFICER, KILIFI COUNTY 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. The 1st Respondent raised a Preliminary Objection against the Petitioners Notice of Motion Application dated 28th September 2021 and the entire Petition on the following grounds;
 - a) That the Petition herein is filed contrary to the provisions of Section 30 of the [Land Adjudication Act](#) Cap 284 of the Laws of Kenya.



- b) That the Petition herein is filed contrary to section 7 of the *Civil procedure Act* Cap 21 Laws of Kenya and offends the doctrine of res judicata for the reason that the issues raised in the Petition were canvassed and/or determined in the following cases;
- I) Kaloleni District Magistrate Land Case No.15 of 1968 Muchiokichala vs Sofa Mwarogo
 - II) Mombasa Resident Magistrate Land Case No.19 of 1986 Chemu Tsanga Vs Kulwa Chalo
 - III) Kaloleni Resident Magistrate Land Award No.23 of 1997 Kulwa Chalo vs Masha M. Mwarogo
2. That the issues pleaded in the Petition, if any, and the reliefs sought do not disclose any Constitutional issue and the Petition as filed is therefore misconceived, vexatious, frivolous, bad in law, fatally defective and amounts to a gross abuse of the Court process. Consequently, the 1st Respondent prays that the Petitioners' Application and entire Petition be struck out with costs.
3. This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd* (1969) E.A 696,
- "..... 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"
- In the same case, Sir Charles Newbold said:
- "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 had to be ascertained or if what is sought is the exercise of judicial discretion".
4. J.B. Ojwang, J (as he then was) in the case of *Oraro vs Mbajja* (2005) e KLR had the following to state regarding a 'Preliminary Objection'.
- "I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point."
5. The 1st Respondent submitted that the Petition herein is filed contrary to section 7 of the *Civil procedure Act* Cap 21 Laws of Kenya and offends the doctrine of res judicata for the reason that the issues raised in the Petition were canvassed and/or determined in the cases mentioned above touching on the same parcel of land and similar parties. The Petitioners do not dispute that these cases existed in their Petition but instead state that the findings in yet another case No. 119 and objection No. 91 were not based on evidence and disagree with the same hence this Petition. In that matter they were given the right of appeal within 60 days. I find that this matter has been litigated upon in the past and is res judicata.



6. The 1st Respondent also raised the issue of this being an ordinary boundary land matter and should not be brought by way of a constitutional Petition as it does not meet the threshold. As to whether or not there is a competent Constitutional Petition before the Court, it is necessary to consider whether the Petition satisfies the threshold of what constitutes a Constitutional Petition as per the principle established in the case of *Anarita Karimi Njeru vs The Republic* (1979) eKLR which principle was later restated by the Court of Appeal in the case of *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. The principle established in the *Anarita Karimi Njeru* case (supra) was that a Constitutional Petition should set out with a degree of precision the Petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed. The *Mumo Matemo* case (supra) reaffirmed the principle in the Anarita Karimi case when the Court at paragraph 44 of the judgment stated 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 1st 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 1st respondent"

In the same judgment the Court on its findings stated as follows:-

"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."

7. I find that a constitutional Petition to be sustainable must at a minimum satisfy a basic threshold. 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. It is not enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints. The instant case appears to me to be an appeal from the decision of the Adjudication Committee and not a constitutional matter.

8. In the case of *Godfrey Paul Okutoyi & Others vs Habil Olaka & Another* (2018) eKLR the court stated that;

"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."



9. In the case of *Bernard Murage vs Fine Serve Africa Ltd & others* (2015) eKLR the Court stated that;

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

10. In the case of *Patrick Mbau Karanja vs Kenyatta University* (2012) eKLR Lenaola, J (as he then was) stated that;

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 owed 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".

11. Lenaola, J also stated in the same case that;

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".

12. I concur with the above referenced cases that this Petition does not meet the threshold of the Court's Constitutional interpretative mandate under the Bill of Rights provisions of *the Constitution*. There should be a clear delineation of constitutional matters and the ordinary civil suits. I find that there are sufficient statutory legal provisions that govern enforcement of civil land matters and the Petitioner ought to have invoked the jurisdiction of the ordinary Civil Court if at all. In conclusion this Petition is not sustainable and constitutes an abuse of the process of the Court and the application and petition is accordingly ordered struck out with costs to the Respondents.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF MAY 2022.

N.A. MATHEKA



JUDGE

