



**Ancient Inland Seas Limited v County Government of Mombasa & 5 others
(Constitutional Petition 40 of 2021) [2025] KEELC 3108 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3108 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 40 OF 2021**

**JO OLOLA, J
APRIL 3, 2025**

BETWEEN

ANCIENT INLAND SEAS LIMITED PETITIONER

AND

THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

MOMBASA CEMENT LIMITED 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

DIRECTORATE OF SURVEY 4TH RESPONDENT

CHIEF LAND REGISTRAR 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. By an Amended Petition dated 9th July, 2024, Ancient Inland Seas Limited (the Petitioner) prays for the following:
 - a. A declaration that the Petitioner is the owner of properties known as Mainland North/Section VI/3995 and Mainland North/Section VI/2079;
 - b. A declaration that the 1st Respondent’s forceful entry, occupation and remaining on the Petitioner’s suit properties namely Mainland North/ Section VI 3995 and Mainland North/ Section VI/2079 is in violation of the Petitioner’s right to property under Article 40 of *the Constitution* of Kenya 2010 and the occupation is illegal;
 - c. A mandatory injunction directing the 1st and 2nd Respondents to demolish the illegal structures constructed on the suit property;



- d. A permanent injunction directed to the Respondents restraining them or their servants or agents from trespassing, occupying and or (in) any manner whatsoever interfering with the Petitioner's ownership and or occupation of Mainland North/Section VI/3995 and Mainland North/Section VI/2079 (amalgamated into Plot No. Mainland North/Section VI/5049);
 - e. Damages for loss of use at the rate of Kshs 4,000,000/= per month from the 13th February, 2019, when the National Land Commission rendered its decision.
2. In the alternative, the Petitioner prays for the following:
- f. A declaration that the Respondent illegally established the registers for plots Numbers Mainland North/Section VI/3995 and Mainland North/Section VI/2079, inducing the Petitioner to purchase the said property;
 - g. A declaration that the Respondents breached the Petitioner's right to property under *the Constitution* and that the Petitioner is entitled to compensation;
 - h. Loss of value of the suit properties at Kshs 268,000,000/=;
 - i. Cost of the Petition.
 - j. Any other relief that this Court may deem fit.
3. The basis of those prayers is the Petitioner's contention that it is the registered proprietor of the suit property situated at Kibarani within Mombasa County. The Petitioner avers that sometimes in the year 2018 both the National Government and the County Government of Mombasa (the 1st Respondent) complained about the said properties to the National Land Commission (the 3rd Respondent). The Petitioner asserts that the 3rd Respondent conducted an inquiry and established that the Petitioner is the rightful proprietor thereof. It is the Petitioner's case that despite the said determination, the 1st Respondent has forcefully trespassed onto the said property and constructed a recreational park thereon.
4. The Petitioner avers that its constitutional rights under Article 40 of *the Constitution* have been violated by the Respondents forceful entry onto the suit land.
5. In response to the Amended Petition and by a Preliminary Objection dated 19th November, 2024, the County Government of Mombasa (the 1st Respondent) objected to the Petition on the grounds:
1. That the Amended Petition dated 15th July, 2024 contravenes the doctrine of constitutional avoidance and ought to be struck out with costs.
 2. That consequently, the claim of instance is incurably defective and bad in law.
6. Following directions issued herein, the Preliminary Objection was canvassed by way of written submissions. I have accordingly carefully considered both the Preliminary Objection as well as the submissions and authorities placed before me by the Learned Advocates representing the Petitioner's and the 1st and 2nd Respondents herein.
7. Black's Law Dictionary, 10th Edition at Page 377 defines the doctrine of constitutional avoidance as:
- “The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.”



8. The doctrine of constitutional avoidance therefore, deals with instances where a court will decline to deal with a matter because there exists another remedy provided in law which the party is yet to utilize.
9. Expounding the doctrine in *Communication Commission of Kenya & 5 Others –vs- Royal Media Services Ltd. & 5 Others* (2014) eKLR, the Supreme 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 –vs- 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.”

(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 the 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.”

10. In *KKB –vs- SCM & 5 Others* (Constitutional Petition No. 14 of 2010 [2022] KEHC 289 KLR, Mativo J. (as he then was) set out the exceptions to the doctrine of Constitutional avoidance as hereunder:
 - i. Where the constitutional violation is so clear and of direct relevance to the matter;
 - ii. In the absence of an apparent alternative form of ordinary relief; and
 - iii. Where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.
11. In the matter before me, the Petitioner asserts that it is the registered owner of the suit properties situated at Kibarani within Mombasa County having purchased the same in the year 2002. It is the Petitioner’s case that following a complaint made to the National Land Commission (the 3rd Respondent) in regard to the validity of its title, the Commission did uphold the legality of its title. The Petitioner accuses the County Government of Mombasa (the 1st Respondent) of ignoring the said decision and forcefully trespassing into the property where it has since constructed a recreational park with the support of Mombasa Cement Ltd (the 2nd Respondent).
12. According to the Petitioner, the Respondents have by those acts violated its right to use and occupy the land as envisaged under Article 40 of *the Constitution*. It is also its case that the Respondents have violated Section 3 of the Trespass to *Land Act* by entering and/or remaining on the suit properties



and its right to fair administrative action by forcefully entering and taking over the property without compensation.

13. Looking at the issues raised, it was clear to me that the dispute herein relates to the ownership of the parcels of land described by the Petitioner as Mainland North/Section VI/3995 and Mainland North/Section VI/2079 and said to have been amalgamated into plot No. Mainland North/Section VI/5049. From the pleadings as framed by the Petitioner, it was evident that the dispute was founded on proprietary rights over the suit properties. From those pleadings, I was unable to discern any issue which could not be addressed by this court in the normal exercise of its civil jurisdiction.
14. As Lenaola J. (as he then was) stated in *Uhuru Muigai Kenyatta –vs- Nairobi Star Publications Limited* (2013) eKLR:

“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 vs 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.”

15. I am guided by the above precedents which all point to the fact that not every infringement and/or violation of a right qualifies to be taken as a Constitutional Petition. This court is well clothed with jurisdiction under Article 162 (2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act* to hear and determine the dispute in the exercise of its ordinary civil jurisdiction.
16. In the premises, I do find merit in the 1st Respondent’s Preliminary Objection dated 19th November, 2024. The Amended Petition dated 15th July, 2024 is accordingly hereby struck out.
17. Each party shall bear their own costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 3RD DAY OF APRIL, 2025

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J.O. OLOLA

JUDGE

In the presence of:

Ms. Firdaus Court Assistant.

Ms. Osewe holding brief for Wafula Advocate for the Petitioners

Mr. Onduso Advocate for the 1st Respondent

Ms. Achieng holding brief for Onyon for the 2nd Respondent

Ms. Wanini for the 3rd Respondent

No appearance for the 4th and 6th Respondent

