



REPUBLIC OF KENYA



KENYA LAW
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**BOSACO & 602 others v National Land Commission & 11 others (Petition
8 of 2021) [2022] KEELC 4840 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4840 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 8 OF 2021
MAO ODENY, J
SEPTEMBER 21, 2022
REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT MALINDI
PETITION NO. 8 OF 2021
IN THE MATTER OF ARTICLES 1, 2,3, 10, 23, 40, 60, 67 AND 258 OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF ARTICLE 25 OF THE UNIVERSAL DECLARATION OF
HUMAN RIGHTS
AND
IN THE MATTER OF SECTION 134 AND 135 OF THE LAND ACT NO. 6 OF
2012
AND
IN THE MATTER OF SECTION 5 AND 6 OF THE NATIONAL LAND
COMMISSION ACT (ACT NO. 5 OF 2012)
AND
IN THE MATTER OF THE RIGHTS TO OWN LAND AND PROTECTION OF
PROPERTY UNDR ARTICLE 40(1) OF THE CONSTITUTION AND RIGHT TO
ACCESS TO LAND BY MARGINALIZED GROUP UNDER SECTION 134 AND
135 OF THE LAND ACT NO. 6 OF 2012.
BETWEEN



BONI/ SANYE COMMUNITY BASED ORGANISATION 1ST PETITIONER
HUSSEIN ABDALLA 2ND PETITIONER
ARAFI LACHO & 600 OTHERS 3RD PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
NATIONAL POLICE SERVICE 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
ABDINOOR OMARA FARAH 5TH RESPONDENT
ISAAC JAMAL IBRAHIM 6TH RESPONDENT
ISSA SHEIKH MOHAMED 7TH RESPONDENT
AHMED ABDULLAHI MOHAMED 8TH RESPONDENT
AHMED MAHMUD HUSSEIN 9TH RESPONDENT
ALPERTON HOLDINGS LTD 10TH RESPONDENT
KASSIM SHARE 11TH RESPONDENT
ABDI REHMAN 12TH RESPONDENT

RULING

1. This ruling is in respect of a Notice of a Preliminary Objection dated May 28, 2021 by the 12th respondent on the following grounds; -
 1. The petition as drawn and filed does not disclose any joint facts or material issues in commonality to the petitioners since they do not own any identifiable property in common and/ or jointly.
 2. The petitioners have not identified any particular property which their property rights have been violated against as per article 40 and they are burdening the court to identify for them their property and thereafter declare it theirs.
 3. The pleadings disclose a purely civil dispute which is disguised as a constitutional petition.
2. The respondents did not file submissions to the Preliminary Objection.

12th respondent's submissions

3. Counsel relied on the case of *Ledidi Ole Tauta & Others v Attorney General & 2 others* (2015) eKLR and submitted that constitutional protection of the right to property only arises when the petitioner can prove ownership of the property and this begins with identification of the property in question and the persons who are laying claim to it.



4. Ms Kitoo further submitted that the petitioners are laying to the Magogoni Village land but they have not specified the particular property in which the 12th respondent has violated their property rights under article 40 of the *Constitution*.
5. It was counsel's submission that the petition as framed does not disclose with any degree of particularity the property the petitioners allege to be the suit land and it would be impractical to enforce any orders granted in this case since the suit land is unidentified in law. Counsel relied on the case of *Anarita Karimi Njeru v Republic* (1979) eKLR.

Analysis and Determination.

6. Preliminary Objections consist of pure points of law as was held in the case of *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd* (1969) E A 696. The court defined a Preliminary Objection and discussed its operation as follows: -

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.

...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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."

7. Further in the Supreme Court case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR stated thus: -

"....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."

8. Counsel submitted that the petition as drawn does not disclose any joint facts or material issues in commonality to the petitioners since they do not own any identifiable property in common and/or jointly and it would be impractical to enforce any orders granted in this case since the suit land is unidentifiable in law.
9. The issue for identification of the suit land is what the court will hear at the full trial and not at a preliminary stage. A preliminary Objection should purely on points of law. Courts should sparingly strike out cases and lock out parties from the seat of justice unless the case is absolutely unsustainable or hopeless.
10. In the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR, the Supreme Court also reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows :

"The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public



cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

11. Having said that, I am not persuaded that the preliminary objection by the 12th respondent has merit and for that reason, the same is dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF SEPTEMBER, 2022.

M A ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

