



Mwaisama & 158 others v Ndara B Community & 2 others (Environment & Land Petition E001 of 2023) [2025] KEELC 4094 (KLR) (Environment and Land) (29 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4094 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND PETITION E001 OF 2023**

EK WABWOTO, J

MAY 29, 2025

BETWEEN

GADIEL MAGHANGA MWAISAMA & 158 OTHERS & 158 OTHERS & 158 OTHERS & 158 OTHERS PETITIONER

AND

NDARA B COMMUNITY 1ST RESPONDENT

TRUSTEES OF DIASPORA UNIVERSITY TOWN 2ND RESPONDENT

UNIVERSAL RESOURCES INTERNATIONAL LIMITED 3RD RESPONDENT

RULING

1. This Ruling is in respect to the 2nd Respondent's Preliminary Objection dated 20th Mach 2025. The objection was raised on the following grounds:-
 - i. That the Petition is a non starter, bad in law and therefore incompetent.
 - ii. That this court does not have jurisdiction to hear and grant orders so sought in the aforesaid Petition.
 - iii. That the said Petition would be flouting the provisions of Section 63 of the Kenyan Constitution, 2010 and the Land Act, 2012.
 - iv. That the Limitation of Actions Act Cap.22 of the Kenyan Laws does not apply to the Community Land.
 - v. That the Petitioners reliefs as sought in the Petition cannot be granted by this court in as much as the suit land is community land.



2. The objection was supported by the 1st and 3rd Respondents and contested by the Petitioners.
3. The objection was canvassed by way of written submissions. The 1st and 3rd Respondents filed written submissions dated 4th April 2025, while the 2nd Respondent filed written submissions dated 30th March 2025 and the Petitioner filed written submissions dated 10th May 2025.
4. The 1st and 3rd Respondents submitted that the Petition is incompetent, and does not meet the threshold set out in the case of *Anarita Karimi Njau v The Republic* (1979) eKLR. It was further submitted that the issues raised in the Petition could not have been brought by way of a Constitutional Petition.
5. It was further submitted that a claim for adverse possession cannot be brought by way of a Constitutional Petition but by way of an Originating Summons. The court was urged to uphold the Preliminary Objection filed.
6. The 2nd Respondent submitted that under the *Constitution*, *Land Act* and *Community Land Act*, the Petitioners cannot invoke the principle of adverse possession against the Respondents. Counsel also made reference to the definition of the word “Community” under the *Community Land Act* which is defined to include:
 - “community” means a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes
 - a. Common ancestry;
 - b. Similar culture or unique mode of livelihood;
 - c. Socio-economic or other similar common interest;
 - d. Geographical space;
 - e. Ecological space; or
 - f. Ethnicity.
7. It was further submitted that Article 63 (1) of the *Constitution* states that Community Land shall vest and be held by Communities identified on the basis of ethnicity, culture or similar community of interest. It was also submitted that Section 63 (4) further emphasizes that Community Land shall not be disposed of or otherwise used except in terms of the legislation specifying the nature and extend of the rights of members of each community individually and collectively.
8. Counsel also submitted that Petitioners are not members of the Ndara B Community and therefore if allowed to invoke adverse possession and then title is issued in their personal names, it would be going against the provisions of Section 63 (4) of the Kenyan *Constitution*.
9. It was argued that the court should note that Article 63 (4) of the *Constitution* is couched in mandatory terms “The Land shall not be disposed of or otherwise used...”
10. It was also submitted that under Section 7 of the *Limitation of Actions Act*, a claim for adverse possession can only be brought against a person and not a “community”.
11. The court was urged to uphold the Preliminary Objection and struck out the entire Petition with costs.
12. The Petitioners in opposing the Preliminary Objection submitted that pursuant to the provisions of Article 162(2)(b) of the *Constitution* and Section 13 of the *Environment and Land Court Act*, the court



has jurisdiction to hear and determine the Petition and that the Petitioners claim being based on adverse possession, the same is properly before this court.

13. It was further submitted that the Petition is competent since the Petitioners' claim to have occupied the suit property since 1952 and that they have the requisite locus standi to institute the instant petition. The court was urged to dismiss the Preliminary Objection with costs.
14. The court has considered the Preliminary Objection and written submissions filed and the main issue for consideration is whether the Preliminary Objection is merited.
15. It is trite law that a Preliminary Objection must be raised on a point of law as reiterated in the case of *Mukhisa Biscuits Manufacturing Co. Ltd V. West-End Distributors Limited* (1969). E.A 696. In *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR the Court of Appeal highlighted that:

“...A Preliminary Objection 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...”
16. The circumstances under which a Preliminary objection can be raised and canvassed was discussed in the case of *Oraro v Mbaja* [2004] eKLR, where the court (per Ojwang J. as he then was);

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a 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 a 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.” [Emphasis mine]
17. A preliminary objection in a constitutional petition is a legal argument raised before the main merits of the case are heard, asserting a point of law that, if upheld, would dismiss the petition without a full trial. It's essentially a "demurrer" that challenges the legal validity of the claim, assuming all the facts presented by the other side are true.
18. Looking at the totality of the issues raised in this petition, it is clear to me that the underlying question of whether the Petitioners rights have been denied, violated, infringed or threatened through the impugned actions of the Respondents or whether the said actions is inconsistent with, or in contravention of the Constitution and the law are issues which can only be considered during trial.
19. As pointed out in the case of *Cami Graphics Limited v Chief Registrar of the Judiciary & 2 others; Commissioner of Lands & 4 others (Interested Parties)* (Constitutional Petition 543 of 2022) [2024] KEHC 2999 (KLR) (Constitutional and Human Rights) (15 March 2024) (Ruling):

“(22)Where a party moves this Court under Article 22 of the Constitution, the Court has jurisdiction in terms of Article 23(1) as read with Article 165(3)(d) to determine the petition. However, the claim must be that the action complained of violates or threatens a right or fundamental freedom and the relief sought must be aimed at redressing that violation.”
20. There can be no denial that what is before this court is a constitutional petition, challenging what the petitioners perceives to be constitutional infractions on various articles of the Constitution.



21. It therefore follows that the contestation as to the form of the said Petition, the nature of the reliefs sought by the Petitioners and the applicability of the provisions of the Limitation of Actions Act, the provisions of the Constitution and the Community Land Act in claims of adverse possession are equally contested issues which can only be determined and considered on merit and not at this preliminary stage. The said issues cannot be considered summarily in the manner sought by the Respondents without hearing the parties.
22. Consequently, it is the finding of this court that the 2nd Respondent's Preliminary Objection is unmerited for seeking to raise issues which can only be determined on merit and not summarily at this stage.
23. In the circumstances the said Preliminary Objection dated 20th March 2025 is hereby dismissed and its costs to abide the outcome of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY/OPEN COURT AT VOI THIS 29TH DAY OF MAY 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mwazighe for the Petitioners.

Ms. Zulekha for the 1st & 3rd Respondents.

Mr. Onindo for the 2nd Respondent.

Court Assistant: Mary Ngoira.

