



**Shah & another v County Government of Kisumu & another;  
Kisumu City Board (Interested Party) (Environment & Land Petition  
E005 of 2020) [2022] KEELC 15409 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15409 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND PETITION E005 OF 2020  
SO OKONG'O, J  
DECEMBER 19, 2022**

**BETWEEN**

**NAVINCHANDRA LALJI SHAH ..... 1<sup>ST</sup> PETITIONER**

**SANDIP LALJI SHAH ..... 2<sup>ND</sup> PETITIONER**

**AND**

**COUNTY GOVERNMENT OF KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**ACTING CITY MANAGER ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KISUMU CITY BOARD ..... INTERESTED PARTY**

**RULING**

1. This suit was brought by the petitioners by way of a petition dated December 29, 2020. In the petition, the petitioners sought the following reliefs;
  1. A declaration that the actions of the respondents are illegal, unconstitutional and in contravention of the fundamental rights and freedoms of the petitioners and are therefore null and void.
  2. A declaration that the 2<sup>nd</sup> respondent has contravened chapter 6 of the *Constitution* as read with the *Leadership and Integrity Act* No 19 of 2012 and the *Public Officer Ethics Act* No 4 of 2003.
  3. A declaration that  

“Kisumu City Local Physical and Land Use Development Plans”



and any other development plan in so far as it purports to declare all or any of the suit properties to be public properties or as reserved for public use or purports to declare that the properties or any of them have been set aside for use other than that for which permission has been granted is in contravention of the Constitution and the Urban Areas and Cities Act No 13 of 2012.

4. A permanent injunction or judicial review writ of prohibition restraining the respondents whether by themselves, their agents or anyone claiming through them from interfering with the petitioners' use and possession of the suit properties.
  5. General damages for trespass.
  6. General damages for contravention and breach of the petitioners' constitutional rights and freedoms.
  7. Costs of the petition.
2. In their petition, the petitioners have averred that they are the registered leasehold proprietors of all those parcels of land known as title Nos Kisumu Municipality/Block10/503,504,505,506,507,508,509,510,511,512,513,514,515 and 517(hereafter together referred to as "the suit properties" and individually as

"plot No 503, plot No 504, plot No 505, plot No 506, plot No 507, plot No 508, Plot No 509, plot No 510, plot No. 511, Plot No 512, plot No 513, plot No 514, plot No 515 and plot No 517"

respectively). The petitioners have averred that plot No 503 is developed with a 6-unit block of apartments while plot Nos 504, 505,506,507 and 508 are developed with children's playground, a "banda", stores and a garden. The petitioners have averred that the 1<sup>st</sup> petitioner has occupied plot No 503 since 1996. The petitioners have averred that the suit properties were created following a subdivision of title No Kisumu Municipality/Block10/105 (hereinafter referred to as "the original parcel"). The petitioners have averred that the suit properties were created with the knowledge of the defunct Municipal Council of Kisumu, the 1<sup>st</sup> respondent's predecessor. The petitioners have averred that they have over the years paid land rates for the suit properties to the Municipal Council of Kisumu and subsequently to the 1<sup>st</sup> respondent.

3. The petitioners have averred that plot No 517 was reserved for the petitioners for the development of a health facility and that on 18<sup>th</sup> December 2017, the 1<sup>st</sup> respondent granted them a conditional change of user of the plot from the said health facility to "commercial-cum-residential". The petitioners have averred that the 1<sup>st</sup> respondent developed what it referred to as "Kisumu City Local Physical and Land Use Development Plans" (hereinafter referred to only as "Kisumu Development Plan") in which it designated plot No 517 as reserved for public use contrary to its approval of change of use referred to earlier. The petitioners have averred further that in the same Kisumu Development Plan, the 1<sup>st</sup> respondent has designated the area where the suit properties are situated as a "Medium Residential Area" without taking into account the existence of plot No 517 which is commercial-cum residential.
4. The petitioners have averred that when Kisumu Development Plan was published, they raised an objection through a memorandum dated July 16, 2020 and that the respondents did not respond to the same. The petitioners have averred that on December 20, 2020, the 2<sup>nd</sup> respondent stormed the suit properties without notice to the petitioners in the company of the security and enforcement officers employed by the 1<sup>st</sup> respondent and declared that the same was public land and that the same had been grabbed by the petitioners and would be repossessed and the developments thereon demolished. The



petitioners have averred that subsequent to that invasion, the 2<sup>nd</sup> respondent has given to the petitioners several verbal directives to vacate the suit properties in default of which they would be forcefully evicted from the same and their developments demolished.

5. The petitioners have averred that the suit properties are private land and attempts by the respondents to forcibly take over the same without compensation and due process of the law is unconstitutional. The petitioners have averred that the interested party has been joined in the petition due to the fact that the 2<sup>nd</sup> respondent has usurped its powers and mandate in that it has not made a declaration that the suit properties are public land that the same have been grabbed.
6. Together with the petition, the petitioner filed a notice of motion application dated December 29, 2020 seeking a conservatory order in the nature of a temporary injunction restraining the respondents from trespassing upon, interfering with, evicting, demolishing or otherwise interfering with the suit properties pending the hearing and determination of the petition.
7. In response to the petition and the said application for a conservatory order, the respondents and the interested party filed grounds of opposition dated January 20, 2021 in which the respondents and the interested party (together referred to as “the respondents”) have raised several issues. The respondents have termed the petition and the application as unmerited, based on hearsay, unfounded fears and “dark imaginings”. The respondents have averred that the petition and the application are not based on any relevant or admissible evidence. The respondents have averred that the original parcel from which the suit properties were created was public land and that the same was acquired illegally by the petitioners. The respondents have averred that the petitioners have not produced any evidence showing how they acquired the said parcel of land. The respondents have contended that the titles to the suit properties having been acquired by the petitioners illegally, the same do not enjoy the protection of the law. The respondents have urged the court to dismiss the petition and the application and to proceed to make a finding that the suit properties were acquired irregularly and order the cancellation of the titles for the same. The 2<sup>nd</sup> respondent filed a replying affidavit sworn on July 1, 2021 in response to the application for a conservatory order in which he raised the same issues in the respondents’ grounds of opposition.
8. In addition to the grounds of opposition and replying affidavit, the respondents filed an answer to the petition and a cross-petition. In their answer to the petition and cross-petition, the respondents reiterated that the original parcel from which the suit properties were created was public land and that the same was acquired by the petitioners corruptly, illegally and fraudulently. In their cross-petition, the respondents have sought the following reliefs against the petitioners;
  1. A declaration that the 1<sup>st</sup> respondent is the rightful owner of the original parcel and the resultant subdivisions comprised of the suit properties which are public land.
  2. A declaration that the purported acquisition of the original parcel and the subsequent subdivision of the same by the petitioners is illegal, null and void.
  3. Rectification of the register for the original parcel by cancellation of the registration of the petitioners as the owners thereof and the registration of the 1<sup>st</sup> respondent and the owner thereof.
  4. A declaration that the occupation of the original parcel and the suit properties by the petitioners is illegal and an order for their eviction from the properties.
  5. A permanent injunction to restrain the petitioners from interfering with the respondents’ use and occupation of the original parcel and resultant subdivisions and from transferring, selling and encumbering the said properties.



9. The petitioners filed a reply to the respondents' answer to the petition and an answer to the cross-petition on April 19, 2022.
10. The petitioners' application for a conservatory order was heard by Ombwayo, J who in a ruling delivered on September 23, 2021 allowed the same with costs to be in the cause. In the ruling, Ombwayo, J stated as follows in part:

“I do find that the petitioners have a *prima facie* case that they acquired the suit property legally and followed the relevant procedure to acquire the certificate of lease and has been faithfully paying land rates and rent to date. The petitioners have been having a quiet and peaceful enjoyment of the property after acquiring the certificate of lease. However, the evidence will be tested during full hearing of the suit. Due to the foregoing, I am satisfied that the petitioners have established a *prima facie* case against the respondents.”
11. What is now before me is a notice of preliminary objection dated July 6, 2022 by the respondents. In the preliminary objection, the respondents have urged the court to dismiss the petitioners' petition without the necessity of a hearing on the following grounds;
  1. That the petition discloses no constitutional issue and is merely an attempt to constitutionalize a matter that relates to land allocation and adjudication.
  2. The petition offends the doctrine of constitutional avoidance by seeking the application of the [Constitution](#) on matters fully addressed by statute.
  3. The petition offends the doctrine of exhaustion in so far as the complaints raised in the petition relates to actions of the 2<sup>nd</sup> respondent who by dint of sections 12, 28 and 29 of the [Urban Areas and Cities Act](#) implements the decisions and the functions of the interested party and therefore the court does not have jurisdiction to determine the matter in light of the provisions of articles 234(2)(i), section 77 of the [County Governments Act](#) and sections 85, 86 and 87 of the [Public Service Commission Act](#).
  4. The petition is incompetent, misconceived, vexatious and an abuse of the process of the court.
12. The petitioners filed grounds of opposition on September 21, 2022 to the respondents' notice of preliminary objection. In their grounds of opposition, the petitioners have contended that there is no rule in the rules regulating petitions providing for a preliminary objection. The petitioners have contended further that the objection by the respondents is contrary to article 159 of the [Constitution](#). The petitioners have contended further that the respondents have already filed an answer to the petition and that the issues raised in the preliminary objection are not anchored in that answer and as such the objection is an abuse of the court process. The petitioners have contended further that the respondents' application was not made in good faith coming after the court dismissed their application dated July 1, 2021 through which they sought the court's assistance to help them fish for evidence. The petitioners have contended that the objection is a contradiction in that the respondents themselves have filed a cross-petition. The petitioners have termed the preliminary objection as wholly misconceived.
13. The notice of preliminary objection was heard by way of written submissions. The respondents filed their submissions on October 25, 2022 while the petitioners filed their submissions in reply on November 9, 2022. In their submissions, the respondents have submitted that; the petition discloses no constitutional issue, offends the doctrine of constitutional avoidance and the doctrine of exhaustion. In their submissions in response, the petitioners have reiterated that the preliminary objection has no basis in the rules and as such a non-starter. The respondents have submitted further



that the preliminary objection is not anchored in the respondent's pleadings and as such raises new issues without amendment of pleadings. The petitioners have submitted further that their petition is properly before the court and that they are not before the court to resolve a dispute over allocation or ownership of land. The petitioners have submitted that their complaint concerns the manner in which the respondents have attempted to take possession of the suit properties without following the process laid down in law. The petitioners have submitted that some of the reliefs sought in the petition cannot be prayed for in a plaint and that the respondents have not indicated in what manner they would be prejudiced if the suit proceeds in the form in which it is.

#### **Analysis And Determination:**

14. I have considered the respondents' notice of preliminary objection, the grounds of opposition filed in response thereto by the petitioners and the respective submissions by the advocates for the parties. The following is my view on the matter: In *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others* [2014] eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) EA 696.

“‘a preliminary objection 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that 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 exercise of judicial discretion.”

15. In *Oraro v Mbaja* [2005] 1 KLR 141, the court stated that:

“A preliminary objection correctly understood is 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 process 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. The court's discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised.”

16. In *CNM v WMG* [2018] eKLR, the court stated as follows on what constitutes a constitutional issue:

"21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & others vs MEC for Education and Training, Eastern Cape &*



others (2002) 23 ILJ 81(CC) in which Justice O'Regan recalling the Constitutional Court's observations in *S v Boesak* (2001)(1)SA 912(CC) notes that:-

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself:

If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the bill of rights. If regard is had to this and to the wide scope and application of the bill of rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”

17. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the Supreme Court stated that:

(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 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 principle well developed in the comparative practice, we hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> 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.”

18. In *Uburu Muigai Kenyatta v Nairobi Star Publications Ltd* [2013] eKLR the court stated as follows:

“...I need say no more. Where there is a remedy in civil law, a party should pursue that remedy ... My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG v SK Dutambala Cr Appeal No 37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”



19. This position was further emphasised in *Leonida Aloo Odhiambo v Attorney General & another* [2020] eKLR where the court stated as follows:

“Further, it is an established practice that where a matter can be disposed of without recourse to the *Constitution*, the *Constitution* should not be invoked at all. The court will pronounce on the constitutionality of an action only when it is necessary for the decision of the case to do so and that if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

20. It is on the foregoing principles that the respondents’ notice of preliminary objection falls for consideration. I am of the view that the petitioners’ main complaint in the petition relates to the respondents’ alleged acts of trespass. There is also a limb of the complaint that touches on the legality or otherwise of Kisumu City Local Physical and Land Use Development Plans. I am in agreement with the respondents that these are issues that have a civil law remedy. It was not necessary at all to invoke the constitutional jurisdiction of this court to redress the said complaints. What this means is that the petitioners should have simply filed a plaint rather than moving the court through a constitutional petition. The petitioners have argued that one of the reliefs that they have sought is a judicial review which they could not seek in a plaint. What I wish to say in response is that the prayer for judicial review order in the nature of a prohibition was not necessary for the kind of dispute before the court. The permanent injunction already sought would have sufficed. In a dispute of the nature before the court that concerns alleged acts of trespass, issues of ownership of land are bound to arise. Constitutional petitions and judicial review are not appropriate procedures for determining such issues. In the present case, the court will be called upon to determine how a parcel of land that was allocated for use as “a nursing home” was sold before the same was developed and again how the new owners subdivided the same into residential plots leaving only one plot for “main hospital” whose user was again changed to “commercial cum-residential”. These are issues that should be determined in a normal civil suit. In *Republic v County Government of Tana River & 2 others* [2018] eKLR, the court while dealing with an application for judicial review stated as follows:

“Having said that, I note that the underlying dispute in this proceedings is ownership of trust land. Judicial review proceedings in my understanding is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the name of the applicant and whether some laid down procedures were followed or not. While faced with a similar issue in *Republic v Exparte Karia Misc Application No 534/03*, Justice Nyamu, Justice Ibrahim and Justice Makhanda held as follows;

“In cases where the subject matter or the question to be determined involves ownership of land and the rights to occupy land, namely occupation and disposition, there would be need to allow viva voce evidence and cross examination of witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents they would be copies that would not be sufficient to establish authenticity of title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”



21. In *Livingstone Kunini Ntutu v Minister of Land and 4 others* [2014] eKLR, the court stated that:

“We would align ourselves with the school of thought which holds that judicial review is not efficacious remedy where the process under which a title is obtained is in dispute. In such a situation, a civil suit in which the parties can call witnesses and adduce evidence is the most appropriate remedy.”

22. Having said that much in favour of the respondents, I want to say that my hands are tied in this matter and as such, I cannot grant the orders sought by the respondents. As I mentioned earlier, the court while considering an application for a conservatory order herein made a finding that the petitioners had established a *prima facie* case. That *prima facie* case could only be a *prima facie* constitutional case. In *Kevin K Mwiti & others v Kenya School of Law & others* [2015] eKLR the court stated as follows:

"51. The first issue for determination is whether the petitioner has established a *prima facie* case. A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable constitutional issues. (Emphasis added). It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition.”

23. The court having made a finding that the petition herein raises *prima facie* constitutional issues, this court which is not an appellate court cannot without hearing the main petition make another finding that the petition raises no constitutional issues or that the petitioners should have pursued the remedies sought herein in another forum. The finding of a *prima facie* case made at the hearing of an application for a conservatory order can only be controverted on appeal or at the hearing of the petition. A preliminary objection falls short of that.

24. The other issue militating against the grant of the orders sought by the respondents is the fact that the issues raised in their notice of preliminary objection are not anchored on any pleading on record. As I have mentioned earlier, the respondents filed grounds of opposition, answer to the petition and a cross-petition. In none of these did the respondents raise the issues the subject of their preliminary objection. As was held in the authorities that I have cited earlier, a preliminary objection should be based on a point of law that has been pleaded. In this case, the points of law on which the respondents have grounded their preliminary objection are not pleaded. The objection lacks foundation in the circumstances. The other issue raised by the petitioners to which the respondents did not respond was the fate of their cross-petition after the striking out of the petitioners’ petition. I am of the view that by filing a cross-petition, the respondents waived their rights if any to raise the issues the subject of the cross-petition.

25. The upshot of the foregoing is that I find no merit in the respondents’ and the interested party’s notice of preliminary objection dated July 6, 2022. The objection is dismissed with costs to be in the cause.

**DELIVERED, DATED AND SIGNED AT KISUMU ON THIS 19<sup>TH</sup> DAY OF DECEMBER, 2022.**

**S OKONG’O**

**JUDGE**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr D Otieno for the petitioners.



Mr Mongeri for the respondents and interested party.

Ms J Omondi - Court Assistant.

