



**Taireni Association of Mijikenda v Patel & 5 others (Environment & Land
Petition E007 of 2023) [2025] KEELC 431 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION E007 OF 2023
EK MAKORI, J
FEBRUARY 5, 2025**

BETWEEN

TAIRENI ASSOCIATION OF MIJIKENDA PETITIONER

AND

HARSHAD PURSHOTTAM PATEL 1ST RESPONDENT

NILESH PURSHOTTAM PATEL 2ND RESPONDENT

KHADIJA KHAIDUM NABHAN 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

LAND ADJ. OFFICER, KILIFI COUNTY 5TH RESPONDENT

COUNTY GOVERNMENT OF KILIFI 6TH RESPONDENT

RULING

1. The petitioner, through a petition dated 11th December 2023, prayed for judgment against the respondents, seeking orders inter alia that:
 - a. An order of declaration issues that the suit land does not form part of the estate of Nabhan Bin Rashid Bin Salim Bin Khamis.
 - b. An order of declaration does issue that the 1st and 2nd respondents forfeited their citizenship when they became residents of the United States of America.
 - c. An order of declaration does issue that the 1st and 2nd respondents cannot be constitutionally registered as proprietors of land held under freehold tenure.



- d. An order of declaration does issue that the occupants of property known as plot No. 1 Group X Mjibu Barani-Malindi Title no. LT. 37, FOLIO 163A FILE 3192 have acquired the same by adverse possession.
2. Simultaneously with filing the petition, the petitioner filed an application seeking orders inter alia for the issuance of conservatory orders staying the proceedings in ELC Case No. 85 of 2022 and ELC Case No. E005 of 2023 and for the issuance of conservatory orders staying any orders of eviction against the communities in occupation of property known as plot No. 1 Group X Mjibu Barani-Malindi Title No. Lt. 37, Folio 163a File 3192 issued in either file ELC Case No. 85 Of 2022 and/or ELC Case No. E005 of 2023 pending the hearing of the petition filed.
3. The 1st, 2nd, and 3rd respondents raised preliminary objections dated 14th May 2024 on the grounds that the petitioner lacks the capacity to institute the suit, that the court lacks jurisdiction to hear and determine the petition concerning the claim for adverse possession disguised as a constitutional petition thereby offending the provisions of Section 38 of the Limitations of Actions Act as read with Order 37 Rule 7 of the Civil Procedure Rules 2010. That the petition is defective, misconceived, lacks merit, and is an abuse of the court process. That the petition should be dismissed with costs.
4. The court first gave directions for the preliminary objection's disposal through written submissions.
5. I frame the issues for this court to determine - whether we have constitutional petitions, whether this court has jurisdiction to hear the petition, whether the petitioner has the capacity to bring suit, and who should bear costs.
6. In their respective submissions, the parties have cited the relevant constitutional and statutory provisions and judicial precedents to guide this court in determining the issues raised—I will revert to the same if need be.
7. It is trite law that a preliminary objection is only raised on pure points of law, as stated in the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors (1969) EA 696. The court need not look elsewhere to determine the matter but rather to the pleadings.
8. A constitutional petition is not the proper forum to determine contested ownership disputes of properties if there is another manner provided by law or Statute. This is what is called the doctrine of constitutional avoidance. The rationale behind the doctrine is that in a constitutional petition like in this case, the court is usually asked to determine violations to or threats to fundamental rights rather than the rival parties claiming ownership to suit property. See Yaa v District Land Registrar Kilifi County (Petition 23 of 2022) [2023] KEELC 21694 (KLR) (16 November 2023), where this court declined to determine the legality of a title in a constitutional petition due to the doctrine of constitutional avoidance the court held as follows:

“ 12. Besides, the issues raised in this petition could easily have been crusaded in our civil courts to decide if the title issued to Thabiti Said Swaleh was obtained through fraud or corruptly gotten as to render it fit for cancellation as envisaged under Article 40(6) of *the Constitution*...

I am persuaded that the correct approach to take is to have the two parties holding or claiming equal rights as owners of the suit property or claiming title to it approach the Court and prove that one has a better title than the other... The Court will need to hear the two parties claiming ownership of the suit property – to check the root of the title. That journey cannot be achieved in this petition.



14. This is what the doctrine of constitutional avoidance envisages. This petition should have been heard as a normal civil suit for the court to decide who between the named parties should be the rightful owner of the land in question...
 15. The petitioner, as I have said, ought to have invoked the civil jurisdiction of the ELC to cancel the title on the grounds as set under Article 40(6) of *the Constitution* and Section 26(1) (a) (b) of the *Land Registration Act*.
 16. The upshot is that the current petition fails with costs.”
9. Okongo J. used a similar approach in the case of *Joseph Musikali Mutemi v National Land Commission & 2 others* [2021] eKLR, where he pronounced himself thus:
- “What I have before me is affidavit evidence on contested facts as to the validity or legality of the petitioner’s title to the suit property. I am unable to determine on affidavit evidence whether the suit property was created from a road and a railway reserve or not. If the property was created from land that was reserved for the Nairobi Southern Bypass road, as claimed by the respondents, then its title would be invalid. On the other hand, if the property was not created from a road reserve as claimed by the petitioner, the title would be valid. This is an issue that requires viva voce evidence to determine. The parties will have to move the court appropriately should they wish to have the issue determined now that this court has found the proceedings before the 1st respondent to have been unprocedural. Due to the foregoing, I will not grant prayer(a) of the petition.”
10. Similarly, in *Valentine Odhiambo & 2 others v HF Development & Investment Ltd & another* [2021] eKLR, Mwangi J. struck out a petition because it attempted to constitutionalize an ordinary civil matter, offending the doctrine of constitutional avoidance.
11. The current petition’s substratum seeks to stay matters pending before this court over the same issues originated via a plaint. It also seeks that the court discuss adverse possession. As correctly submitted by the 1st, 2nd, and 3rd respondents, this is not the proper forum. See the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, where the court held:
- “.....where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”
12. The petitioners claim adverse possession through a constitutional petition, which is not the avenue to ventilate such a claim. Their claim is raised in the two pending suits before this court. As submitted by the respondents – and correctly so - citing the case of *Edarus Salim Husein & 6 others v Shariffia Binti Salim & 3 others* [2022] eKLR, the Court held as follows:
- “As I have stated above, the substantive claim in this matter is for a declaration that the Petitioners have acquired the suit parcel of land by way of adverse possession. There is an elaborate procedure for filing a claim for adverse possession in the Civil Procedure Rules, which the Petitioners are aware of and should invoke instead of filing a Constitutional Petition. In the case of *Parkire Stephen Munkasio & 14 others v Kedong Ranch Limited & 8 others* [2015] eKLR (supra), the court held that:
- “I think this is a good point to also address the argument that this Petition is incompetent for seeking to pursue a claim for adverse possession as a Constitutional Petition. I agree with



this argument. Claims for adverse possession are adequately addressed by the *Limitation of Actions Act*, CAP 22, Laws of Kenya, and the Civil Procedure Rules, specifically Order 37 thereof. Claims of adverse possession are private law claims which need to be addressed through the private law legal channels provided. I do not see how the petitioners can assert a claim for adverse possession, a purely private law claim, through a constitutional petition. Indeed, I doubt if there is a constitutional violation, which one will point at when pursuing a suit for adverse possession. It follows that even if I am wrong on the point that the issue of adverse possession on behalf of the same parties herein has previously been litigated, the aspect of this Petition that relates to pursuance of a right over land by dint of adverse possession is incompetent, for there are laid down procedures on how to pursue an adverse possession suit, which ought to be followed.”

The above case summarizes the holding that a party cannot claim adverse possession through a petition.”

13. A Similar position was adopted in *Parkire Stephen Munkasio & 14 others v Kedong Ranch Limited & 8 others* [2015] eKLR. In its holding, the court struck out the prayer for adverse possession for being wrongly pursued under a constitutional petition.
14. As the petition seeks a claim of adverse possession through a petition, which is not the procedure stipulated under Order 37 Rule 7 of the Civil Procedure Rules as read with Section 38 of the Limitations of Actions Act, this petition must fail.
15. The other pleas that the respondents are not Kenyans but USA citizens and therefore cannot hold freehold title can still be ventilated in the two pending suits the petitioners seek to stay.
16. On the other preliminary objection raised, I agree with the 1st and 2nd respondents that a society is an unincorporated body and cannot institute proceedings in its name. It can only bring proceedings through its registered officials with the express authority of the members of the said society. See *Kituo Cha Sheria v John Ndirangu Kariuki & another* [2013] eKLR where the court held that:

“ 39. As a general rule, unincorporated legal persons including societies, clubs and business-names can only bring proceedings through their registered or elected officials or in their proprietor’s names.”
17. The petitioner further stated that it is instituting the suit on behalf of the occupants of the suit property, therefore making this a representative suit. In a representative suit, the person instituting proceedings has to demonstrate that they have permission to bring action on behalf of the people they seek to represent. See *Ephantus Muriuki Muhoro & 4 others v National Land Commission & another* [2018] eKLR where the court held that:

“ where the action is brought in the name of some of the group members on behalf of others, it is a requirement of law that the other members on whose behalf the action is brought be listed and their authority for filing of the group action be sought and obtained if they are to benefit from the reliefs sought in the group action. This is especially so where remedies of private nature as opposed to public remedies are sought in the suit.”
18. In this case, the petitioner has not produced any authority to institute pleadings on behalf of the persons it wishes to represent. The institution of suits on behalf of persons who may or may not have authorized it is detrimental, as the parties will have difficulty enforcing court orders when the specific persons being represented cannot be identified.



19. I further agree with the 1st and 2nd respondents that this petition represents an abuse of the court process. Abuse of court process was defined in the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR as follows:

“...the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive.”

20. The *Muchanga Investment Ltd Case* (supra) cited the Nigerian case of *Sarak v Katoye* (1992) (NWL 9pt 264), which defines the concept of abuse of judicial process as follows:

- “(a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.
- (d) (sic meaning not clear))
- (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”

21. The petitioner represents several persons occupying the suit property, plot No. 1 Group X Mjibu Barani-Malindi Title No. LT. 37, FOLIO 163A FILE 3192 is registered in the names of the 1st and 2nd respondents. The 1st and 2nd respondent instituted ELC Case No. E005 of 2023 lists all the persons who have trespassed onto the suit property as the defendants. The persons represented by the petitioner in this case are the same persons listed as the defendants in the other case. The subject matter in both cases is also the same.

22. Conversely, the 3rd respondent instituted ELC Case No. E085 of 2022, suing trespassers of the same property, plot No. 1 Group X Mjibu Barani-Malindi Title no. LT. 37, FOLIO 163A FILE 3192, the same persons the petitioner represents herein.

23. The court in ELC Case No. E005 of 2023 and ELC Case No. E085 of 2022, in trying to make a just determination, instructed the Deputy Registrar to conduct a site visit on the suit property with a pending report. Therefore, any issues the defendants might have had in the said cases were better off being raised in the same matters instead of instituting a fresh suit. The petitioner’s actions in instituting a fresh suit involving the same parties, subject matter, and the same issues of who the rightful owner of the suit property amounts to an abuse of the court process, and consequently, this petition ought to be struck out.

24. The upshot is that the preliminary objections raised by the respondents are germane and are allowed; the current petition is hereby struck out with costs to the respondents.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 5TH DAY OF FEBRUARY 2025.



E. K. MAKORI

JUDGE

In the Presence of:

Mr. Ongera, for the Petitioner

Mr. Mwarumba, for the 1st and 2nd Respondents

Mr. Lisanza, for the 3rd Respondents

Happy: Court Assistant

In the Absence of:

Ms. Apiyo, for the Interested Party

