

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC PETITION NO. 3 (B) OF 2023

CATHERINE MWANGALE

(As the Administratrix of the Estate of the late

ANDREW

SARAI

MWANGALE)-----PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL-----

RESPONDENT

RULING

1. The respondent took out a Preliminary Objection dated **10/4/2023** that:

- (1) *The court has no jurisdiction to entertain the petition under Article 162 (2) (b), (3) as read with 165 (5) (b) of the Constitution***
- (2) *The application and the petition offend Section 13 of the Environment and Land Court Act.***
- (3) *The petition as drawn amounts to constitutional avoidance as there are other avenues and forums with requisite jurisdiction to handle or resolve the dispute.***
- (4) *The court should therefore, down its tools and decline to hear the dispute or issue any order.***

2. The respondent relies on written submissions dated **17/5/2023**. It is submitted that the petitioner sues as the legal Administratrix of the estate of her late

husband, in respect of parcel LR No. **7076/1, 7076/2,** and **6138/4, Quintin Farm** situate in Trans Nzoia County, bequeathed to the deceased by his late father, who had bought it through a loan from the Agricultural Finance Corporation (A.F.C) **in 1991** for **Kshs.12,000,000/=**, only for the land to be invaded and occupied in **1991** by 'warriors' from the Sabaot tribe.

- 3.** The respondent submits that the petitioner alleges that the invasion and occupation of the suit properties were without the acquiescence of the then KANU government, and out of frustration, the deceased registered owner sold it to the government of Kenya in **1997**, and the same was transferred to the Settlement Funds Trustees (SFT) in **5/2/1997**.
- 4.** Again, the respondent submits that the petitioner alleges that the failure of the Government of Kenya to prevent the alleged invasion of the suit properties by the 'warriors' from the Sabaot tribe violated the deceased registered owner's right to property and hence seeks declaration orders of violation of right to property under **Sections 70** and **75** of the Repealed Constitution **1963, Articles 3, 12,** and **17** of Universal Declaration of Human Rights (UDHR) **1948;** special ad general damages, loss of income and profit,

loss of prospective future use of the land and interest arising out of the pleadings. The respondent urges the preliminary objection falls under the description set in **Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696**, for it is solely based on law, namely; the Constitution and the Environment and Land Court Act, with no factual issues being ventilated.

5. The respondent submits that jurisdiction is everything, and without it, the court downs its tools as held in **Owners of Motor Vessel "Lillian S" -vs- Caltex Oil (K) Ltd [1989] eKLR**. In this instance, the respondent submitted that the court should find that it lacks jurisdiction to move even one step further, including to transfer the matter to the proper court, but to decline jurisdiction and let the petitioner file the dispute in the appropriate forum. Reliance was placed on **John Beecroft Saunders** in **Words and Phrases Legally Defined Vol.3, Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & Others [2013] eKLR, Samuel Kamau Macharia & Another -vs- KCB Ltd & Others [2018] eKLR and Orange Democratic Movement -vs- Yusuf Ali Mohamed & Others [2018] eKLR**.

6. In addition, the respondent submits that pursuant to **Article 162(3)** of the Constitution, Parliament enacted the Environment and Land Court Act 2011, which defines the jurisdiction of the Environment and Land Court, under **Section 13(1) & (2) and (7)**. It was submitted that the orders sought by the petitioner are supposed to be handled by the ELC Court as held in **Republic -vs- Karisa Chengo & Others [2017] eKLR.**
7. The respondent further submits that courts should employ the predominant purpose test as held in **Suzanne Achieng Butler & Others -vs- Redhill Heights Investment Ltd & Another [2016] eKLR and Co-operative Bank of (K) Ltd -vs- Patrick Kangethe Njuguna & Others [2017] eKLR.**
8. There is no dispute that the petition was initially filed at the Milimani High Court, Constitution and Human Rights Division. Directions were given on **13/7/2022** for the respondent to file a response to the main petition within **30** days. The petitioner was given corresponding leave to file a further affidavit within **10** days upon service of the response. The matter was listed for directions on **13/10/2022** and later on **6/2/2023**. Parties were granted an extension of time to comply on **17/4/2023**. The respondent raised the

preliminary objection. Parties were directed to canvass the same by way of written submissions within **28** days. On **27/11/2023**, counsel for the petitioner conceded that the matter belongs to the Environment and Land Court, which the respondent's counsel agreed to. The court transferred the matter to this court. The Attorney General, since **22/2/2024**, has been given more than five mentions to confirm the filing of responses.

- 9.** A preliminary objection, as defined in **Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696** is a point of law that 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 include objection to jurisdiction of the court, limitation and capacity to sue.
- 10.** The preliminary objection raised by the respondent touches on the jurisdiction of this court, the doctrine of constitutional avoidance, the non-exhaustion of the alternative available forums to hear and determine the dispute, and as being offensive to the Environment and Land Court Act.
- 11.** As a starting point, the petitioner describes herself as the wife of the late Andrew Sarai Mwangale, who died domiciled in the United States of America on

10/4/2015. The petitioner pleads that her late husband was the son of the late Elijah Mwangale, the registered owner of the land, who passed on, on **25/11/2004**, and letters of administration were issued to Salome Naliaka Mwangale on **18/4/2005**, but did not include the suit properties herein, as part of the estate as it had been willed to her husband. The petitioner avers that her late husband did not pursue the suit lands before he passed on, to which she took out letters of administration on **28/8/2018**.

12. The petitioner brings the petition on behalf of the estate of her deceased husband, allegedly bequeathed to him by the late father-in-law.

13. She avers that she was shocked to find that the land had been transferred to Settlement Fund Trustees (S.F.T), in dubious and unclear circumstances; was also illegally and unlawfully invaded and occupied by Sabaot tribe members, who have subdivided it into small portions. The petitioner avers that though the deceased registered owner acquired the land, invested, and developed it, it was wrongfully, unlawfully, and without any color of right trespassed into and invaded by Sabaot tribe members, a sub-clan of the Kalenjin tribe, with the connivance of the provincial administration and the active direction,

sponsorship, perpetuation, involvement of the KANU government, to brutally evict and unlawfully disposes the registered owner from the land.

- 14.** The petitioner avers that due to the invasion by squatters, the deceased's father-in-law, on **29/10/1993**, offered to sell the suit properties to the S.F.T, on a walk-in walk-out basis so that squatters could be allocated the land. In view of the constraints of the loan of **Kshs.16,948,752.40/=** as of **10/2/1995** arrears, he had no choice but to dispose of the land below the market rate of **Kshs.46,750,000/=**, to mitigate the loss he could have otherwise incurred, which was **Kshs.33,000,000/=** as of **9/10/1996**.
- 15.** Similarly, the petitioner avers that after protracted negotiations, the suit properties were the S.F.T, on **5/2/1997**, who discharged the loan obligations with the A.F.C, only that for **6** years, he never realized any income, harvest, or yield of the said property, given the invasion.
- 16.** The petitioner blames the Government of Kenya for failing to protect the deceased registered owner's constitutional right to property, by failing to prevent the invasion by the said Sabaot tribespeople, who had no right whatsoever to settle on the land. Additionally,

the petitioner blames the Government of Kenya for participating in engineering, orchestrating, directing, and consciously having the deceased registered owner evicted from his lawful suit land, designed as an unlawful and illegal scheme, and set in a stream of events and consequences leading to the forceful purchase of the suit property and unlawfully secured the suit properties for possession and occupation by the said Sabaot tribe members, at no cost to them. She termed the acts as amounting to an assault on the deceased's constitutional right to property by dispossessing him of his property and forcefully, unlawfully, violently, maliciously, and illegally transferring it to other persons without payment to him, of due and prompt compensation. Further, the petitioner avers that the deceased registered owner was discriminated against, contrary to the Constitution and subjected to physical, emotional distress, intimidation, coercion, violence, indignity, insecurity, threats, fear, anxiety, despondency and all manner of suffering contrary to **Sections 70** and **75** of the Repealed Constitution of Kenya and **Articles 3, 5** and **14** of the African Charter on Human and Peoples Rights (ACHPR) and **Articles 3, 12** and **17** of the Universal Declaration on Human Rights (UDHR).

17. The petitioner prays for:

- (1) Declaration that the deceased registered owner's rights relating to the right to ownership of property and prompt, full, fair, and just compensation were violated by the government of Kenya.**
- (2) Declaration that the deceased registered owner's rights under Articles 31, 13, and 17 of the UDHR relating to the protection of private property were violated by the government of Kenya.**
- (3) Declaration that the deceased registered owner's right under Articles 3, 12, and 17 of the Universal Declaration of Human Rights UDHR relating to the protection of private property were violated.**
- (4) Special damage of Kshs.65,699,500/=, being the total compensation for LR Nos. 7076/1, 7076/2, and 6138/4, Quintin Farm as of 5/2/1997, plus interest at commercial bank rates till payment in full.**
- (5) Kshs. 11,710,000/= from 1992 until payment in full.**
- (6) Compensation for maize crops in 150 acres destroyed by the invaders.**
- (7) Investment cost of Kshs.3,000,000/= prior to the invasion.**
- (8) General damages under Articles 23(3)(e) of the Constitution of Kenya for violation of the deceased Registered owner's right to property.**
- (9) Loss of income and property from the date of invasion.**
- (10) Loss of prospective future use of the property.**
- (11) Interest.**
- (12) Costs of the petition.**

18. The petition is supported by the affidavit of Catherine Adhiambo Olweny Mwangale, sworn on **22/6/2022**, attaching a copy of the death certificate for her husband as **CAOM'1'**, copy of the Petition in Nairobi Succession **371 of 2001** as **CAOM'2'**, copy of grant issued to Salome N. Mwangale as **CAOM'3'**, limited grant of letters of administration *ad colligenda bona* as **CAOM'4'**, copies of certificates of titles as **CAOM'5 (a), (b) and (c)'**, correspondences as **CAOM'6'**, loan application documents and correspondences as **CAOM'7 (a) and (b)'**, inventory as **CAOM'8'**, correspondence on invasion **CAOM'9'**, relevant background literature and publication on the tribal clashes as **CAOM' 10(a), (b), (c) and (d)'**, letters to the PS Ministry of Land and Housing Development as **CAOM'11'**, copies of negotiation correspondences marked **CAOM'12 (a) and (b)'**, letter from A.F.C as **CAOM'13'**, letter from Ministry of Lands and Settlement dated **27/9/1995** as **CAOM'14'**, letter from the Ministry of Lands and Settlement dated **9/10/1996** as **CAOM'15'**, correspondences with S.F.T leading to the transfer on **5/2/1997** as **CAOM'16 (a), (b), (c), (d) and (e)'**, copy of deceased registered owners request and Highland Valuers Valuation dated **3/2/1996** as **CAOM'17'**, grant of letters of

administration *ad litem* as **CAOM'18'**, valuation report dated **30/1/2019**, as annexure **CAOM'19'**.

19. The petition is equally supported by affidavits sworn by Janet Eloise Mwangale dated **12/6/2022**; Pius Wanyonyi Matanda sworn on **21/6/2022**; Patrick Masika Webale sworn on **21/6/2022**; David Nyongesa Namutali sworn on **21/6/2022**; Charles Wafula Barasa sworn on **21/6/2022**; Professor Washington Alima sworn on **21/6/2022** and lastly; Cleopus Wanyongo Wanyonyi sworn on **21/6/2022**.

20. The starting point is whether the petitioner has *locus standi* to bring this petition for and on behalf of the estate of the late Andrew Sarai Mwangale, on behalf of the estate of his late father, the late Elijah Wasike Mwangale. In paragraph **13** of the supporting affidavit sworn on **12/6/2022** to the petition, the petitioner has invited this court to find that in the circumstances hereto, she has the requisite *locus standi* in equity to pursue a claim in favor of her late husband for a property belonging to the deceased registered owner, which had been bequeathed to her deceased husband.

21. Section 82(a) of the Law of Succession Act defines one of the powers of a legal representative as to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or

arise out of his death for his estate. The jurisdiction of a constitutional court is to uphold or vindicate constitutional rights which have been contravened, threatened with breach, violated, and or breached as held in **Siewchand Ramanoop -vs- The Attorney General of Trinidad & Tobago, PC Appeal No.13 of 2004** and in **Alphie Subiah -vs- The Attorney General of Trinidad & Tobago Privy Court Appeal No. 39 of 2007 as cited in Gitobu Imanyara & Others -vs- Attorney General [2016] KECA 557 (KLR)**.

22. A cause of action was defined in **DT. Dobie & Co. (K) Ltd -vs- Joseph Mbaria Muchina & Another [1980] eKLR**, as an act or conduct on the part of the defendant, which gives the plaintiff his cause of complaint. In **Karl Wehner Claasen -vs- Commissioner of Lands & others (2019) eKLR**, the respondents had taken the view that the right of the intestate court proceedings under **Article 22 (1)** of the Constitution is a close in action which is personal, does not survive the claimant and abates upon the demise of the claimant, unlike under **Article 22(2)** which survive the deceased;
23. At the Court of Appeal, the fundamental question was whether a constitutional petition seeking compensation

for alleged unconstitutional deprivation could be continued by a legal representative after the death of the petitioner. The court cited with approval **Phillip Karugaba -vs- Attorney General SC of Uganda Appeal No., 1 of 2004**, that whether or not a right of action in a constitutional petition survives the death of a petitioner depends on the nature of the petition and the reliefs sought. The court said that **Articles 22 and 258** of the Constitution provide that a petition may be instituted by a person acting on behalf of another person, as a member of a group or class of persons, or acting in public interest. The court observed that causes of action of a personal nature do not survive for the benefit of a deceased's estate, for they die with the person unless excluded under **Section 2(1)** of the Law Reform Act.

24. In addition, the court held that a cause of action is different from choses in action and includes a combination of facts that entitles a person to obtain a remedy in court from another person and includes a right of a person violated or threatened with violation of such rights by another. The court defined a chose in action, and therefore, the petition brought under **Article 40(1)** of the Constitution by the deceased for his properties was a cause of action vested in him

which survived for the benefit of the estate by virtue of **Section 2(1)** of the Law Reform Act, and which could be continued by his legal representative. The court observed that the right to institute court proceedings for enforcement of the Bill of Rights is not solely a personal right exercisable to a person in his interest.

25. In this petition, the petitioner pleaded that the suit properties were bequeathed to her late husband by her late father-in-law before he passed on, on **25/11/2004**. The suit properties were not part of the estate of the deceased father-in-law, going by the Grant issued to Salome N. Mwangale on **18/4/2005**. The copy of the records annexed as **CAOM ' 5(a), (b), (c) and (d)'** indicate that the suit land was transferred to the S.F.T, on **5/2/1997** by the late Elijah Mwangale for a consideration of **Kshs.33,000,000/=**. Between **1997** and **2004**, when the deceased registered owner passed on, there is no evidence that he had sued the government or the SFT for breach of his constitutional rights under **Sections 70 and 75** of the retired Constitution for forced purchase of his land, deprivation of property, invasion of his property, loss of income, profits, lost investments, denial of access of his land rights, entry into a sale agreement and transfer of the suit parcels of land through coercion,

intimidation, force and or compulsory acquisition of land without fair, prompt and just compensation. Between **2004** and **2015**, when the late Andrew Sarai Mwangale passed on. There is equally no evidence that he had filed a suit as a beneficiary of the land seeking to advance breach of contractual and constitutional rights to own land for his behalf and on behalf of the estate of his deceased, late father.

26. The question is whether the petitioner is empowered to enforce a personal action of her late father-in-law, for and on behalf of her late husband, who allegedly derived the right to the land by virtue of it being bequeathed to him. The petitioner pleads that the government infringed on the right to property of the deceased registered owner and that as a chose in action, it was enforceable by her late husband, hence the reason she can advance the claim. A constitutional tort refers to a private civil suit brought to redress a constitutional violation.

27. In **John Atelu Omilia & Another -vs- Attorney General & Others [2017] eKLR**, the court observed that constitutional torts are violations of one's constitutional rights by government servants. They are avenues through which individuals can directly appeal to the Constitution as a source of right, to remedy

government inflicted injury, and which is aimed at deterring constitutional rights violation.

28. In **Kimunai Ole Kimeiwa & Others -vs- Joseph Motari Mosigisi & Others [2019] eKLR**, the court observed that constitutional torts are encompassed in the Bill of Rights' liberty interests in circumstances where an abuse of power fairly characterizes the official conduct. In **Re Estate of Job Ndunda Muthike (Deceased) [2018] eKLR**, the court observed that any property which the deceased was not legally competent to freely dispose of during his lifetime and in respect of which his death had terminated his interest, could not form part of his estate and could not be the subject of an application for confirmation of Grant. **Section 3** of the Law of Succession Act defines a free property when a deceased is alive. Free property of a deceased person is such property that can be proved by documents such as a title deed, an allotment letter, a lease agreement, or a sale agreement.

29. In this petition, it is not in dispute that by the time the late Elijah Mwangale passed on in **2004**, he had already ceded all his interest over the suit properties to the S.F.T by 1997. Therefore, it could not have been possible for him to have bequeathed the suit

properties under a will to the late Andrew Sarai Mwangale by the time he passed on. It is, therefore, for this reason that Salome N. Mwangale, as the administratrix of the estate of the late Elijah Mwangale, did not and could not have included the Quintin Farm as part of the estate of the deceased husband. Equally, if the late Andrew Mwangale had been bequeathed any such property by way of a will, he would have during his lifetime put the will on probate and perhaps obtained letters of probate to found a cause of action against the registered owner; the S.F.T and against the estate of his late father for disposing of the land which already belonged to him. See also **Martevé Guest House Ltd vs Njenga & Others (Civil Appeal 400 of 2018 (2022) KECA 539 (KLR) (28th April 2022) (Judgment)**, with a dissent of W. Karanja J.A.

- 30.** If then the deceased father-in-law had not complained to the government after his property was allegedly invaded in **1992** and subsequently coerced into selling it to the S.F.T below the market price in 1997, could his late son have sustained a claim based on an alleged bequest before the death of his late father? Was the alleged a chose of action? In my considered view, the alleged cause of action under **Section 13** of the Environment and Land Court Act, which was not

transferable upon the death of the late Elijah Mwangale to his son and, by extension, to the petitioner. See **Phillip Jalang'o -vs- Ryan Properties Ltd [2020] KEELC 96 [KLR] and Roman Karl Hintz -vs- Mwangombe Mwakima [1984] eKLR.**

- 31.** In this instance, the late Elijah Mwangale was not in possession after 1997. See **Daniel Toroitich Moi vs Mwangi Stephen Murithi & Another (2014) eKLR.** In **Bell -vs- Moi & Another [2013] KESC 23 [KLR] (24th October 2013) (Ruling),** the applicant had alleged coercion imposed on the late father to surrender or transfer the land to the school. In this petition, the petitioner has alleged that her father-in-law was coerced government in order to settle the invaders. A claim based on fraud, illegality, and misrepresentation in acquiring land must be brought before the expiry of three years after the discovery of the fraud. It must be brought against the party who allegedly fraudulently acquired the land
- 32.** The respondent has invoked the doctrine of constitutional avoidance. It has been submitted that the petition offends **Section 13(7)** of the Environment and Land Court Act. In **Emmanuel Nyongesa & Others -vs- County Government of Trans Nzoia [2020] eKLR,** the court stated that the constitutional

court has a particular jurisdiction that is not open for general claims and frowns upon the practice of bringing ordinary disputes as constitutional petitions, especially where there are alternative remedies. The **Black Laws Dictionary 10th Ed, P 377** defines constitutional avoidance as a doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion. In **CCK & Others -vs- Royal Media Services Ltd [2014] eKLR**, the court held that the principle entails that a court will not determine a constitutional issue when the matter may correctly be decided in another forum or basis.

- 33.** The petitioner pleads that the late Elijah Mwangale was subjected to unfair treatment, discrimination, intimidation, coercion, forced eviction by the state agencies and later on forced to dispose of the suit properties at forced market value to settle squatters contrary to **Sections 70** and **75** of the retired Constitution, prohibiting deprivation of property of any description unless the deprivation is for public purpose, or in the public interest and is carried out under the Constitution or any Act of Parliament, requiring fair, prompt, full and just compensation and the right to access a court of law.

- 34.** In **Speaker of National Assembly -vs- James Njenga Karume [1992] eKLR**, the court observed that where there is a straightforward procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should strictly be followed. In **Abudha Nicholas -vs- Attorney General & Others SCOK Petition No. E007 of 2023**, the court observed that the availability of an alternative remedy does not necessarily bar the institution of a constitutional petition.
- 35.** The petitioner pleads that though the father-in-law entered into a sale agreement with the S.F.T, there was coercion and forced sale of the land to settle the squatters who had invaded the land. In **Mutuma Angaine -vs- M'Marete M'Muronga Court of Appeal No. 123 of 2006**, the court observed that when a person's property is forcefully acquired, the government must fully comply with the law.
- 36.** There is no dispute that the late Elijah Mwangale voluntarily and willingly sold and transferred his land in **1997** to the S.F.T. The Settlement Fund Trustees was a corporate body established under **Section 167** of the Repealed Agriculture Act Cap 318 Laws of Kenya. It is now governed and succeeded by Land Fund Trustees under Section 134-135 of the Land Registration Act.

- 37.** A claim for a right to recovery of land must be lodged before the expiry of **12** years under **Section 7** of the Limitation of Actions Act. The petitioner has not sued the S.F.T., who bought and are the registered owners of the suit parcels of land. **Section 167(2)** of the Agriculture Act, now repealed and replaced by **Sections 134** and **135** of the Land Act, give the S.F.T the capacity to sue and be sued, purchase, hold, manage, and enter into contracts as may deem necessary or expedient. The late Elijah Mwangale did not file the suit within 12 years from the date he sold and transferred the land based on coercion, fraud, misrepresentation, and breach of his constitutional rights against the buyer.
- 38.** The petitioner has not faulted that S.F.T could not enter into a land transaction with the land Elijah Mwangale. The petitioner has not denied that there was consideration paid of **Kshs. 33,000,000/=**, on a willing buyer-willing seller basis. The petitioner has not pleaded now the government interfered with the contract entered into between the S.F.T and the late Elijah Mwangale. There was no privity of contract between the late Elijah Mwangale and the respondent. A court of law cannot rewrite a contract between the parties unless elements of coercion, fraud, or undue

influence are pleaded and proved. See **National Bank of Kenya -vs- Pipe Plastic Samkolit (K) Ltd (2011) eKLR.**

39. A contract only affects parties to it and cannot be enforced by or against a non-party. See **William Muthee Muthomi -vs- Bank of Baroda CA No. 91 of 2004 and Savings & Loan (K) Ltd -vs- Kanyenje Karangaita Gakombe & Another (2015) eKLR.** A contract cannot confer rights or impose obligations on any person other than the parties.

40. Only a person who is a party to a contract can sue under it. See **Dunlop Pneumatic Tyre Co. Ltd -vs- Selfridge & Co. Ltd (1915] AC 847.** In **AFC -vs- Lengetia Ltd, Kenya Women Finance Trust -vs- Bernard Oyugi Jaoko & Others [2018] eKLR.** In **Midland Gen Ltd & Another -vs- Airspace Forwarders Ltd & Another [2016] eKLR,** the court held that a third party has no *locus standi* to sue on a contract. Further, in **Kenindia Assurance Co. Ltd -vs- Otiende [1991] KLR 38,** the court held that where a party purports to enforce a contract by way of a suit, the court is divested of jurisdiction.

41. In this petition, the court has observed that the late Elijah Mwangale had voluntarily sold and transferred the suit land in **1997** and lodged no complaint

regarding the legality of the sale agreement, transfer and registration until he passed on in **2004**. Similarly, the court has made a finding that the late Elijah Mwangale could not bequeath titles to the suit land to the late Andrew Sarai Mwangale before he passed on. Equally, the court has made a finding that the late Andrew Sarai Mwangale, between **1997** and **2004**, and between **2004** and **2015**, when he passed on, lodged no claim against the S.F.T, regarding the alleged bequeathed interest or rights over the suit land.

42. From the pleadings herein, there is evidence that there was no privity of contract between the respondent and the late Elijah Mwangale regarding the sale, transfer, and acquisition of the suit land by the S.F.T in **1997**. By extension, the nexus between the suit lands, the petitioner and the respondent is lacking. Therefore, no contractual, statutory, or constitutional rights had accrued or arisen between the late Andrew Sarai Mwangale on his part and the respondent that the petitioner can seek to enforce.

43. The necessary parties to the contract of sale and transfer of the suit lands are not before the court. See **Football (K) Federation -vs- Kenya Premier League Ltd [2015] eKLR**. Only parties to a contract

can sue and be sued under it. It can neither confer rights nor impose liabilities on others not privy thereto. See **City Council of Nairobi & Another -vs- Nairobi City Water & Sewerage Co. Ltd.**

44. A suit instituted by a person who has no capacity or *locus* to institute it is nullity *ab initio*. The petitioner has no *locus standi* for any legal or equitable remedy over the suit lands against the respondent.
45. The claim of fundamental rights presented by the petitioner is not justifiable. See **William Odhiambo Ramogi & Another -vs- Attorney General & 5 others [2018] KEHC 9327 (KLR)**. In **CCK & Others -vs- Royal Media Services Ltd (supra)**, the court observed that constitutional avoidance doctrine interrogates whether there are ways of resolving a dispute outside a constitutional court. The petitioner did not subject the matter to other available forums since it is a historical land justice claim. See **Goefrey Muthinja & others -vs- Samuel Munga Henry & others (2015) eKLR.**
46. The petitioner did not file a suit based on economic duress. See **Madhupaper International Limited -vs- Kerr [1985] eKLR. In Southlake Panorama Limited -vs- Kenya Electricity Transmission Company Limited & 3 others [2021] eKLR,** the

court observed that the doctrine of constitutional avoidance is invoked to ensure that the constitutional jurisdiction of the court is not misused by bringing ordinary disputes as constitutional petitions. Not every violation of a contractual obligation under the Law of Contract Act amounts to a constitutional petition. See **Bernard Murage -vs- Fineserve Africa Limited & 3 others [2015] eKLR**

47. In **James Kimwetich Kulei -vs- County Government of Uasin Gishu & Others' (2021) eKLR**, the petitioner had filed a constitutional petition seeking compensation and a declaration that there was a breach of contract. The court, guided by **Godfrey Paul Okutoyi & Others -vs- Habil Olaka & Another [2018] eKLR**, held that *"It is time it becomes clear to both litigants and counsel that rights conferred by statute are not constitutional rights under the Bill of Rights and therefore, a breach of an ordinary statute is redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with the statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation, or infringement*

of or a threat to a right or fundamental freedoms. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure".

48. In my considered view, even if there was privity of contract, and the petitioner could bring the petition or had a defined constitutional tort or cause of action, the petition still raises no constitutional questions or issues for this court to have jurisdiction.

49. The upshot is that I uphold the preliminary objection dated **10/4/2023** in terms of grounds No. **(3)** and **(4)**. The petition is dismissed for lack of capacity, incompetence, lack of merits, and as an abuse of the court process. There will be no order as to costs.

Ruling dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 5th day of March 2025.

In the presence of:

Court Assistant - Chemutai

Miss. Mwaura for Petitioner present

Jerubet for Attorney General present

**HON. C.K. NZILI
JUDGE, ELC KITALE**

ORIGINAL