Nabhan & another v National Land Commission & 3 others (Environment & Land Petition E018 of 2023) [2025] KEELC 1108 (KLR) (5 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1108 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION E018 OF 2023

EK MAKORI, J

MARCH 5, 2025

BETWEEN

KHADIJA KHAIDUM NABHAN ..... 1ST PETITIONER

ATWIYA HAIDUM NABHAN ..... 2ND PETITIONER

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

MINISTRY OF LANDS & PHYSICAL PLANNING ..... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

DIRECTOR OF SURVEYS ..... 4TH RESPONDENT

JUDGMENT

1. By an Amended Petition dated 11th July 2024 the Petitioners sought the following orders:
    a. A declaration that the action by the Respondents is illegal, unconstitutional, and amounts to compulsory acquisition, thereby violating the Petitioner's economic and social rights.
    b. A declaration that the Respondent violates Articles 2, 10, 19, 20, 21, 28, 40, 42, 47 and 50 (1) of *the Constitution* of Kenya, 2010 and the provisions of the Fair Administrative Actions Act.
    c. An order that the 2nd Respondents be ordered to compensate the Petitioners the market value of the suit property in the sum of Kshs. 13,780,000,000/- as per the valuation report dated 3rd June, 2022.
    d. General damages for violation of the Petitioners' fundamental rights.
    e. Exemplary and aggravated damages.
    f. Costs of the Petition be awarded to the Petitioners herein.

2. The Petitioners described themselves as administrators of the estate of one Rashid Bin Salim (deceased), whom they claimed is the duly registered owner of all that property identified as Sub-division No. 4 of Mazrui Reserve No. 2 situated in the Mtondia area, within Kilifi County, and measuring approximately 3,461 acres (the suit property).

3. The 1st Respondent was described as a body corporate established under Article 67 of *the Constitution* of Kenya, 2010. The 2nd Respondent was described as a government ministry mandated to deal with all land issues including adjudication, allocation and registration of all land within the Republic of Kenya; and the 4th Respondent as the concerned department of the 2nd Respondent, for the present Petition. The 3rd Respondent was described as the chief legal advisor of the Republic of Kenya and was sued in such capacity and as the representative of the 2nd and 4th Respondents.

4. The Petition was supported by affidavits sworn by Josephine Osodo, described therein as a licensed valuer, on 12th July 2024; another sworn by Edward Marenye Kiguru, a licensed land surveyor, on 11th July 2024; and a supplementary affidavit sworn by the 1st Petitioner on 12th July 2024.

5. Briefly, the Petitioners' case was that the Respondents, jointly and severally, took and caused the sub-division and subsequent allocation of the suit property to third parties, without following the due process in law regarding compulsory acquisition of private land. The Petitioners claim that the Respondents failed to give them audience to be heard before their actions, in other words, the Respondents failed to obtain the Petitioners' consent before acquiring the suit property. To the Petitioners therefore, the Respondents' actions violated Articles 10, 40, 47 and 50 of *the Constitution* of Kenya. The Petitioners proceeded to outline the particulars of breach in the said Petition.

6. The 1st Respondent filed a Replying Affidavit sworn on January 31, 2024, by Brian Ikol, the Director of Legal Affairs and Dispute Resolution of the National Land Commission.

7. The 2nd, 3rd and 4th Respondents filed a response dated 16th August 2024, raising the following grounds of opposition:

    a. The amended Petition is premature, fatally defective, unsubstantiated and lacks merit.

    b. The amended Petition does not raise with precision the constitutional violations or breaches by the 2nd, 3rd, and 4th Respondents to sustain a constitutional petition. Thus, not meeting the threshold as was set out in Anarita Karimi Njeru v Attorney General [1979] eKLR

    c. The 2nd, 3rd and 4th Respondents at all material times were performing their duties as prescribed by *the Constitution* of Kenya and all enabling Statutes.

    d. The Petitioners have neglected to avail themselves of the remedy outlined in the relevant statute, which directs the preferred mode of dispute resolution for the issues raised in the amended petition before bringing about a motion before this Honorable Court. The subject matter falls under the *Land Act*, *Land Registration Act*, Surveys Act and the Land (Assessment of Just Compensation) Rules, 2017.

    e. Although this Honorable Court has jurisdiction to hear this matter, the exhaustion doctrine dictates that all available remedies should be followed before court proceedings are instituted.

    f. The amended Petition concerns a claim for compulsory acquisition, and the 2nd, 3rd, and 4th Respondents are wrongly joined.

g. Similarly, the Petitioners have gone against the Constitutional avoidance doctrine, seeing that there are other ways of resolving this dispute outside a constitutional petition. This matter can only be resolved by filing a civil suit, not a petition.

h. There is no evidence that the search document produced is a proper search from the Land Office, as it is unclear and not stamped or certified by the relevant Land Office.

i. No evidence exists that the search and the indenture produced refer to the same land.

j. The Petitioners have not shown that the subject matter of the succession proceedings refers to the exact property referenced under the official search.

k. The government has not submitted any interest in acquiring property belonging to the petitioners, as required under Sections 107 to 133 of the *Land Act*.

l. The 2nd and 3rd Respondents have not and do not have any mandate to carry out compulsory acquisition as held in Nairobi Civil Appeal No. E290 of 2023 Five Star Agencies Limited v National Land Commission & National Kenya.

m. There is no evidence of the alleged subdivision and no demonstration that the respondents are responsible.

n. The Petition's allegations touch on a land ownership dispute that can only be adjudicated through a civil suit.

o. There is no demonstration that any respondents have carried out compulsory acquisition pursuant to the *Land Act* and under Article 40(3) of *the Constitution*.

p. The petition is premised on speculation, unsubstantiated fears, and concealment of material facts, thus falling short of the essential criteria for granting the reliefs sought.

q. The Petitioners, in their pleadings, have not stated or alluded to the Court that the government is in possession or use of the suit land.

r. The 1st Respondent has not published any notice of intention to acquire the land.

s. The amended petition concerns a claim for compulsory acquisition, and the 2nd to 4th Respondents have been wrongly joined in this petition. They pray that the same be dismissed with costs.

t. The Amended Petition is frivolous, vexatious, and an abuse of the court process. It does not raise a cause of action against the Respondents.

8. The Petition was canvassed by way of written submissions.

The Petitioners' submissions

9. Mr. Gikandi counsel for the Petitioners raised three issues for determination - Whether the Government of Kenya legally acquired the suit property herein through the Respondents; Whether the acts of the Government of Kenya through the Respondents herein amount to violation of human rights under *the Constitution* of Kenya, 2010; Whether the Petitioners herein are entitled to compensation on account of illegal acquisition of their property by the Government of Kenya.

10. On whether the government legally acquired the suit property, counsel based his argument on the indenture dated 18th December 1920 produced by the Petitioners. He submitted that Section 9 (c)

of the *Land Act* states that private land may be converted to public land by compulsory acquisition, reversion of leasehold interest to government after lease expiry, transfers or surrender. Therefore, since the indenture exists, which vests a freehold interest on the late Rashid bin Salim, the government could only have acquired the land through compulsory acquisition or by purchase from the said registered owner.

11. Counsel added that the law relating to compulsory acquisition and how it ought to be conducted by the state was discussed in the case of Patrick Musimba v National Land Commission & 4 others [2016] eKLR. To counsel, the Respondents did not provide evidence that the government lawfully acquired the suit property and failed to compensate the Petitioners as required.

12. Further relying on the cases of Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Timsales Limited v Harun Thuo Ndungu [2010] eKLR, counsel submitted that the process of acquiring the suit property from Rashid bin Salim was tainted with grave illegalities, hence the Respondents' failure to adduce any evidence.

13. Counsel further submitted that the issue of the doctrine of constitutional avoidance raised by the Respondents did not apply in this case since the Petition is solely premised on the violation of the Petitioners' rights under *the Constitution* occasioned by the government's acquisition of the suit property.

14. Counsel urged the Court to uphold the Petition and order that the Petitioners are entitled to be compensated the full market value of the suit property as was held in *Attorney General v Zinj Limited (Petition 1 of 2020)* [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment).

15. On whether the acts of the government through the Respondents amount to violation of human rights under *the Constitution* of Kenya, counsel submitted that the Petitioners have proved the Petition to the acceptable standards and relied on the evidence of Edward Marenye Kiguru. Counsel argued that the government's conduct is an affront to the national values and principles set out in Article 10 of *the Constitution* of Kenya, 2010 and at the same time, such conduct is an affront to what is administratively fair as required by Article 47 of *the Constitution* of Kenya, 2010. According to counsel, by failing to consider the Petitioners' view and failing to give reasons for their decision before alienating the suit property to other third parties when it was clear that the Petitioners owned the suit property, the Respondents have violated Article 47 (1) and (2) of *the Constitution*.

16. Counsel added that the resultant deprivation by the government of the Petitioners huge and prime parcel of land without having consulted the Petitioners at all clearly shows that the Petitioners' right to natural justice was also violated. They relied on the decision in Nyongesa & 4 others v Egerton University College [1990] eKLR.

17. As a result of the Respondents' actions, counsel so submitted that the Petitioners' rights guaranteed under Article 40 and 48 were thus violated. Counsel explained that under Article 40 (3) of *the Constitution*, 2010 the state is prohibited from depriving a person of property of any description, or of any interest in, or right over any property unless the deprivation results from an acquisition of land or interest in land in accordance with Chapter Five of the said Constitution. Quoting the Supreme Court in Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), counsel added that since the Respondents failed to disclose how the government acquired the suit property, the Petitioners' indenture was the only available proof of ownership, which interest is entitled to protection.

18. To counsel, the government's alleged ownership of the suit property is illegal, so it cannot purport to transfer it to third parties in any manner. To this end, counsel cited the case of Republic v National

Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR.

19. On whether the Petitioners are entitled to compensation, counsel submitted that Article 40 (3) of *the Constitution* of Kenya, 2010 makes it a requirement that where the government compulsorily acquires a person's property, prompt payment in full of just compensation to that person shall ensue. Therefore, having established that the government of Kenya acquired the suit property, and considering that the third parties have occupied the suit property, the Petitioners are thus entitled to compensation for the said deprivation of the suit property by the government of Kenya, in terms of the valuation report the Petitioners exhibited as was the case in Arnacherry Limited v Attorney General [2014] eKLR.

20. To further justify an award for general damages, counsel relied on the case of Rahimkhan Afzalkhan Rahimkhan & 4 others v Chief Land Registrar & 2 others [2017] eKLR and submitted that the Petitioners are also entitled to damages for loss of use of the property, physical, mental and psychological torture and that the same be assessed at Kenya Shillings Fifty Million (Kshs. 50,000,000/-).

The 1st Respondent's submissions

21. Mr. Kiilu, learned counsel for the 1st Respondent, identified two issues for determination: whether the 1st Respondent has carried out compulsory acquisition of the suit property and whether the 1st Respondent has carried out subdivision of private land.

22. To the first issue, counsel submitted that the process of carrying out compulsory land acquisition is well defined in Section 107 (1) of the *Land Act*, which specifies what the 1st Respondent must follow.

23. The 1st Respondent has not received a request from the National or County Government nor a public body to acquire the suit property. The 1st Respondent has equally not published any notice of intention to acquire the suit property under Section 107 (5) of the *Land Act*. As such, counsel argued that suit property has not been compulsory acquired by the 1st Respondent, thus the Petitioners are not eligible to be compensated by the 1st Respondent.

24. On whether the 1st Respondent carries out subdivision of land, counsel submitted that the 1st Respondent's role and functions defined in Article 67 of *the Constitution* of Kenya, and under Section 5 and 6 of the *National Land Commission Act* do not include subdivision of land. That role, he asserted, is reserved to the 2nd Respondent as provided under section 41 of the Physical Planning Act. Counsel thus urged the Court to dismiss the Petition with costs.

The 2nd, 3rd and 4th Respondents' submissions

25. Ms. Lutta, state counsel representing the 2nd, 3rd, and 4th Respondents, identified five issues for determining whether this Petition offends the principle of constitutional avoidance. To define the doctrine of constitution avoidance, counsel relied on the case of Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR. She argued that the claim in this petition touches on matters of ownership and that the only way the issues raised can be well adjudicated is by filing a civil suit. Counsel asserted that the prayers sought require this court to determine the issue of ownership, which can be adequately determined by viva voce evidence instead of affidavit evidence. To support this argument, counsel cited the case of Maureen Ochi*eng & 4 others v Nairobi City County Government &4 others; Anthony Tom Oluoch & 1001 others (Interested Parties) [2021] eKLR and Malindi Petition No. 2 of 2023* Legal Advice Centre T/A Kituo Cha Sheria v National Environment Management Authority.

26. Secondly, whether the Petitioners have exhausted proper mechanisms for redress or review under relevant statute. Counsel asserted that the doctrine of exhaustion was explained in the cases of Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR; Speaker of National Assembly v Karume [1992] KLR 21; and in Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR.

27. She submitted that the law on compulsory acquisition has its basis on Article 40 (3) of *the Constitution* and Sections 107 to 133 of the *Land Act* 2012 and that the body with the mandate to carry out compulsory acquisition is the 1st Respondent, which has denied the Petitioners' allegations. Therefore, all the Respondents needed to do was lodge a complaint with the 1st Respondent or issue a demand letter to answer whether the government had acquired the suit property. According to Ms. Lutta, the available mechanisms are for the Petitioners to prefer a court case in the Land Acquisition Tribunal or appropriately refer the dispute under section 128 of the *Land Act*.

28. Thirdly, on whether the Petition raises any constitutional issues, counsel submitted that it is improper since it requires some verification, evidence, and proof before this honourable court can make any consideration. She added that petitions ought to be drafted with precision and clarity on all claims that the petitioner tends to raise and the requirement for precision and presentation of evidence cannot be ignored, as was decided in Maureen Ochieng & 4 others v Nairobi City County Governmen &4 others; Anthony Tom Oluoch & 1001 others (Interested Parties) [2021] eKLR; Anarita Karimi Njeru v Attorney General [1979] KLR and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.

29. Counsel observed that there is no evidence of ownership of the suit property by the government or the alleged sub-division; that there is no proof that the land referred to in the search document and the property description in the indenture refer to the exact property; that there is no evidence the government has not submitted any interest to acquire any property belonging to the petitioners as required under section 107 to 133 of the *Land Act*; and lastly that the petitioner has not submitted any evidence to demonstrate compulsory acquisition which the Respondent has denied.

30. Fourthly, on whether the 1st Respondent has carried out compulsory acquisition, it was counsel's submission that the same was not substantiated, especially considering that the 1st Respondent denied the allegation.

31. Lastly, counsel submitted on whether the Petitioners' rights have been infringed. She argued that as per the rationale in the case of Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272), the Petitioners have not demonstrated infringement of their rights by the 2nd to 4th Respondents. She added that the Supreme Court of Kenya in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others - Petition No. 2B of 2014; [2014] eKLR illuminated how the legal and evidentiary burden of proof is applied in the law of evidence and how the Court analyzed the application of Sections 107 and 112 of the *Evidence Act*, as was similarly held in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR.

32. She added that it is established in law and principle that a compensation claim is meant to compensate for loss suffered and to restore a claimant to a position existing before the action complained of, as was held in Patrick Musimba v National Land Commission & 4 others [2016] eKLR. To counsel, the Petitioners are not entitled to compensation or the damages sought.

Issues for determination

33. I have evaluated the entire petition, supporting affidavits, replying affidavits, and submissions including case law cited by learned counsels for the petitioners and Respondents. The issues for determination as distilled therefrom are:

    a. The Petitioner has proved compulsory acquisition to warrant compensation.

    b. Whether the Petition offends the principle of drafting constitution petitions, the principle of exhaustion, and the principle of constitutional avoidance.

    c. Whether the petition discloses a violation of the Petitioner's constitutional and fundamental rights.

    d. Remedies available to the Petitioners

Analysis and determination

34. The compulsory acquisition process is stipulated in the *Land Act*, 2012, and can be broken down into a pre-inquiry stage, an inquiry stage, and a payment stage. Sections 107-133 of the *Land Act*,2012, details the procedure in undertaking compulsory land acquisition. As Mr. Kiilu and Ms. Lutta, for the Respondents submitted Section 107 (1) of the *Land Act*, postulates:

> " Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf."

35. This procedure can be encapsulated as follows: A cabinet secretary or a county executive committee member submits a land acquisition request to the National Land Commission (NLC). The NLC evaluates if the request complies with the constitutional requirement of fulfilling a public purpose. The NLC then issues a notice in the Kenya Gazette and circulates it to all parties interested in the land. An inquiry is performed by the NLC to identify interested parties and ascertain who qualifies for compensation. Thereafter, the NLC assigns compensation to all stakeholders interested in the land. Compensation may be rendered in cash or land of equivalent value, and the specifics of the compensation award are published in the Kenya Gazette. Furthermore, the NLC might grant pre-emptive rights to the original landowners if the acquisition's public purpose is no longer valid. The NLC may also arrange meetings and workshops to inform the public about the project and perform inspections of the land to assess its appropriateness for the intended use.

36. The Petitioner provided no evidence that the 1st Respondent had received a request from the National or County Government or a public body to acquire the suit property. The 1st Respondent has equally not published any notice of intention to acquire the suit property under Section 107 (5) of the *Land Act*.

37. As it stands, the discussion on compulsory acquisition of this specific land is far-fetched.

38. The triple issues of constitutional drafting, exhaustion, and constitutional avoidance deal with instances when the court declines to invoke its constitutional jurisdiction.

39. Ms. Lutta believes the current petition does not accord itself with the drafting of constitutional petitions. The constitutional claim by the Petitioners has to be precise and fall within the four corners

of the Anarita Karimi Njeru(supra) test as echoed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR as follows:

> "However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:
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> > "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."
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> (43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.
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> (44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise,

comprehensive, or elegant drafting," without requiring remedy by the 1st respondent."

40. On the doctrine of exhaustion - in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 [2020] eKLR the court elaborately dealt with the exhaustion doctrine as follows:

> " 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:
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> 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:
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> > "Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."
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> 43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.
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> This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:
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> > "It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

41. The Court also dealt with the exceptions to the exhaustion doctrine. It expressed itself as follows:

> " 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
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> > "What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation, especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)
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> 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
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> 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
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> 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

42. The principles of ripeness and constitutional avoidance concern themselves with avoiding addressing a constitutional matter when another legal option can relieve the litigant's desires. In other words, a constitutional matter is not ready for resolution unless it is the sole option to offer the litigant the remedy he seeks. Both constitutional avoidance and ripeness delay the resolution of constitutional issues until it becomes necessary, to the point that it is the only option left to support the litigant's case.

43. The Petitioners in the instant case allege that their rights have been violated by having the suit property subdivided and allotted to third parties.

44. The Petitioners aver that they have a right to peacefully enjoy their property as provided under Article 40 of *the Constitution* of Kenya. The Respondents have violated this right by unlawfully converting the suit property for public use without following the prescribed procedure.

45. The indenture that the Petitioners have attached dates back to 18th December 1920, it is alleged that it was under the name of one Rashid bin Salim. He allegedly died in 1960, the Petitioners took out letters of administration on the 26th day of November 2018, followed by the valuation of the suit property in June 2022. The property is described as:

> " all that piece or parcel of land.... containing 3461 acres be the same more or less situate near Kilifi and forming part of the Mazrui Reserve number 2 as more particularly described and delineated in the map or plan attached hereto and – there in numbered sub-division number 4....."

46. The Respondents have a problem with the specificity of the Petition: whether the land remained in the exact nature and state as it was in 1920 to the time of filing this petition in 2023 – a century later. Whether the 1920 land is the exact land we are talking about with a search certificate showing it is now under the government of Kenya, whether it is the same land subdivided and allotted to other third parties, and who these other third parties are. This petition cannot answer those questions.

47. Besides, the petitioners did not adduce evidence of how they acquired this property, even though it is shown that it was through transmission. How were they related to Rashid bin Salim, who was one of the Trustees of the Mazrui Board? Have the Petitioners been in occupation? When did the alleged subdivision commence?

48. The valuation reports capture a mass of land over 3461 acres as of 1920, which is said to be inhabited by third parties who have done extensive development. These third parties are said to be waiting for titles. The process under which they are awaiting the titles is not disclosed, and who allotted them the land between the Respondents is also not disclosed. How many people are they? Are they aware of these proceedings?

49. It would have been prudent for the Petitioners to precisely state who allotted the third parties the land and the processes leading to the said allotment in order to precisely apportion liability on any or all the Respondents. This was not the case in the current Petition.

50. The 1st Respondent elaborated on the procedure of compulsory acquisition. The 1st Respondent has denied ever invoking the provisions under the *Land Act*, 2012 to acquire this land compulsorily. The 2nd, 3rd, and 4th Respondents, too, have denied involvement in the allocation of this land. The Petitioners have not shown whether any attempt was made as provided under the *Land Act* to seek compensation before pursuing this claim

51. It was up to the Petitioners to precisely state how the Respondents severally infringed their constitutional rights—we have a constitutional petition lacking precision.

52. I agree with Ms. Lutta that this petition boils down to a land ownership feud that requires the so-called third parties to be joined in a civil suit (subject to the limitation of actions) and the issue of ownership addressed.

53. For the reasons aforesaid, the current petition lacks specificity, offends the doctrine of constitutional avoidance, and the reliefs sought by the Petitioners cannot be granted. No compulsory acquisition without a fair and just compensation has been proved. The allocation of the suit property to third parties complicates the issue of whether those parties should have been sued to show how they acquired the suit property. The history of the land is scanty – the indenture issued in the 2020s and the search certificate cannot support a petition of this nature – a root of the title had to be undertaken.

54. The upshot is that the current petition lacks merit and is hereby dismissed with costs.

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

E. K. MAKORI

JUDGE

In the Presence of:

Mr.Otieno, for the Petitioners

Happy: Court Assistant

In the absence of:

Mr. Kiilu for the 1st Respondent

Ms. Lutta for the 2nd, 3rd and 4th Respondents