



Omollo (Suing as the Administrator Ad Litem of the Estate of John Omolo Anditi - Deceased) v Asembo (Sued as the Administrator of the Estate of Lazaro Odera Jura) & 6 others (Environment and Land Petition E007 of 2024) [2025] KEELC 5087 (KLR) (11 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5087 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND PETITION E007 OF 2024
FO NYAGAKA, J
JUNE 11, 2025**

BETWEEN

MARGARET OMOLLO (SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF JOHN OMOLO ANDITI - DECEASED) PETITIONER

AND

SELLAH AKECH ASEMBO (SUED AS THE ADMINISTRATOR OF THE ESTATE OF LAZARO ODERA JURA) 1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER MBITA SUB-COUNTY ... 2ND RESPONDENT

THE CABINET SECRETARY LAND, SETTLEMENT & PHYSICAL PLANNING 3RD RESPONDENT

THE DIRECTOR LAND ADJUDICATION & SETTLEMENT ... 4TH RESPONDENT

THE LAND REGISTRAR, HOMABAY COUNTY 5TH RESPONDENT

THE PRINCIPAL MAGISTRATE'S COURT- MBITA 6TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 7TH RESPONDENT

RULING

1. This ruling determines the parties' contention regarding the Preliminary Objection erroneously dated 6th January 2024 raised by the 1st respondent. The Objection is in response to the Petition herein that is dated 2nd December 2024 in which the Petitioner alleged breach of her constitutional rights over the Respondents' conduct in relation to their dealings in the property known as Plot No. 1148 and 1157 Kaswanga/Wanyama Adjudication Section.



2. The Preliminary Objection is grounded on the points that this Court lacks jurisdiction to entertain the instant Petition as it has been lodged in contravention of the mandatory provisions of Section 9 (2) and (3) of the [Law Reform Act](#) and Order 53 Rule 2 of the Civil Procedure Rules 2010 as it has been lodged outside the mandatory stipulated timelines.
3. Further that that the Petition is devoid of any legal merit and an outright abuse of the Court process as it offends the mandatory provisions of Section 29 of the [Land Adjudication Act](#). The 1st respondent thus sought the striking out of the petition with costs to it.
4. The Petitioner opposes the preliminary objection vide her supplementary affidavit sworn on the 27th January 2025 in which she deposed that this court has jurisdiction to entertain the petition as she alleges violation of her constitutional rights as enshrined in Article 23, which rights are not limited by any strict and mandatory timelines as prescribed under Order 53 of the Civil Procedure Rules 2010 and the [Law Reform Act](#). The Petitioner thus deposed that the objection ought to be dismissed as it is devoid of merits.
5. This court issued directions to the effect that the preliminary objection be disposed of by way of written submissions.
6. The 1st Respondent submitted that this court lacks jurisdiction to entertain the instant Petition as there were alternative remedies open to the petitioner. It relied on the case of Republic v Public Procurement Administrative Review Board Ex Parte Syner-Chemie Limited [2016] eKLR where the Court affirmed that even where constitutional violations are alleged, parties must first utilize the available statutory dispute resolution mechanisms, unless they can demonstrate exceptional circumstances warranting direct constitutional intervention and thus this Petition is defective and should be dismissed for failure to adhere to the established legal procedures.
7. The 1st Respondent submitted further that the courts have consistently held that the six-month limitation period for filing an application for certiorari is strict and cannot be extended. Reliance was placed on the case of Wilson Osolo v John Ojiambo Ochola & Another (1996) eKLR wherein the Court of Appeal held unequivocally that the six-month period prescribed under Section 9(3) of the [Law Reform Act](#) is mandatory and cannot be extended under the Civil Procedure Rules.
8. It was further submitted that an order of certiorari among other judicial review orders can only be issued if leave is sought to apply for such an order within six months after the date of such decisions as was held in the case of Lepore Ole Maito v Letwat Kortom & 2 Others [2016] eKLR whereas the petitioner herein brought this claim through a petition rather than judicial review proceedings 3 years after the decision was issued by the 2nd Respondent.
9. The 1st respondent submitted further that a Petition cannot be filed in utter violation of the Statutes that govern legal processes as was held in Fredrick Mworira v District Land Adjudication Officer Tigania West/East & 3 others [2016] eKLR and the case of Speaker of National Assembly Versus Karume [1992] KLR 425.
10. The Petitioner on her part submitted that her petition sought interpretation and enforcement of her Constitutional rights pursuant to Article 22 and 23 of [the Constitution](#) as read together with Article 162(2)(b) and Section 13 of the [Environment and Land Court Act](#) and thus the 1st Respondent's Preliminary Objection on the [Law Reform Act](#) and Order 53 of the Civil Procedure Rules is therefore a misconception.
11. The Petitioner submitted that an approach of this court for enforcement of the rights by way of a Constitutional Petition pursuant to Article 22 and 23 of [the Constitution](#) is not restricted to mandatory



timelines as was held in the case of *Baitalakua v Deputy County Commissioner Igembe Central Sub County & another; Kabilia (Interested Party)* (Petition E003 of 2023) [2024] KEELC 1778 (KLR) (20 March 2024) (Judgment).

12. The Attorney General filed written submissions on behalf of the 2nd – 7th Respondents in support of the Preliminary Objection raised by the 1st respondent as well as its submissions therein and further stating that the grounds raised by the 1st respondent do meet the test of what amounts to a Preliminary Objection as set out in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West-End Distributors Ltd* (1969) EA 696.

Issue, Analysis and Determination

13. I have considered the preliminary objections, the submissions in support and the submissions opposing the same and the issue to determine is whether the issues raised in the preliminary objections are merited.
14. The law on preliminary objections is now settled by then Court of Appeal for East Africa, in the case of *Mukisa Biscuit Manufacturing Co. Ltd* (supra) where it was held that:

“A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a Preliminary Objection may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...A preliminary Objection is 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 the exercise of judicial discretion.”

15. Recently, the Supreme court pronounced itself on the use of preliminary objection as follows in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* (2015) eKLR.

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objects. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection-against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially and on merits.”

16. Since a preliminary objection may only be raised on a pure point of law, the Supreme Court in *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 others*, Application No. 50 of 2014 (2015) eKLR, had this to say:

“Thus, a preliminary objection may only be raised on a pure question of law’. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

17. On this basis, this Court finds that once a preliminary objection on a point of law is raised it requires no party to counter it by way of evidence, whether oral or by way of affidavit. Therefore, the Supplementary Affidavit sworn by the Petitioner in response to the Objection is misplaced. It is disregarded by this Court since it invites the Court to venture into considering evidence at this stage,



a step that flies on the face of the requirements of the law regarding preliminary objections. Thus, the only question that emerges is what points of law has the 1st Respondent raised in his preliminary objection, and are they settled?

18. The Court notes the other grounds are that the Respondents allege that the Petition offends the mandatory provisions of Section 9(3), (2) of the [Law Reform Act](#), CAP 26, Order 53 Rule 2 of the Civil Procedure Rules, 2010 and Section 29 of the [Land Adjudication Act](#). Section 9(3) provides as follows: -

“In the case of an application for an order of Certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application is made not later than six months after the date of that judgment, order, decree, conviction.”

19. Order 53 Rule 2 provides that:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding. For the purpose of its being quashed, unless the application for leave is made not later than 6 months after the date of the proceeding or such shorter period as may be prescribed by any act;”

20. The above rule is basically derived from Section 9(3) of the [Law Reform Act](#) and has the same force in terms of the period within which an order of Certiorari must be made.

21. Section 29 of the [Land Adjudication Act](#) provides inter alia that any person who is aggrieved by the determination of an objection by the Land Adjudication Officer ought to appeal within 60 days to the Minister whose decision is final.

22. The question that this Court is to answer can only be derived from the pleadings of the parties herein. These are the Petition and the Response(s) thereto. That would lead to finding whether the Court has jurisdiction. These are whether the Petitioner complied with the requirements of the law as required and her rights violated in the process or was prevented by the Respondents from exercising her constitutional right to comply with the law. In such circumstances a constitutional violation would arise. But where a party fails whether by inadvertence, inaction or ignorance to take advantage of the legal and constitutional means available to him or her at the time to move the appropriate forum and loses that opportunity whether by effluxion of time or other means it does not trigger a constitutional violation. Courts must be vigilant to distil the clothing of parties' mistakes as constitutional violations simply because the parties are closed from opening legal doors hence seeking refuge in allegations or pleadings of constitutional violations, infringements or threats because they span limitation of actions.

23. This Court has considered the in the instant case. The petitioner, under the backing of Articles 22 (1) and (2) as read with 258 (1) and (2) of [the Constitution](#), alleges violation of her constitutional rights as guaranteed under Articles 27, 40, 47, 48, 50, 73 and Section 4 and 5 of the Fair Administrative Actions Act. She seeks to quash the decision in respect of Adjudication Land Appeal Case No. 71 of 1990 whose decision was rendered on November 2021. I have carefully analysed her pleadings, particularly the Petition itself and the Supporting Affidavit. Annexure MAO 3 is the copy of the land Adjudication Committee Judgment and Proceedings. It is delivered on 10th November 1988. Annexure MAO 4 is the copy of the Grounds of Appeal against the decision. She alleges that the determination of the appeal took from 1990 to 2021 which is over thirty years hence a Constitutional violation. Annexure MAO 6 is a copy of a letter dated 2nd November 2021 by the Deputy County Commissioner (DCC) inviting parties to attend the hearing of the appeal on 9th November, 2020.



24. One thing is clear, that the Adjudication process is not subject to the rules of procedure as the Civil Procedure Rules regarding when appeals should be handled, upon filing. In my view, whether the delay took thirty or less years, the issue is whether the parties were given an opportunity to be heard during the hearing. I confirm from the annexure MAO 6 that the parties were invited for hearing of the appeal and they actually participated. The applicants and/ or their appointed representative duly presented themselves as the representatives of the Estates of the deceased persons and took active part in the appeal as it went on. The doctrine of estoppel operates here: they are estopped from turning against a decision that they voluntarily took part in as shown in Annexure MAO 10(b). They even called a number of witnesses for each side or party.
25. To understand her issue against the parties it is behooving that this Court carefully looks at her pleadings: the Petition and the Supporting Affidavit.
26. The petitioner seeks a declaration that the proceedings in Appeal Case No. 71 of 1990 were unconstitutional; orders of the Court to quash the proceedings and judgement of the decision made sometime in the year 2021, as well as prayers for orders of mandamus and prohibition against the 5th and 6th respondents respectively from making a final determination in Mbita Principal Magistrate's Court Cause No. E056 of 2024, and general damages.
27. It is clear that the payer for general damages is dependent on whether the court finds the Petition unconstitutional or not. The orders of prohibition, mandamus and quashing hinge on the legality of the process leading to and the decision itself and its reasonableness while the constitutionality thereof would be a factor of when any of the provisions of *the constitution* were violated, infringed, denied or threatened.
28. Starting with the legality of the decision, the main challenge of the decision impugned is that the it was made about thirty years after the appeal was lodged and there was no explanation for the delay. Also, that the Respondent withheld the decision made for over three years, it was unreasonable in that it took into account factors it ought not have done so, and was contrary to Sections 4 and 5 of the *Fair Administrative Action Act*, the actions of the Ndhiwa Court were abrogating the *Law of Succession Act*,
29. Having carefully considered the allegations as summarized in the paragraph immediate above, I am of the view that contrary to the contention by the Petitioner, there is no factor shown which the Court took into account which it ought not have. Additionally, while the Petitioner lays blame on the Respondent for inaction on the Appeal No. 71 of 1990 for over thirty years he has not shown that she or the estate she now represents took any steps towards the finalization thereof and was prevented by the Respondents from doing so. The Estate, having been served with the notice to hear the appeal and participated in it shows that the Respondents acted in good faith and procedurally towards finalizing the same while the decision itself considered he evidence of the parties and was reasonable. With regard to the Ndhiwa Succession Cause proceedings, I see nothing illegal about them for the ownership of the parcel of land which is a subject of the same is clear and the estate of the deceased owner is undergoing succession.
30. Lastly, regarding withholding the decision made by the Minister in 2021, it is instructive that there was a flurry of correspondence about it, soon after the decision was given. But a number of facts thereto raise suspicion and a calculated scheme carefully designed paint a picture unconstitutionality and illegality so as to lay foundation for the instant petition. However, in my view they amount to naught. Those facts thereto are that Annexure MAO 6 is an invitation through the Area Chief by the DCC on 2nd November 2020 for a hearing in his office on 9th November, 2020. Annexure MAO 10(b)



which is the decision impugned shows that indeed the parties took part in the hearing of the appeal before a decision was arrived at on 29th October, 2021, a year later.

31. Here is where the Petitioner becomes uneconomical with truth. She has not disclosed to the Court the communications between the Respondents including the DCC and the Estate of the deceased whom she purports to represent now between the 9th November, 2020 when they last appeared before the DCC if they complied with the summons, and 29th October 2021 when the decision was given. Particularly, if the decision was oral, she must have received communication: a document or documents she has not shown. If the decision was communicated in writing, she has not shown the copy she received.
32. Then after the decision, comes in the numerous almost one sided correspondence by her learned counsel which raises curiosity and doubt as to truthfulness about the fact of the decision not being given to the Petitioner. In all these, the 1st Respondent is not copied at all.
33. Thus, from nowhere, from 9th November, 2020, the Petitioner knows that a decision was made on 29th October, 2021 and exactly two days later, on 1st November, 2020, as shown by annexure MAO 8(a) she instructs a lawyer whose offices are at Rose Avenue off Argwings Kodhek Road in Nairobi who writes a letter that day to the DCC to give the decision. The letter is received physically by the Mbita DCC and stamped on 1st November, 2021 (same day). At this point the Court takes judicial notice of the distance between Nairobi GPO Stage and Mbita DCC 427 kilometers. Using Google Maps to estimate the time to be taken, and traveling nonstop by car, it would take someone seven (7) hours and fifty six (56) minutes using the shortest route, via Naivasha, Nakuru and Oyugis. This excludes the distance and traveling between the lawyer's offices and GPO. Other routes, except traveling by air would take 08 hours and 40 mins or thereabout nonstop. In other words, it is practically impossible for the lawyer to have written the letter the same date and delivered it in Mbita DCC's office the same date. The correspondence is made up: perhaps that is why all of it including the receiving stamp is a photocopy. Even the email it purported to be copied to is neither shown to have been sent to or received through it. In any event an email copy should have been attached thereto to show delivery and receipt by the means.
34. The subsequent correspondence raises further suspicion. This is because, without much explanation, on 15th November, 2021 a similar request is made by the lawyer and purportedly served on the Ministry of Lands in Nairobi the following day. See Annexure MAO 8(b). The same letter copy is added as MAO 8(c) but not received by anyone. Annexure 8(d) is handwritten at the left top corner "Att, Mr. Njenga, 8th flr". It is not received anywhere.
35. Then the communication that was fast and zealous goes to a lull for two years, without any explanation. It surfaces on 14th October 2024 by way of another letter which is addressed to the DCC, Mbita but not showing that it was ever sent or delivered. See annexure MAO 9(a). it is written from Nyaku House in Argwings Kodhek, Nairobi. On the same date it is purportedly sent to Mbita DCC and acted upon by a response of the same date by the Mbita DCC whose response is that the file was forwarded to Nairobi. See annexure MAO 9(b). Then on 23rd October 2024 the lawyer writes to the Director of Land Adjudication (annexture MAO 10(a) and the Director purports to give a certified copy of the decision on 5th November, 2024. Curiously again, the top page is not certified in the original stamp but the other pages are.
36. All the above show a pattern of fact or information collection designed to convince the court to decide in favour of the Petitioner. This Court cannot buy it that design.



37. Besides, it is not shown why then, if true, the Petitioner having received the document on 5th November, 2024 did not apply for extension of time for leave to file a judicial review matter instead of a Petition for I see no violation of his rights here.
38. The upshot of the above is that I find that the 1st Respondent's Preliminary Objection dated 6th January 2024 is merited and I proceed to dismiss the Petition with costs to the Ex Parte Applicant and Respondents.
39. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JUNE 2025

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Otieno Adv for Petitioner,

Chatia Ebuyele for Wanza for

Sarah Juma for other Respondents

