



Wanje & 2 others (Suing as Officials of Matolani Residents Development Association) v County Government of Kilifi & 6 others (Constitutional Petition E009 of 2024) [2025] KEELC 4333 (KLR) (5 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CONSTITUTIONAL PETITION E009 OF 2024**

FM NJOROGE, J

JUNE 5, 2025

BETWEEN

**SAMSON ZIRO WANJE 1ST PETITIONER
ELIMA ZAWADI CHARO 2ND PETITIONER
JOSEPHINE DAMA RIZIKI 3RD PETITIONER
SUING AS OFFICIALS OF MATOLANI RESIDENTS DEVELOPMENT
ASSOCIATION**

AND

**COUNTY GOVERNMENT OF KILIFI 1ST RESPONDENT
M.S BAWAZIR & COMPANY (1993) LIMITED 2ND RESPONDENT
NAPOLI INVESTMENTS LIMITED 3RD RESPONDENT
MILLY FRUITS PROCESSORS LIMITED 4TH RESPONDENT
FARM AFRICA MILLYS INVESTMENT LIMITED 5TH RESPONDENT
LAND REGISTRAR MOMBASA 6TH RESPONDENT
ATTORNEY GENERAL 7TH RESPONDENT**

RULING

1. This is a ruling on a Preliminary Objection dated 21st February 2025 raised by way of a Notice filed by the 2nd Respondent, M.S. Bawazir & Company (1993) Limited, and the 4th Respondent, Milly Fruits Processors Limited. The objectors set out the following as the limbs of their preliminary objection to the main suit filed by way of Petition herein:



1. That under Section 13(4) as read with Section 9(1) of the Trust Land Act Cap 288 the Petitioners ought to have lodged their claim for compensation with the District Commissioner and not before this court;
 2. That Under Section 13 (4) as read with Section 10(1) of the Trust Land Act Cap 288 the Petitioners ought to have lodged their appeal regarding compensation to the Provincial Agricultural Board and not this court;
 3. That Under Section 10(1) of the Trust Land Act Cap 288 as read with Section 13(4) of the said Act, the Petitioner’s appeal ought to have been lodged within 30 days. This petition was filed outside the statutory timeline;
 4. That the Petitioners did not explore the remedy provided for in Section 12 of the Trust Land Act;
 5. That the case is statute barred by limitation.
2. The preliminary objection was ordered disposed of by way of written submissions, which the two opposing sides filed, and which I have taken consideration of while preparing the present ruling.

2nd And 4th Respondents’ Submissions

3. Basically, the objectors’ argument is that the petitioners filed their claim in the wrong forum. They point out specifically paragraph 24 of the petition as stating that there was no setting apart of their ancestral land as envisaged in the Trust Land Act Cap 288 and that there was no compensation, which was in contravention of the Constitution; that throughout the petition, the petitioners have invoked and relied on Sections 7, 8 and 13 of the Trust Land Act Cap 288. That Section 117(1)(c) of the repealed Constitution of Kenya provided for setting aside of trust land and the statute referred to in that Section is the Trust Land Act; that Section 13(4) of the Trust Land Act applied Section 7 (3) and (4), Section 8 (1), Section 9, Section 10, and Section 11 of the Act to land which was set apart under Section 13. It is the submission of the objectors that the 5 sections mentioned herein above deal with the setting apart of trust land for government purposes, but that the same provisions “apply to setting apart of trust land at the instance of the national government”; that however vide Section 13(4) the same sections apply mutatis mutandis to the setting a part of trust land by the Council to a private person pursuant to Section 13(1)(c) of the Trust Land Act; that the detailed procedure for setting apart of trust land by the Council to a private person is contained in Section 13(2) of the Trust Land Act and that Section 13(3) requires that the setting apart be published in the Kenya gazette. Provisions as to prompt compensation are contained in Section 81 of the Trust Land Act. Section 9 of the Act contains the procedure for applying for and assessment of compensation; and Section 10 of the Trust Land Act clearly provides for the appellate mechanism and procedure regarding assessment and payment of compensation. Consequently, the petitioners ought to have lodged their claim for compensation with the District Commissioner at the time of setting apart of the suit properties. A person aggrieved by the decision of the District Commissioner was to appeal to the Provincial Agricultural Board within 30 days of that decision. A person aggrieved with a decision of the Provincial Agricultural Board was required to appeal to the Magistrate’s Court; a person aggrieved by the decision of the Magistrate’s Court was required to appeal to the High Court whose decision would be final. The petitioners did not follow that procedure; they never applied to the District Commissioner for just and prompt compensation. They approached this court directly, which is wrong because this court can only sit on appeal in respect of a decision concerning prompt compensation emanating from the Magistrate’s Court. This court thus lacks jurisdiction to hear and determine the petition, and the complaint that



they were not paid just and prompt compensation under the petition must be struck out. *Jacob Ogola Ondige Versus the Commissioner of Lands and Others Kisumu - ELC 823 Of 2016* was cited.

4. It is also submitted that the petition should be dismissed because the petitioners did not explore the remedy provided for in Section 12 of the Trust *Land Act*. *Jacob Ogola Ondige (supra)* was cited again for the said proposition.
5. Lastly, it was argued that the petition is barred by limitation in that though 30 days had been provided for in the Trust *Land Act*, the petitioners are approaching this court in 2024, yet the suit properties were allocated a long time ago in December 1994 and May 2013.
6. The respondents/objectors also aver that the orders which the petitioners seek are outside the statutory timelines within which search orders can be granted; that what the petition seeks is to quash the titles held by the second and fourth respondents. It is argued that an order seeking to quash the decision of a public entity such as the County Government of Kilifi must be sought within 6 months from the time the decision was made. *Republic Versus County Council of Kwale & Another Ex parte Kondo & 57 Others [1998] 1 KLR* was relied on for the proposition. It is argued that the petitioners have merely avoided use of the word certiorari but it is clear that what they are seeking is a judicial review remedy of certiorari which is the equivalent of a quashing order. Their approach to this Court by way of a constitutional petition is also blamed as a ruse to evade statutory limitation.

Petitioners' Submissions

7. The Petitioners' submissions dated 22nd March 2025 were quite brief. They fault the respondents for the misconception that the petition is merely for payment of just and prompt compensation after the setting apart of the suit premises; they point out that at paragraph 24 of the petition, they have pleaded that there was no setting apart of the suit premises. The issue as to whether or not there was setting apart of the suit properties as advised by Section 13 of the Trust *Land Act* is not a matter for the determination by the District Commissioner under Sections 91 and 101 of the Trust *Land Act* Cap 288; that the mandate of the District Commissioner is limited to determining dispute relative to their assessment of the compensation payable upon setting a part of the suit properties; that the petition is not a claim for payment of compensation or assessment of the compensation payable under Section 9. As such, Sections 9, 10 and 12 of the act are not applicable to the petition. The issue is purely whether or not there was setting apart of the suit property. It is urged that if there was no such setting apart then there was violation of the petitioners' constitutional rights. It is pointed out that the petition claims that the Kilifi County Government wrongfully assumed lordship of the petitioners' ancestral lands and, in contravention of the law, proceeded to arbitrarily and secretly allocate and lease the suit premises to the other respondents; that exercise of power to set apart would be contrary to the law if it was exercised in violation of the petitioners' rights to participate in such an exercise and if such setting apart is not for a public body or in public interest; that in the instant case the allocation was not for any public purpose or public interest, but was meant to satisfy the private interests of the respondents and that the petitioners were not involved or given any reasons for such action, and this amounted to failure to accord them equal protection of the law and to a reasonably fair administrative action, which was in violation of their rights. It is stated that whether or not there occurred any setting apart is a matter of evidence to be given at a full trial and which can not be determined in a preliminary objection. The petitioners submitted that the claim is not time barred as claimed by the respondents as the same is not an appeal against any award of compensation and none of the reliefs sought seek any payment of compensation, but seek that the petitioners get back their ancestral lands secretly allocated to some of the respondents. Thus the petition itself is not a disguise as claimed, for an appeal, and there is no prayer for certiorari as claimed and the petition does not amount to judicial review proceedings.



The court thus has jurisdiction under Article 23, Section 13 of the ELC Act to grant appropriate reliefs within its discretion or as sought in the petition. It is submitted that in any event Section 12 of the Trust Land Act provides that any person claiming right or interest in land set apart under the Act shall have access to the High Court for inter alia the determination of the legality of the setting aside, and thus under Article 162 of the Constitution of Kenya 2010 and Section 13 of the ELC Act this court has jurisdiction to handle the present petition under Section 12 of the Trust Land Act.

Analysis and Determination.

8. The issues arising for determination are as follows:
 - a. Whether this court has jurisdiction to hear and determine the petition;
 - b. Whether the petition is statute barred by limitation.
9. Issue no (a) covers the first four grounds of the preliminary objection while issue no (b) addresses the fifth.
10. The approach taken by the objectors in regard to the first issue is that the petition amounts to claim for compensation for the land set apart and that the petitioners ought to have lodged such a claim with the District Commissioner and not before this court. If dissatisfied with the District Commissioner's decision they should have appealed to the Provincial Agricultural Board. If they were dissatisfied with the Board's decision they were to appeal to the Magistrate's Court from whose decision again they were entitled to another level of appeal, to the High Court and which was the final appeal allowed by the law.
11. The petitioners on the other hand oppose that argument on the basis that their claim is not for compensation and that their stance as outlined in their petition is that there was no setting apart of the suit land in the first place, hence the objection to the petition on the basis that it is a disguised appeal being brought too late in the day is misguided.
12. This court has perused the petition dated 5th July 2024. The petitioners allege that the suit properties are their ancestral lands and which formed part of trust land under first the County Council of Kilifi and later the County Council of Malindi. They allege that the County Council of Kilifi wrongfully assumed lordship over the suit property now known as LR No 20254 –Kilifi and arbitrarily allocated and leased the same to the 2nd respondent in 1994 for a term of 99 years and the 2nd respondent took possession and began operations thereon and issued notices to the petitioners to vacate. They also allege that the County Council of Malindi wrongfully assumed lordship over the suit property now known as LR No 29690 –Kilifi and arbitrarily allocated and leased the same to the 4th respondent in 2013, also for a term of 99 years, and the 4th respondent took possession and began operations thereon and issued notices to the petitioners to vacate. Later the allottees transferred the suit lands to third parties. The petitioners aver that they have been deprived of the use of the suit lands, and that they now remain without any land tenure security and that the County Council of Malindi and County Council of Kilifi respectively violated their own constitutional obligations and also violated the various constitutional rights of the petitioners. They aver that no alienation of trust land should have been undertaken without compliance with the existing statutory and constitutional provisions. At paragraph 24 they state that there was no setting apart of the suit lands in accordance with the law and the Constitution. The main issue in the present petition is therefore whether or not there was any setting apart. At paragraph 26, they aver that in the event there was any setting apart then the same was not conducted for a public purpose or for any public interest but for private interests of the 2nd and 4th respondents. In the prayers the petitioners seek orders declaring that their rights to the suit properties as guaranteed by the Constitution and the Trust Land Act have been infringed by the respondents; a declaration that the allocation of the suit lands to the 2nd and 4th respondents are null and void; and



orders quashing the said allocations. Others are an order that the registrations of the suit parcels be cancelled and they be registered in the names of the petitioners to hold on behalf of the residents of Matolani.

13. Clearly I do not see any pleading or prayer for compensation in the petition. It is the case then that since no such pleading has been made or prayer sought, then the grievance that the petitioners have is obviously not a claim for compensation that should have been subjected to the decision of the District Commissioner, the Provincial Agricultural Board and the Magistrate's Court and, finally, the High Court, in that progressive sequence.
14. The upshot of the foregoing is that this court is not persuaded that the dispute in this court is a disguised appeal concerning compensation, and grounds 1-3 of the notice of preliminary objection must therefore fail.
15. The objectors also further aver that the petitioners did not first explore the remedy provided for under Section 12 of the Trust *Land Act*. This claim also goes into the issue of jurisdiction in that if there is another process that was provided for by statute, then that process ought to be first applied in an attempt to resolve a dispute before it is brought to the court. This court must first make two important observations concerning this limb of the preliminary objection.
16. First it must be admitted that the repeal of the Trust *Land Act* presents a serious difficulty for the objectors to argue their point, especially regarding the second allocation that occurred in 2013 after the promulgation of the *Constitution* of Kenya 2010 which had the consequence of reclassifying the former trust lands into community land and the enactment in 2016 of the *Community Land Act* whose Sections 37-42 in Part VIII thereof provide for the manner of resolution of disputes with relation to community land. It remains to be seen how these new provisions of the law and the *Constitution* affect the present dispute. It is not thus a straightforward issue that can be settled by merely stating that the dispute ought to have been subjected to the High Court for resolution instead of the Environment and Land Court.
17. Secondly, perchance it was assumed that it is the High Court that had or has jurisdiction over this dispute, an interpretation of Section 12 of the repealed Act points to further difficulties. Section 12 of the repealed Act provides as follows:
 - “ 12. Right of access to High Court
Notwithstanding anything in this Act, any person claiming a right or interest in land set apart under this Act shall have access to the High Court for—
 - a. the determination of the legality of the setting apart; and
 - b. the purpose of obtaining prompt payment of any compensation awarded.”
18. The introduction to that section refers to “any person claiming a right or interest in land set apart” and clause (a) refers to “the legality of the setting aside” yet in the present petition the claim is that the land was expropriated and arbitrarily allocated to the 2nd and 4th respondents without any setting apart as required by the law and the *Constitution* for a public purpose or in the public interest. Since the claim is that there was no setting apart, then the matter could not have come to the jurisdiction of the High Court under that section. The claim that there was no setting apart done is a claim that can be resolved by this court in substance this court has original jurisdiction in matters land. It would not be appropriate for the court in the post-2010 Constitution era to refer a matter relating to whether there was any setting apart to the High Court as this court now has jurisdiction to inquire into that issue



and also for the reason that the Act that gave the High Court Jurisdiction has already been repealed. Regarding Subsection (b) of Section 12 of the repealed Act, this court must reiterate that this is not a claim for compensation and thus the matter could not also have come under the jurisdiction of the High court under that subsection. Consequently, this court finds that grounds no 1-4 of the notice of preliminary objection dated 21/2/2025 lack merit and they are for dismissal.

19. On Issue no (b) the objectors have intertwined that issue with the first issue of compensation which has been found to have no merit as immediately herein above. Limitation is usually provided for under statute, and statutes are below the Constitution in terms of power and effect. There is no provision of the Constitution cited by the objectors as requiring the petitioners to bring their claim within a certain period. Furthermore, the objectors have allowed their reasoning linked to statutory time frames in the Trust Land Act within which an appeal ought to have been lodged, and the statutory time frames under the Law Reform Act, to liberally diffuse into the realm of a constitutional dispute. Those are the statutory provisions that appear give the objector's argument an element of false vigor. However, in this court's view that is an improper argument; even where a court of law examines whether there has been inordinate delay in lodging a petition which may be deemed fatal to the petition, it does not refer to any statutorily fixed time frames. Instead it refers to other factors such as the reasons for delay in lodging the petition and handles the issue on a case to case basis.

20. James Kanyita Nderitu vs A.G and Another, Petition No. 180 of 2011 (HC) held as follows:

“Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.”

21. Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR, (CA), held as follows:

“Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights.

In our view, subject to the limitations of Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions Act. However, each case is to be decided on its own merits....”

22. It is therefore the case that there are substantive factors to be considered based on the factual matrix surrounding the lodging of a petition in addressing the merits of claim of time bar in a constitutional petition which can not be addressed in a preliminary objection.

23. Finally, this court refuses to attach any importance to the use of the word “quashing” which the objectors, in their argument aligned with their submission regarding limitation, have equated with the



remedy of “certiorari”. This being a constitutional petition, it is obvious that remedies that the court can give, including certiorari itself, are set out in Article 23 of the Constitution under clause (f) - an order of judicial review. It is also clear from the language of Article 23 that the remedies that the court can grant under a constitutional petition exceed those stated therein. That additional ground is also for dismissal.

24. The upshot of the totality of the foregoing discourse is that this court finds that all the limbs of the preliminary objection raised by the 2nd and 4th respondent vide their notice dated 21st February 2025 are devoid of merit and the entire preliminary objection is hereby dismissed with costs to the petitioners. This petition shall be mentioned on 26/6/2025 for directions as to hearing.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 5TH DAY OF JUNE 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

