



REPUBLIC OF KENYA



KENYA LAW
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**Mutua & 5 others v Mtua & 5 others (Environment and Land Petition
E004 of 2024) [2025] KEELC 5118 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5118 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND PETITION E004 OF 2024

EK MAKORI, J

JULY 3, 2025

**IN THE MATTER OF: SECTIONS 7, 13, 17, 37 AND 38 OF THE
LIMITATION OF ACTIONS ACT, CHAPTER 22 OF THE LAWS OF KENYA**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 26(1), (3), 27(1), (2), 28, 29(C), (D) OF THE CONSTITUTION AND RULE
11 (C) & 12 PROTECTION OF FUNDAMENTAL RIGHTS AND PROCEDURE RULE AND
ALL OTHER RELEVANT ENABLING POWER & PROVISIONS OF THE LAWS OF KENYA**

**IN THE MATTER OF: ARTICLE 25 OF THE
UNIVERSAL DECLARATION OF HUMAN RIGHTS**

BETWEEN

ONESMUS MUEMA MUTUA 1ST PETITIONER
MICHAEL MUTINDA WAKUNGI 2ND PETITIONER
GEDION KITULU MUSYOKI 3RD PETITIONER
DAVID KISASA MUSYOKI 4TH PETITIONER
PATRICK MUTISYA MUTUKU 5TH PETITIONER
JOHN KISASA MWEU 6TH PETITIONER

AND

SHAIB HAMISI MTUA 1ST RESPONDENT
GAPCO (K) LIMITED 2ND RESPONDENT
KILIFI COUNTY GOVERNMENT 3RD RESPONDENT
THE HON ATTORNEY GENERAL 4TH RESPONDENT
THE LAND REGISTRAR MOMBASA 5TH RESPONDENT



JUDGMENT

1. The petitioners, claiming a violation of their rights under the *Limitation of Actions Act* and *the Constitution*, seek to recover land they have allegedly occupied for over fifty years.
2. The petitioners claim that the action is brought under Section 7 of the Limitations of Actions Act to recover land after twelve years, based on the doctrine of adverse possession. They allege that the 3rd respondent, the County Government of Kilifi, issued a notice to the petitioners, asserting that the land occupied by the petitioners is a land reserve, and that this is intended to frustrate, punish, and render them destitute.
3. The petition is supported by an affidavit sworn by John Kisasa Mweu. The petitioners contend that they have been residing on the suit property, LR No. 11492/384 CR. No. 122/1, registered in the land registry in Mombasa under the name of the 2nd respondent, Gapco Limited. They assert that they have continuously occupied the land for over fifty years and have acquired rights through the doctrine of adverse possession.
4. The respondents objected to the petition by submitting grounds of opposition, asserting that the petition was frivolous and did not meet the criteria required for filing a constitutional petition, as established in *Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272*. The petition fails to reveal any threat, violation, or denial of constitutional rights; furthermore, the 3rd respondent issued an enforcement notice in accordance with the *Physical and Land Use Planning Act* (PLUPA) directed at one Edwin Murangiri.
5. Significantly, the 2nd respondent asserts that the land belongs to it, having been purchased legally in 2002 with due diligence and having established that there were no squatters at the time of taking possession. Additionally, the 2nd respondent claims that it is unaware of the notices issued by the 3rd respondent indicating that the land was a reserve. Furthermore, the 2nd respondent maintains that the land is fenced off and has no squatters on it.
6. The petition was canvassed through written submissions. The issues I frame for the court's consideration are whether the petition satisfies the criteria of constitutional crafting under the *Anarita Karimi Njeru* test, the doctrine of constitutional avoidance, and whether the petitioners are entitled to the reliefs they seek, as well as who should bear the costs. The court's role in upholding these legal procedures is crucial in ensuring a fair and just resolution.
7. From the materials presented by the petitioners and the respondents, it is evident that the petitioners assert they have resided on the suit property for a period exceeding fifty years and that they have acquired ownership of the suit property through the principle of adverse possession.
8. The 3rd respondent claims that the notice issued was for enforcement under section 72 of PLUPA and was addressed to a person named Edwin Murangiri. In contrast, the 2nd respondent is unaware of the notice and argues that the land in Mariakani is fenced and under their control; therefore, they consider the current petition to be unusual. The petitioners have not clearly shown how their rights have been threatened, denied, or violated by any of the respondents.



9. This court agrees that the petitioners have not articulated their case with the necessary precision, as established in the case of *Anarita Karimi Njeru v Republic* (1979) eKLR, wherein the court stated as follows:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

10. Furthermore, in fortifying the foregoing position, in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, the court reaffirmed the holding established in the *Anarita Karimi Njeru* case (*supra*) as follows:

“We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (*supra*). In view of this we find 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.....”

11. The petitioners have not clearly shown how the respondents have individually or collectively violated their constitutional rights. Therefore, they have not satisfied the threshold set in the *Anarita Karimi* case (*supra*).

12. A review of the petition reveals that the petitioners seek to be recognized and registered as the owners of the suit property by virtue of the doctrine of adverse possession. Furthermore, they filed this petition in response to the notice of enforcement issued under Section 72 of PLUPA.

13. Under Kenyan law, a claim of adverse possession cannot be filed as a constitutional petition. It must be pursued through the proper legal channels, specifically an Originating Summons under the *Limitation of Actions Act*. Claims of adverse possession primarily involve disputes over land ownership based on occupation and duration, as outlined in the *Limitation of Actions Act* (Cap 22), which requires uninterrupted, continuous, and open occupation of the suit property for over 12 years. Conversely, constitutional petitions address violations of fundamental rights and freedoms outlined in *the Constitution*. The correct procedure for asserting adverse possession is through an Originating Summons supported by an affidavit, not a Constitutional Petition. A series of several judicial precedents in Kenya have emphasized that claims of adverse possession should not be filed through Constitutional Petitions. See, for example, the case of *Tarus & 51 others v Attorney General & 4 others*; *Kebenei & 15 others (Interested Parties)* [2025] KEELC 819 (KLR), (Obaga J.), *Taireni Association of Mijikenda v Patel & 5 others* [2025] KEELC 431 (KLR) (Makori J.), and *Kyule & 640 others v County Government of Kajiado & 5 others* [2023] KEELC 16997 (KLR) (Naikuni J.) These are some of the judicial decisions I can cite. There are a multitude of them.

14. The courts have established that seeking to pursue a claim of adverse possession through a Constitutional Petition is deemed legally incompetent. An elaborate procedural framework has been enacted under statute to govern the initiation of an adverse possession claim. The procedure for submitting a claim of adverse possession in Kenya is outlined in Order 37 of the Civil Procedure Rules, whereby an individual is required to file an Application under Section 38 of the *Limitation of Actions*



Act via an Originating Summons, supported by an Affidavit and accompanied by a certified extract of the title to the land in question.

15. The provisions of Order 37, Rules 1 and 7 of the Civil Procedure Rules delineate the compulsory procedure for presenting applications to the court, which must be conducted via an Originating Summons. This procedure entails the court's examination of issues pertaining to adverse possession. Specifically, Order 37 Rule 7 asserts that adverse possession applies solely when the land is registered and a valid title exists. In instances where the land has not yet been registered, adverse possession cannot be claimed, and rights must be determined through the adjudication process. Additionally, for a court to entertain a claim of adverse possession, the applicant must explicitly identify the exact title to the land in question.
16. It is imperative to adhere to specific legal restrictions before exercising such rights. These restrictions are formulated to ensure that the doctrine of adverse possession, which serves as a limitation on property rights, aligns with the constitutional standards for restrictions on fundamental rights as outlined in Article 24 of *the Constitution*. These principles were elucidated in the case of *Kahindi Ngala Mwangandi v Mtana Lewa* [2021] eKLR, where the Court of Appeal sitting in Malindi ruled:

“Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, *nec vi, nec clam, nec precario*, that, one's possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met the possessor, without more becomes the new owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 as follows: -

“7

- (1) an application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The Court shall direct on whom and in what manner the summons shall be served.”

17. The above explains that the procedure for filing an adverse possession claim in court is outlined by law and must be followed.
18. Regarding the enforcement notice issued by the 3rd respondent, it was argued that it was explicitly addressed to Edwin Murangiri and not to all the petitioners. Additionally, the 2nd respondent confirms that the land is fenced off in its name with no squatters on site.
19. Section 72 of the PLUPA provides as follows:

“Enforcement notice



- (1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—
 - (a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or
 - (b) any condition of a development permission granted under this Act has not been complied with.
- (2) An enforcement notice shall—
 - (a) specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;
 - (b) specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and
 - (c) require within a specified period the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.”

20. To handle any complaints an affected individual may raise after receiving an enforcement notice, section 72 (3)(4) outlines the applicable mechanism of redress as follows:

- “(3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.
- (4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.”

21. Based on the above discourse, it follows that the petitioners have approached this court through an improper channel. Regarding adverse possession, they should have filed an originating summons (OS). For the issue of enforcement notices, they should have approached the County's Physical Planning and Land Use Planning Liaison Committee. If dissatisfied with the outcome, they are entitled to appeal to the Environment and Land Court (ELC).

22. When a statute provides a procedure for conducting business and resolving grievances, strict adherence to this process is mandatory, and it must be thoroughly followed before considering judicial review through constitutional redress. This principle is what constitutional avoidance declares. For example,



in *K K B v S C M and 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Mativo, J. (as he then was), explained this doctrine:

“In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant’s cause...”

23. The Supreme Court reinforced that, as seen in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR), the principle of avoidance advises courts to avoid deciding on constitutional issues when they can be resolved on other grounds. Additionally, the doctrines of ripeness and constitutional avoidance emphasize that *the Constitution* should not be applied in isolation but rather interpreted and enforced alongside relevant laws and legal remedies. When alternative remedies are available, it is generally better to pursue those options before turning to *the Constitution*. These doctrines are intended to prevent unnecessary escalations of disputes to constitutional levels, recognizing that all legislative and common-law remedies are vital parts of the legal system.
24. In a nutshell, the current petition is a non-starter. It is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 3RD DAY OF JULY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Lisansa for the Petitioners

Ms Okata for the 2nd respondent

Mr. Mungai and Mr. Mohammed for the 3rd Respondent

Happy: Court Assistant

