# Okoiti v Malaba Municipality & 3 others; Busia County Business Owners Association & 9 others (Interested Parties) (Environment and Land Petition E004 of 2024) [2025] KEELC 5444 (KLR) (8 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5444 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ENVIRONMENT AND LAND PETITION E004 OF 2024**

**BN OLAO, J**

**JULY 8, 2025**

**BETWEEN**

**OKIYA OMTATAH OKOITI ................................................................. PETITIONER**

**AND**

**MALABA MUNICIPALITY .......................................................... 1ST RESPONDENT**

**CHIEF OFFICER URBAN DEVELOPMENT & PHYSICAL PLANNING ........................................................................... 2ND RESPONDENT**

**THE COUNTY EXECUTIVE OF BUSIA ................................... 3RD RESPONDENT**

**THE COUNTY EXECUTIVE COMMITTEE MEMBER (CECM) FOR LANDS AND URBAN PLANNING ......................................................... 4TH RESPONDENT**

**AND**

**BUSIA COUNTY BUSINESS OWNERS ASSOCIATION ... INTERESTED PARTY**

**MALABA BUSINESS COMMUNITY ASSOCIATION ........ INTERESTED PARTY**

**KOCHOLYA MARKET MANAGEMENT ASSOCIATION INTERESTED PARTY**

**THE BUSIA COUNTY ASSEMBLY ....................................... INTERESTED PARTY**

**THE COUNTY LANDS SURVEYOR, BUSIA ...................... INTERESTED PARTY**

**THE LAND REGISTRAR, BUSIA ......................................... INTERESTED PARTY**

**THE MINISTRY OF LANDS & PHYSICAL PLANNING .. INTERESTED PARTY**

**THE NATIONAL LAND COMMISSION ............................. INTERESTED PARTY**

**THE HON. ATTORNEY GENERAL ..................................... INTERESTED PARTY**

**THE OFFICER COMMANDING STATION (OCS) MALABA POLICE STATION ........................................................................... INTERESTED PARTY**

**RULING**

1. OKIYA OMTATAH OKOITI (the Petitioner herein and who is also the Senator of Busia) approached this Court vide his Petition dated 15th July 2024 and filed on the same day. He impleaded the MALABA MUNICIPALITY, CHIEF OFFICER URBAN DEVELOPMENT & PHYSICAL PLANNING, COUNTY EXECUTIVE OF BUSIA and COUNTY EXECUTIVE COMMITTEE MEMBER (CECM) FOR LANDS & URBAN PLANNING (the 1st to 4th Respondents) respectively and enjoined the following ten (10) Interested Parties i.e.

    1. BUSIA COUNTY BUSINESS OWNERS ASSOCIATION - 1st Interested Party
    2. MALABA BUSINESS COMMUNITY ASSOCIATION - 2nd Interested Party
    3. KOCHOLYA MARKET MANAGEMENT ASSOCIATION - 3rd Interested Party
    4. BUSIA COUNTY ASSEMBLY - 4th Interested Party
    5. COUNTY LANDS SURVEYOR, BUSIA - 5th Interested Party
    6. LAND REGISTRAR, BUSIA - 6th Interested Party
    7. MINISTRY OF LANDS & PHYSICAL PLANNING - 7th Interested Party
    8. NATIONAL LAND COMMISSION - 8th Interested Party
    9. HON. ATTORNEY GENERAL - 9th Interested Party
    10. OFFICER COMMANDING STATION (OCS)
    11. MALABA POLICE STATION - 10th Interested Party

2. The Petitioner cites, as his locus standi to file this Petition, his Constitutional obligation to defend *the Constitution* and in particular, his right to protect and defend the Fundamental Freedoms and Rights as well as other laws. He invokes the following Constitutional Provisions as the basis of this Petition; Articles 1(1) 2(1-4), 3(1), 10, 19, 20, 21, 22, 23, 24(1), 50(1), 60, 62, 67(2)(a) and (h), 73(1), 75(1), 232 (1) (a-f), 232 (2)(a), 249(1) & (2), 252(1)(c), 258 and 259(1). He also cites the following provisions of the *Access to Information Act* in Sections 3, 4 and 5. He also invokes the following provisions of the Fair Administrative Actions Act i.e. Sections 3, 4 and 5, Sections 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54 of the *Physical and Land Use Planning Act*, Sections 36 to 42 of the *Urban Areas and Cities Act*, Sections 4, 7, 9, 10, 12(1), 12(7), 15, 16, 17(1) and 17(2) of the *Land Act* and finally Sections 104 and 108 of the County Government Act.

3. The factual background of the Petition is captured in paragraphs 58 to 82 as follows: That on 11th July 2024, the Petitioner's office received complaints from small scale traders as well as concerned members of the Public in Malaba Town and Kocholya areas that on 24th June 2024, the 1st Respondent had issued a 21 days eviction notice directing traders in customs, main stage and Kocholya areas who carry out business on road reserves and public land to move or be evicted to allow for the implementation of the organization agenda in line with the development partners. The Petitioner's County office decided to initiate investigations which established that the intended eviction was unconstitutional to the extent that:

    a. The Respondents did not subject the process to public participation.

b. There is no spatial plan guiding the intended changes to the use of the land.

c. There is no budget allocation for what the Respondents call "reorganization of Malaba Town" including the demolition of structures in the customs, main stage and Kocholya areas which are ostensibly built on "road reserves and public land" to allow for the re-organisation agenda.

d. There is no transparency and accountability in the process.

e. No alternative land has been provided for the project affected traders to relocate to.

The above revelations prompted the Petitioner to timeously move to this Court to uphold *the Constitution* and the rule of law since the Respondents acted in vain and ought to have subjected the process to public participation which is widely recognized as a crucial aspect of public accountability, policy and regulatory process and what the Respondents are calling "public participation" is a mockery of the said principle because:

1: Public land affects many people and not just those mentioned and the traders in customs, main stage and Kocholya areas were not consulted.

2: The mentioned stakeholders are not representatives of the general public.

3: The mentioned stakeholders were not competent to know all regarding the use and occupation of and title to public land.

The Respondents cheapened and undermined the Constitutional imperative of public participation as the general public were not consulted and public land cannot be managed without public participation. Further and in particular:

a. Contrary to the requirements of the law, there is no County Physical and Land Use Development Plan.

b. There is no Local Physical and Land Use Development Plan.

c. There is no land use plan of any nature not even a special land use plan.

d. There are no allocation documents including an allocation letter from the National Land Commission.

e. No advert on the issue was published in the press by the Respondents calling for public participation.

f. The invitation to the meeting (the letter ref. CG/BSA/MM/ADM/028/24 is dated 15th June 2024) is giving the addressed stakeholders a notice of 3 days only which is contrary to the standard notification period of a minimum of 7 days.

g. On it's part, the Notice of Demolition was issued on 24th June 2024. Only four (4) days were allowed between the meeting of 18th June 2024 and demolition notice. The standard law is 14 days to allow room for the hearing of any dissenting opinions or Petitions.

The Petitioner is aware that public land belongs to the citizens and not to the National or County Government which are just trustees on behalf of the public. There must therefore be utmost fidelity to *the Constitution* in the change of land use and in particular:

a. The existing land use plan must be fully understood and found to be inadequate for emerging needs.

b. The proposed new land use plan must be published and publicized.

c. The stakeholders must be agreeable to the proposal.

d. The change use process must show what alternative use the proposers wish to put the land to.

e. For such substantial land transactions especially for safeguarding public interests, there is need for approval from the County Assembly.

4. The Petitioner is aggrieved that the Respondents have failed/refused to follow the law and failed to ensure the proper use of public land resources entrusted to the County and in particular, the first approval by the owners of the land who are the public was not sought and obtained, there is no public approval status report from the County Assembly and public information is different from public participation. The affected public land does not belong to the County Executive to use on it's whims as it belongs to the people of Busia and Kenya and there is no room for arbitrary re-allocation for other uses. Any changes to land use must be planned and approved and even if the re-organisation of Malaba Town is necessary, the same can only be done after audits and planning have been done and approved by the County Assembly and with Public participation which has not been done. The National Land Commission has a management role to ensure that use of land is based on sustainable land policy. The Petitioner points out that the decision not to comply with the law is deliberate on the part of the 1st and 2nd Respondents who know the law. The undeniable fact that the Busia County does not have a spatial plan is in the letter dated 15th May 2024 from the Busia CECM for Lands, Physical Planning and Urban Development inviting the Petitioner to attend "an initial sensitization workshop to be held on 21st May 2023 (sic) … at Farm view Hotel starting at 9.00am". That Public participation must be real and not illusory and it should also be attained both quantitatively and qualitatively. Whereas it is by law required that all budgetary expenditure must be anchored on the County Integrated Development Plan (CIDP) and captured in the subsequent Annual Development Plans (ADPs) before they are appropriated annually (i.e. included in the respective annual budgets), there is no mention of the impugned re-organization of Malaba Town in both the CIDP 2023-27 and the ADP 2023/2024 which is being implemented in the 2023/2024 Financial Year. Further, a detailed interrogation of the County Executive Financial Year 2023/2024 annual budget (Busia County Appropriation Act 2023) does not make any reference to the impugned re-organisation of Malaba Town. The County Government of Busia has not developed, let alone implemented a civil education programme contrary to Section 100 of the County Government Act 2012 that can facilitate meaningful engagement and interrogation of policies and governance including the purported reorganisation of Malaba Town thus undermining the effective participation of the citizenry in governance processes.

5. The Petitioner has set out the following as the main violations of *the Constitution* and Statute:

   1: Articles 4(2) and 10 of *the Constitution* are violated/threatened to the extent that the impugned action and omission do not accord with the National values and principles of governance which bind the Respondents including the rule of law, good governance, integrity, transparency, accountability and sustainable development.

   2: The Constitutional doctrine of rule of law was violated to the extent that the Respondents' impugned actions and omissions:

   a. Are contrary to Part V of the *Urban Areas and Cities Act* 2011. There is no Urban Development Plan.

b. Contrary to Sections 36 to 54 of the *Physical and Land Use Planning Act* (cap 303 Laws of Kenya). There is no physical Land Use Development Plan for Busia County and there is no Spatial Planning Area.

c. Contravenes the Principles of Land use planning in Sections 4, 7 and 9 of the *Land Act* 2012.

d. Contravenes Section 10 of the *Land Act* 2012 which empowers the Commission with the development guideline for management of public land under Public agencies, statutory bodies and state corporations in actual occupation or use of public land. There are no guidelines for the management and use of this public land.

e. Are contrary to Section 12(1) of the *Land Act* 2012 by usurping the powers of an Independent Constitutional body charged with public land allocation. There is no consent from the National Land Commission (NLC) to show concurrence about the purported allocation.

f. Are contrary to Section 12(7) of the *Land Act* 2012 which provides that there shall not be allocation of public land unless the land is planned, surveyed and serviced and guidelines for it's development prepared.

g. Are contrary to Section 15 of the *Land Act* 2012 which vests the Commission with powers to reserve public land through an order in the Gazette.

h. Are contrary to Section 16 of the *Land Act* 2012 which empowers the National Land Commission with placement of care, management and control of functions of public land to a statutory body, public corporation or a public agency for the same purpose as that for which the relevant public land is reserved under Section 15.

i. Are contrary to Section 17(1) of the *Land Act* 2012 which requires a management body to submit to the National Land Commission for approval a plan for the development, management and use of the reserved public land vested in the management body.

j. Contravenes Section 17(2) of the *Land Act* 2012 which requires a report detailing the environmental conservation or heritage issues/concerns relevant to the development, management or use of public land in it's managed reserve for the purpose of that managed reserve alongside an environmental impact assessment plan.

k. Contravenes both the 2023-2027 Busia County Integrated Development Plan (CIDP) and the 2024 Annual Development Plan (ADP) to the extent that they do not provide for the impugned land transaction.

The Petitioner pleads further that the binding Constitutional principles and National values of Governance in Article 10 of transparency and accountability as read together with Article 232(1)(e) and 91(f) on accountability for Administrative acts and transparency and provision to the public of timely accurate information were violated to the extent that the impugned purported reorganization of Malaba Town is opaque. Article 35(1)(a) and (3) of *the Constitution* on access to information which entrenches every citizen's right to access information held by the State and places an obligation on the State to publish and publicize any important information affecting the Nation was violated to the extent that the Respondents acted in complete secrecy in purporting to reorganize Malaba Town. The principle of National value of participation of the people in Article 10 as read together with Article 232 (1) (d) on involvement of the people in the process of policy making was violated by opaque actions and omissions of the Respondents. The impugned actions and omissions of the Respondents violated the principle and National value of good Governance in Article 10. Good governance is the process of measuring how public institutions conduct public affairs and manage public resources and

guarantee the realization of human rights in a manner essentially free of abuse and corruption and with due regard for the rule of law. Article 47(1) of *the Constitution* on Fair Administrative action was violated/threatened to the extent that the impugned actions and omissions of the Respondents do not constitute Administrative action that is expeditious efficient, lawful reasonable and procedurally fair. Further, that the impugned actions and omissions of the Respondents contravened Section 18 of the *Environment and Land Court Act* on principle of sustainable land and environment use.

6. From the above acts, the Petitioner has pleaded that the impugned acts and omissions of the Respondent are unlawful, un-Constitutional and therefore invalid null and void ab-initio. Other than this Petition, there is no case pending in any other Court of competent jurisdiction involving the parties herein over the subject matter on the Constitutional and legal validity of the Respondents impugned decision on what they call the "reorganization of Malaba Town" including by demolishing all structures in customs, main stage and Kocholya areas which are ostensibly built on "road reserves and public land to allow the implementation of the reorganization agenda in line with our development partners."

7. The Petitioner therefore seeks the following reliefs:

    1. A declaration that the on-going re-orgnisation of Malaba Town including by demolishing all structures in customs, main stage and Kocholya areas which are ostensibly built on "road reserves and public land to allow the implementation of the reorganization agenda in line with our development partners" is unconstitutional and, therefore, invalid, null and void ab initio.

    2. A declaration that the impugned purported "reorganization of Malaba Town" cannot be the basis or justification of the evictions of anybody or party from public land in the town and adjacent areas.

    3. The purported reorganization of Malaba Town must be conducted strictly according to *the Constitution* and the law including by being subjected to public participation.

    4. An order prohibiting the Respondents and their agents or assigns howsoever acting, from implementing their impugned "reorganization of Malaba Town", including by demolishing all structures in customs, main stage, Kocholya areas which are ostensibly built on "road reserves and public land to allow the implementation of the reorganization agenda in line with our development partners."

    5. An order quashing the 1st Respondent's 21-day eviction notice dated on 24th June 2024 directing the traders in customs, main stage and Kocholya areas who carry out business on "road reserves and public land" to move or be evicted.

    6. An order compelling each party to bear their own costs of these proceedings.

    7. That this Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant to advance the cause of justice herein.

    8. The following documents are annexed to the Petition:

        a. Copy of a letter dated 15th June 2024 from the Manager Malaba Municipality inviting all Kiosks and Temporary Buildings owners at the Malaba Main Stage, customs area and Kocholya Market to a Town Reorganisation consultative meeting to be held at the Municipality Town Hall on 18th June 2024 at 12 noon.

b. A copy of Eviction Notice dated 24th June 2024 from the Manager Malaba Municipality addressed to all occupants of Targeted areas giving them twenty-one (21) days to vacate road reserves and public land.

c. Copy of a letter dated 15th June 2024 from the County Executive Committee Member, Lands, Housing and Urban Development County Government of Busia addressed to the Hon. Senator County Government of Busia inviting him to a sensitization workshop on preparation of Busia County Physical and Land Use Development Plan (County Spatial Plan).

d. Copies of Brochures on the presentation of the Busia County Physical and Land Use Development Plan (County Spatial Plan).

Simultaneously with the Petition, the Petitioner filed a Notice of Motion also dated 15th July 2024 seeking the following orders:

1. Spent

2. Spent

3. Pending the hearing and determination of this Petition, this Honourable Court be pleased to issue a conservatory order to restrain the Respondents whether by themselves or their servants, agents, advocates or otherwise howsoever, from engaging in the purported re-organisation of Malaba Town including by demolishing all structures in customs main stage and Kocholya areas which are ostensibly built on “road reserves and public land”.

4. That consequent to the grant of the prayers above, this Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders and/or favour the cause of justice.

5. That costs be in the cause.

That Motion is not the subject of this ruling and therefore, I will not delve into it. What is important is that when the Motion was placed before me on 16th July 2024, I issued directions that it be served upon the Respondents and the Interested Parties and be canvassed by way of written submissions. It would then be mentioned before the Deputy Registrar on 26th August 2024 to confirm compliance and take a date for ruling.

9. However, the Respondents opted to file Preliminary Objections both to the Motion and the Petition.

10. By their Notice of Preliminary Objection dated 6th September 2024, the 1st Respondent raised the following issues:

1. That the application and the Petition have been filed prematurely without exhaustion of all the available internal mechanisms and offends the provisions of Sections 61(3) and 78 of the *Physical and Land Use Planning Act* NO 303 of 2019.

2. That this Honourable Court lacks the jurisdiction to entertain the Petitioner’s application and Petition as there is a clear procedure for redress set out under Sections 61(3) and 78 of the *Physical and Land Use Planning Act* NO 13 of 2019.

On their part, the 2nd, 3rd and 4th Respondents also filed a Notice of Preliminary Objection dated 11th November 2024 in which they raised the following grounds:

1. This Honourable Court lacks the jurisdiction to entertain this suit as the Petitioner has invoked the jurisdiction of this Honourable Court without exhausting available statutory remedies provided for in Sections 40(4) and 78 of the *Physical and Land Use Planning Act*.

2. The Petition does not meet the threshold for a Constitutional Petition as set out in the ANARITA KARIMI NJERU case; and

3. The Petition is otherwise frivolous, premature and an abuse of the Court process.

11. In response to the Respondents' Preliminary Objections, the Petitioner filed grounds of opposition thereto dated 3rd December 2024. He raised the following grounds in opposition to the Preliminary Objections by the Respondents:

    1. The Preliminary Objections are vexatious, scandalous and brought in bad faith.

    2. The Preliminary Objections do not meet the test of a valid Preliminary Objection as established in the case of MUKISA BISCUIT MANUFACTURING CO LTD -V- WEST END DISTRIBUTORS LTD 1969 E.A 696 which requires that a Preliminary Objection be based purely on points of law and not on disputed facts.

    3. This Court has the jurisdiction under Article 162(2)(b) of *the Constitution* 2010 read together with Articles 23 and 165 (5) (b) thereof to hear and determine disputes relating to the environment and the use and occupation of and title to land.

    4. The jurisdiction is further reinforced by the *Environment and Land Court Act* 2011 which empowers this Court to hear and determine disputes relating to the environment, use and occupation of and title to land.

    5. The matters raised in this Petition squarely fall under this Court's Constitutional and Statutory mandate making the Court the appropriate forum for adjudication.

    6. The Petition complies with the principles established in the case of ANARITA KARIMI NJERU -V- R 1979 eKLR which requires a clear identification of the Constitutional provisions alleged to have been violated and a precise statement of how the alleged violation occurred. Further, the standard in ANARITA (supra) has since been overtaken by the epistolary jurisdiction of this Court under Article 159(2) (d) of *the Constitution* as read with *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013) popularly known as the MUTUNGA Rules.

    7. Courts have recognized the evolving nature of public interest litigation as seen in MUMO MATEMU -V- TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE 2013 eKLR where the requirement for precision must not be applied rigidly in cases of significant public concern.

    8. The Petitioner has demonstrated the infringement of Constitutional rights including of Article 40 (Right to Property) and Article 35 (Right to access information).

    9. The issues raised in this Petition are rife for determination as the Constitutional violations or threats to public interest have already occurred. Prematurity cannot be argued where there is on-going harm to fundamental rights or to the environment.

10. The Petition raises substantial Constitutional questions that are justiciable and merit the Court's intervention. Therese include matters of public interest and the protection of fundamental rights related to land use and environmental concerns.

11. The Petition raises questions of great public interest concerning the environment, land use and planning. Technical objections such as procedural requirements under the Physical Planning Act must not override substantive justice in public interest cases.

12. Under Article 159(2)(d) of *the Constitution*, Courts must prioritize substantive justice over procedural technicalities especially in matters of public interest and Constitutional rights.

13. The Preliminary Objections filed herein serve only to delay the hearing and determination of the substantive issues contrary to the principle of expeditious justice under Sections 1A and 1B of the *Civil Procedure Act*.

14. The Environment and Land Court (ELC), is Constitutionally mandated to resolve Constitutional disputes efficiently especially when they touch on public interest.

15. The availability of alternative remedies however, does not oust the jurisdiction of the ELC as the Petitioner has the Constitutional right to seek redress for alleged violations under Articles 22 and 258 of *the Constitution*.

16. The Petition is properly before the Court and does not amount to any abuse of the Court process as it raises significant Constitutional and public interest issues that require judicial consideration.

17. Section 40 of the *Physical and Land Use Planning Act* does not provide any remedies herein because the instant dispute does not concern "a decision of the County planning authority concerning the County Physical and Land Use development plan". For clarity, completeness and the avoidance, the section provides:

> " A person aggrieved by a decision of the County planning authority concerning the physical and land use development plan or matters connected therewith may within sixty days of receipt by him of notice of such decision appeal to the County physical and land use planning liaison Committee in writing against the decision in such manner as may be prescribed."

18. Further, Section 61(3) of cap 303 is inapplicable herein as it concerns a party who is aggrieved by the decision of a County executive Committee member regarding an application for development permission. It has absolutely nothing to do with the issues in dispute. For clarity, completeness and the avoidance of doubt the Section provides:

    (3) "An applicant or an Interested Party that is aggrieved by the decision of a County executive committee member regarding an application for development permission may appeal against the decision to the County Physical Land Use Liaison Committee within fourteen days of the decision by the County executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.

    (4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the Committee may appeal against that decision to the Environment and Land Court."

19. Likewise, Section 78 of cap 303 concerns functions of the County physical and Land Use Planning Liaison Committee. It has absolutely nothing to do with the issues in dispute herein. For clarity completeness and the avoidance and the avoidance of doubt, the Section provides:

 78: "Function of the County Physical and Land Use Planning Liaison Committee;

 The function of the County Physical and Land Use Planning Liaison Committee shall be to –

 a. hear and determine complaints and claims made in respect to applications submitted to the planning authority in the County;

 b. hear appeals against decision made by the planning authority with respect to physical and land use development plans in the County;

 c. advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and

 d. hear appeals with respect to enforcement notices."

20. Hence, the bar of exhaustion under Sections 40(4), 61(3) and 78 of the *Physical and Land Use Planning Act* (CAP 303) does not oust the jurisdiction of this Court as the forum of first instance. Further, the Petitioner has a Constitutional right to seek redress for the alleged violations under Articles 22 and 258 of *the Constitution*.

21. The Petition is properly before the Court and does not amount to an abuse of the Court process as it raises significant Constitutional and public interest issues that require judicial consideration by this Court.

22. Since no alternative remedies are available, the Petitioner's approach to the ELC has ensured the protection and enforcement of rights and fundamental freedoms enshrined in *the Constitution* that are at risk.

23. The Petition addresses significant public interest matters including the enforcement of Constitutional rights related to environmental protection, access to information and sustainable land use.

24. Dismissing the Petition without a full hearing would undermine the principles of access to justice under Article 48 and public accountability.

25. The Preliminary Objections dated 6th September and 14th November 2024 should be dismissed with costs to the Petitioner.

26. The matter should proceed to full hearing on it's merits.

12. Following the filing of the Preliminary Objections by the Respondents, the Court directed that they be canvased by way of written submissions. Those submissions were subsequently filed by the Petitioner who is acting in person, by MR WEKESA instructed by the firm of AMANI WEKESA & ASSOCIATES ADVOCATES for the 1st Respondent and by MR OWUOR instructed by the firm of OMBOK & OWUOR ADVOCATES LLP for the 2nd, 3rd and 4th Respondents.

13. I have considered the Preliminary Objection by the Respondents, the grounds of opposition by the Petitioner and the submissions.

14. A Preliminary Objection as was defined by LAW JA in the locus classicus case of MUKISA BISCUIT MANUFACTURING COMPANY LTD -V- WEST END DISTRIBUTORS 1969 E.A 696, and which is the path that Courts in this country have continued to follow;

> " ... consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a Preliminary point, may dispose of the suit. Examples 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."

In the same case, Sir CHARLES NEWBOLD P added:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on 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."

See also the cases of NITIN PROPERTIES LTD -V- SINGH KALSI & ANOTHER 1995 eKLR and also the case of HASSAN ALI JOHO & ANOTHER -V- SULEIMAN SAID SHABAL & 2 OTHERS SCK PETITION NO 10 of 2013 [2014 eKLR] where the principles set out in the case of MUKISA BISCUIT MANUFACTURING COMPANY LTD -V- WEST END DISTRIBUTORS LTD (supra) have been pellucidly captured.

15. OJWANG J (as he then was) also discussed what amounts to a Preliminary Objection and said the following in the case of ORARO -V- MBAJA 2007 KLR 141:

> " A Preliminary Objection correctly understood, is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claim to be a Preliminary Objection yet it bears factual aspects calling for proof or seeks to adduce evidence for it's authentication is not, as a matter of legal principles, a true Preliminary Objection which the Court should allow to proceed. When a Court needs to investigate facts, a matter cannot be raised as a Preliminary point ... Anything that purports to be a Preliminary Objection must not deal with disputed facts and must not itself derive it's foundation from factual information which stands to be tested by normal rules of evidence..."

From what I can glean out of the Preliminary Objections raised by the Respondents, the following issues call for my determination:

1. The Petition and the Motion offends the provisions of Section 61(3) and 78 of the *Physical and Land Use Planning Act*.
2. The Petition does not meet the threshold of a Constitutional Petition as set out in the case of ANARITA KARIMI NJERU (supra).
3. This Court lacks the jurisdiction to determine this Petition and the Motion.
4. The Court should apply the doctrine of exhaustion.

The other issue raised by the 2nd, 3rd and 4th Respondents that this Petition is frivolous, premature and an abuse of the process of this Court is not, stricto sensu, a pure point of law. In my view, that issue will be well subsumed in the other grounds if the Court upholds them.

**Jurisdiction.**

16. I shall commence with this Preliminary Objection because, as is clear from the case of OWNERS OF THE MOTOR VESSEL "LILLIAN S" -V- CALTEX OIL (KENYA) LTD C.A. CIVIL APPEAL NO 50 of 1989 1989 eKLR, jurisdiction is everything and must be disposed off as a first port of call. And once a Court finds that it has no jurisdiction in a matter, it must down it's tools. Without delving fully into the reliefs sought by the Petitioner herein, it is clear from the Petition that the issues raised revolve around the eviction notices issued to the Interested Parties to vacate areas within Malaba Town on the basis that they have constructed structures on road reserves and public land thus interfering with the Respondents' plan of reorganization of the Town. Those are issues which relate to the use of land and under Section 13(1) and (2) of the *Environment and Land Court Act*, such issues are within the jurisdiction of this Court. Article 162(2) (b) of *the Constitution* also makes it clear that his Court is among the Superior Courts and whose jurisdiction includes the determination of disputes relating to –

" the environment and the use and occupation of, and title to, land".

The Petitioner seeks various remedies arising out of what he deems to be the Respondents' violation of various Constitutional rights. There can be no dispute that this Court is empowered to hear and determine disputes touching on a violation of Constitutional rights. No authority has been cited to suggest that this Court has no jurisdiction to determine this dispute. Section 13(2) (a) of the *Environment and Land Court Act* provides for the jurisdiction of this Court in the following terms:

(2) "In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes -

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources".

The Preliminary Objection questioning this Court's jurisdiction to determine this dispute is not well taken. I dismiss it.

**That This Petition Offends The Provisions Of Sections 61(3) And 78 Of The *Physical And Land Use Planning Act*:**

17. The above provisions read as follows:

61(3) "An Applicant or an Interested Party that is aggrieved by the decision of a County executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the County executive Committee members and that committee shall hear and determine the appeal within fourteen days of the appeal being filed." Emphasis mine.

78: "The functions of the County Physical and Land Use Planning Liaison Committee shall be to:

a. hear and determine complaints and claims made in respect to application submitted to the planning authority in the County;

b. hear appeals against decisions made by the planning authority with respect to physical and land use development in the County;

c. advise the County Executive committee member on broad physical and land use planning policies, strategies and standards; and

d. hear appeals with respect to enforcement notices." Emphasis mine.

Counsel for the 1st Respondent has cited the above provisions in support of the Preliminary Objection that this Court lacks the jurisdiction to determine this dispute. Counsel then goes on to submit as follows at paragraph D of his submissions:

> " Your Lordship, it is our onset submission that the Petitioner filed the said Petition and the application prematurely and without having exhausted the first tier mechanism for resolving the dispute and as such, this Court lacks jurisdiction to entertain the Petition and application at this stage. We submit that the said prayers and orders sought by the Petitioner, as a matter of trite law, fall within the jurisdiction of the County Physical and Land Use Planning Liaison Committee which is duly vested with the mandate to hear and determine such a dispute at the first instance. The issues raised in the Petition and application relate to the decision by the 1st Respondent and it's intended plan to reorganize the Malaba Town, which decision is only subject to an appeal to the County Physical and Land Use Planning Liaison Committee at the first instance".

It is clear to me that the 1st Respondent has misapprehended the provisions of Section 61(3) and 78 of the *Physical and Land Use Planning Act*. Section 62(3) of the said Act falls under Part IV which deals with "Development Control" and Section 56 is clear that the County Government has the power to control the development of lands and building including considering applications for the same. Section 57 deals with development permissions, Sections 58 to 71 provides for applications for land development and other related matters including fees. Part V deals with "enforcement" while Part VI where Section 78 falls deals with the Physical and Land Use Planning Committees and as is clear from the provisions of Section 78 which I have already cited above, it deals with applications for such land developments and appeals arising from the decisions of such Committees, arising out of applications by land developers. There is nothing to suggest that the Petitioner or any of the Interested Parties have made any applications to the Respondents seeking permission to develop any lands and a dispute has arisen following such applications. It is not therefore correct for the Respondents to allege, as they have done, that this Petition falls within the jurisdiction of the County Physical and Land Use Planning Liaison Committee. The said Committee is infact a Respondent in this Petition and it is inconceivable that it can itself be called upon to determine the various Constitutional violations which are the subject of this Petition. Of course whether or not the Petition will succeed is an issue which will be determined when the Court has considered the evidence by all the parties herein. What the Petitioner seeks by this Petition is for the Court to consider the alleged violations of Constitutional rights by the Respondents and make appropriate orders in relief of those violations. It cannot be correct to suggest, as the Respondents have done, that the Committees set out in the *Physical and Land Use Planning Act* cap 303 Laws of Kenya are the appropriate fora to hear and determine this Petition.

18. The 2nd, 3rd and 4th Respondents have, in their objection to this Court's jurisdiction, cited Section 40(4) of the *Physical and Land Use Planning Act*. It reads:

> " A person aggrieved by a decision of the County Planning authority concerning the County Physical and County development plan or matters connected therewith, may within sixty

days of receipt by him of notice of such decision, appeal to the County Physical and Land Use Planning Liaison committee in writing against the decision in such manner as may be prescribed."

As is already now clear from the case of MUKISA BUSICUIT MANUFACTURING CO LTD -V- WEST END DISTRIBUTORS (supra), a Preliminary Objection must be based on an issue of pure law. It must not be blurred with issues of fact. For Section 40(4) of the *Physical and Land Use Planning Act* to be properly invoked as a Preliminary Objection, the parties need to be in agreement that there was indeed public participation prior to the preparation of the County Physical and land use development plan. This is because, Section 40 of the said Act is headed.

40: "Public participation in the preparation of the County physical and land use development plan."

However, the issue of public participation is contested and in paragraph 61 of the Petition, the Petitioner has pleaded thus:

61: "The Petitioners (sic) posit that the Respondents acted in vain since the issues in contest entail public land and they ought to have been but were NOT subjected to public participation as a regulatory requirement under Kenyan law."

Again, whether or not there was public participation will be a matter to be determined when the Petition is heard. As of now, that is a contested issue and as was held in ORARO -V- MBAJA (supra), a Preliminary Objection must "be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence."

19. It must be obvious from all the above that in so far as the Preliminary Objections by the 1st, 2nd, 3rd and 4th Respondents purport to invoke the aforestated provisions of the *Physical and Land Use Planning Act*, the same must be dismissed for the simple reason that they invoke both the law but are also blurred by contested factual issues. The Preliminary Objections are therefore not founded on issue of pure law.

**Doctrine Of Exhaustion:**

20. The 2nd, 3rd and 4th Respondents have also submitted that this Court's jurisdiction to determine this dispute should also be governed by the doctrine of exhaustion. Counsel has submitted at paragraph 9 of his submissions as follows:

> 9: "Two important legal doctrines are to be examined while considering this question on jurisdiction. These are the doctrine of exhaustion and the doctrine of Constitutional avoidance. The doctrine of exhaustion requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to the Courts. The doctrine of Constitutional avoidance on the other hand frowns upon the practice of brining ordinary every dispute to the Constitutional Court."

Counsel then cited the Court of Appeal's decision in the case of GEOFFREY MUTHINJA & ANOTHER -V- SAMUEL MUGUNA HENRY & 1756 OTHERS 2015 eKLR where the Court had this to say on the doctrine:

> " 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside

of Courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

The doctrine of exhaustion was also restated in the case of SPEAKER OF NATIONAL ASSEMBLY -V- KARUME 1992 KLR 21 where the Court of Appeal held that:

> "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."

In this case, however, it is clear from the preceding paragraphs of this ruling that the issues which call for adjudication by this Court cannot be determined under the provisions of the *Physical and Land Use Planning Act* as suggested by the Respondents. Those issues do not involve any application made by the Petitioner or the Interested Parties and they cannot therefore be within the purview of the Liaison Committee established under that Act. There is therefore no basis for the application of the doctrine of exhaustion in the circumstances of this case. To do so would be to leave the Petitioner without a forum to litigate his claim. The doctrine of avoidance is therefore not applicable in the circumstances of this case. Besides, it is not an issue of pure law.

**The Petition Does Not Meet The Threshold Of A Constitutional Petition.**

21. It is now well settled that a Petitioner seeking remedies for a violation of Constitutional rights must demonstrate with some degree of precision the rights which he alleges to have been violated – ANARITA KARIMI NJERU -V- R 1976-80 I KLR 1272 [1979 KLR 154]. See also the case of MUMO MATEMU -V- TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS 2013 eKLR.

22. A perusal of the Petition which I have summarized at the commencement of this ruling clearly shows that from paragraphs 58 to 82, the Petitioner has set out the factual background of the Petition. Then from paragraphs 83 to 92, he has set out the main violation of *the Constitution* and other Statutes and finally from paragraphs 94 to 98, the reliefs sought. It cannot therefore be validly argued, on the face of it, that this Petition does not meet the requisite threshold as set out in the case of ANARITA KARIMI NJERU -V- R (supra) as pleaded in the Preliminary Objections.

23. In any event, failure to meet the threshold of a Constitutional Petition cannot be a proper Preliminary Objection as it is not a pure point of law which can dispose of the Petition. That is only a matter which can be determined on the basis of the evidence adduced.

24. It is clear to this Court that the Respondents' Preliminary Objection dated 6th September 2024 and 11th September 2024 are both devoid of any merits. They are for dismissal.

25. Even as this Court dismisses the Respondents Preliminary Objection, there is still pending for my determination the Petitioner's Notice of Motion dated 15th July 2024 and whose disposal this Court had already issued directions. That Motion had to give way to the Respondents' Preliminary Objections which questioned this Court's jurisdiction and which had to be determined first. Having dismissed the Preliminary Objection, I shall shortly be issuing fresh directions regarding the disposal of the Petitioner's Notice of Motion dated 15th July 2024.

26. Ultimately therefore, and having considered the Respondents Preliminary Objection dated 6th September 2024 and 11th November 2024, this Court issues the following orders:

    1. The Respondents Preliminary Objection dated 6th September 2024 and 11th November 2024 are hereby dismissed.

2. The Respondents shall meet the Petitioner's costs of the same.

3. Fresh directions are hereby issued on the Petitioner's Notice of Motion dated 15th July 2024 as follows:

   a. Prayer NO (3) of the Motion shall be canvassed by way of written submissions.

   b. The Petitioner to serve the Respondents with the Motion together with submissions within 7 days from today and file an affidavit of service.

   c. The Respondents will have 10 days from the date of service to file their responses and submissions and also file their affidavits of service.

   d. Mention on 29th July 2025 to confirm compliance and take a date for ruling and or for any further orders.

   e. The parties to ensure that they abide by the timelines set out herein.

**BOAZ N. OLAO**

**JUDGE**

**8TH JULY 2025**

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 8TH DAY OF JULY 2025 WITH NOTICE TO THE PARTIES.**

BOAZ N. OLAO

JUDGE

8TH JULY 2025

Explanatory notes:

This ruling was due for delivery on 8th April 2025 but was not ready then. Thereafter I proceeded on my annual leave until 2nd July 2025. That explains the delay which is regretted.

BOAZ N. OLAO

JUDGE

8TH JULY 2025