



**Wanjare (An Administrator of the Estate of the Late Jacob Wanjare Okore - Deceased) v County Government of Homa Bay & 3 others (Constitutional Petition E006 of 2022) [2024] KEELC 1214 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1214 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
CONSTITUTIONAL PETITION E006 OF 2022  
GMA ONGONDO, J  
MARCH 5, 2024**

**BETWEEN**

**ZEDEKIA OKEYO WANJARE (AN ADMINISTRATOR OF THE ESTATE OF THE LATE JACOB WANJARE OKORE - DECEASED) ..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF HOMA BAY ..... 1<sup>ST</sup> RESPONDENT**

**SUBA SUB COUNTY, HOMA BAY ..... 2<sup>ND</sup> RESPONDENT**

**MAGUNGA SDA CHURCH ..... 3<sup>RD</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The instant ruling is in respect of a preliminary objection dated April 26, 2023 and lodged in court on May 12, 2023 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents through Wesonga, Mutembei and Kigen Advocates on the following grounds:
  - a. That this Honourable court is deprived of jurisdiction to entertain the petition herein, since the petitioner has initiated a claim for historical injustices with the 4<sup>th</sup> respondent pursuant to the provisions of section 15 of the [National Lands Commission Act](#) No. 5 of 2012 which is pending before the 4<sup>th</sup> respondent.
  - b. That the petitioner has not exhausted mechanism, processes and remedies provided for under section 15 of the [National Land Commission Act](#) No. 5 of 2012.
  - c. That petition does not disclose any violation of the petitioner’s constitutional rights by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.



2. The petitioner through E. M. Orina and Company Advocates, opposed the preliminary objection by way of a replying affidavit sworn on 23<sup>rd</sup> June 2023 and filed herein on July 21, 2023. He deposed, inter alia, that he lodged his claim before the 4<sup>th</sup> respondent, within the prescribed period under section 15 (3)(e) of the [National Land Commission Act](#). That however, no prompt action has been forthcoming. That this court is properly seized of this matter since the 4<sup>th</sup> respondent does not have exclusive authority on adjudicating historical land injustices.
3. On June 15, 2023, this court ordered and directed that the Preliminary Objection be heard by way of written submissions in the spirit of article 159 (2)(b) of the *Constitution of Kenya*, 2010.
4. Accordingly, the 3<sup>rd</sup> respondent through M/s Abisai and Company Advocates, filed submissions dated February 27, 2024 and asserted that it is an allottee paying rates to the 1<sup>st</sup> respondent and was not party to any of the injustices alleged by the petitioner in the petition. That the petitioner lacks locus to prosecute the instant suit as he has not availed a copy of the grant letters of administration to the estate of the deceased. That further, the cause of action arose more than twelve years ago hence, this petition is time barred under the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya. That therefore, this court lacks jurisdiction to hear and determine the petition herein. To reinforce the submissions, counsel relied on various authorities, including the case of [Christopher Mutiembu Machimbo and 3 others -vs- County Surveyor, Trans Nzoia and 4 others](#) (2022) eKLR.
5. The petitioner's counsel filed submissions dated June 23, 2023 on July 21, 2023 and identified three issues for determination namely:
  - a. Whether court lacks jurisdiction to hear and determine the petition by virtue of the petitioner lodging a claim for historical land injustices with the 4<sup>th</sup> respondent.
  - b. Whether the petitioner was required to exhaust the remedies provided under section 15 of the [National Land Commission Act](#); and
  - c. Whether the petition discloses any violation of the petitioner's constitutional rights by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
6. Briefly, learned counsel submitted that this court has jurisdiction to hear and determine historical land injustices. That the 4<sup>th</sup> respondent has failed to promptly address the petitioner's claim and that despite the presence of alternative remedies, the court has residual authority to intervene in extraordinary situations, disregarding the doctrine of exhaustion. That the petition discloses violation of the petitioner's constitutional rights thus, the preliminary objection herein is unmerited and ought to be dismissed with costs. Counsel cited the case of [Safepak Limited -vs- Henry Wambega and 11 others](#) (2019) eKLR, among others, to fortify the submissions.
7. It is noteworthy that by a petition dated August 22, 2022 and filed herein on September 5, 2022, the petitioner through E. M. Orina and Company Advocates is seeking the orders infra;
  - a. A declaration that the petitioner's right to acquire and own property without arbitrarily being deprived of the same as guaranteed by article 40 of the *Constitution* has been contravened by the unlawful and/or illegal occupation by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the subject parcels of land.
  - b. A declaration that the respondent's acts are in violation of the petitioner's right to equality before the law and the right to equal benefit and protection of the law as enshrined in article 27 of the *Constitution*.



- c. A declaration that failure of the 4<sup>th</sup> respondent to initiate investigations into the historical land injustice is a violation of articles 67 and 27 of the *Constitution*.
  - d. An order for prompt payment in full of just compensation for the unlawful deprivation of property to the petitioner pursuant to the express provisions of article 40 of the *Constitution*.
  - e. An order for general damages.
  - f. Costs of this petition.
  - g. Any other relief the honourable court may deem fit and just to grant.
8. The petition was opposed by way of a replying affidavit sworn by Samson Okwach Mirongo on June 21, 2023 on behalf of the 3<sup>rd</sup> respondent.
  9. The Preliminary Objection is mainly grounded on section 15 of the [National Land Commission Act No. 5 of 2012](#). So, is the preliminary objection sustainable?
  10. It must be noted that the preliminary objection is on a point of law and may dispose of this petition; see *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 where the Court of Appeal pronounced itself on what constitutes a preliminary objection as follows:
 

“...a preliminary objection 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 a contract giving rise to the suit to refer the dispute to arbitration...” (Emphasis added).
  11. I have considered the preliminary objection, the petition, the reply thereto and the rival submissions. Therefore, the foremost issue that arises for determination is: whether this court has jurisdiction to hear and determine the instant petition.
  12. Article 162 (2) (b) of the [Constitution of Kenya, 2010](#) anchors the jurisdiction of this court. The same is operationalized by section 13 (1) of the [Environment and Land Court Act, 2015](#) (2012) and other relevant statutes.
  13. The Court of Appeal at Nairobi in [Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others](#) [2013] eKLR, stated the following in respect to jurisdiction:
 

“So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.”
  14. The Honourable Court went ahead to quote Nyarangi J.A in *The Owners of the Motor Vessel Lillian S’-vs- Caltex Kenya Ltd* [1989] KLR 1 that;
 

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no



power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”

15. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that this court lacks jurisdiction to entertain the petition herein, since the petitioner has initiated a claim for historical injustices with the 4<sup>th</sup> respondent pursuant to the provisions of section 15 of the [National Lands Commission Act](#) No. 5 of 2012. That the claim is pending before the 4<sup>th</sup> respondent.
16. This court subscribes to the Court of Appeal decision in the case of [Chief Land Registrar & 4 others -vs- Nathan Tirop Koech & 4 others](#) (2018) eKLR, where the Court pronounced itself as follows regarding jurisdiction:
  75. On the question whether a court should await investigations and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seized of the matter. Our conviction stems from a reading of article 67(2) (e) of the [Constitution](#). The Article provides that the NLC can investigate “present or historical” land injustices. We lay emphasis on the word “present.” If the NLC had an initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the Environment and Land Court redundant. We do not think this was intended to be so. Our view is fortified by section 15(3)(b) of the [National Land Commission Act](#) which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.
  76. Further, there is nothing in the 2010 [Constitution](#) or in the [National Land Commission Act](#) ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice...” (Emphasis added)
17. Therefore, I endorse the reasoning of my learned brother Munyao J. in the case of [Henry Wambega & 733 others -vs- Attorney General & 9 others](#) (*supra*) where he stated thus:

“I think the issue of jurisdiction is settled. This court has jurisdiction to hear claims even those based on historical injustices. What we need to have in mind here is that just because a court is vested with jurisdiction, does not mean that in all cases the court will proceed to exercise that jurisdiction, especially where there is another body that also has capacity to hear that dispute. In other words, depending on the facts and circumstances surrounding the case, the court can defer jurisdiction to another body, or decline to take up the matter altogether, and this would not be because it has no jurisdiction, but because given the surrounding circumstances, it would be best for the court not to exercise its jurisdiction.” (Emphasis added)
18. In the present case, the petitioner has instituted a claim before the 4<sup>th</sup> respondent herein. The same is pending determination.
19. the [Constitution](#) of Kenya, 2010 at article 67 (2) (e) does provide one of the functions of the 4<sup>th</sup> respondent namely;

“to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.”



20. This function was embodied in Section 15 of the National Land Commission Act. So, does this court have jurisdiction in respect of the dispute in the first instance? Evidently, the answer is in the negative in light of the foregoing.
21. Clearly, the exhaustion principle is applicable in this petition since where mechanisms exist outside court, the court does not have jurisdiction in the first instance in the matter in question. See *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR and *Geoffrey Muthinja Kabiru and 2 others-vs-Samuel Muguna Henry and 1756 others* (2015) KLR.
22. Furthermore, I subscribe to the Supreme Court of Kenya decision in the case of *Albert Chaurembo Mumbo and 7 others -vs- Maurice Munyao and 148 others* (2019) eKLR on the exhaustion doctrine where the court held that:

“...even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute...”
23. Additionally, the 3<sup>rd</sup> respondent’s counsel submitted that the petitioner lacks *locus standi* to initiate this petition. Indeed, it is evident that the petitioner has not obtained a grant of letters of administration in respect of the estate of the deceased to mount this petition as stipulated under Section 82(b) of the *Law of Succession Act*, chapter 160 Laws of Kenya and in the case of *Trouistik Union International & another -vs- Jane Mbeyu & another* (1993) eKLR. He is not a legal representative under section 2 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
24. In the premises, I find the notice of preliminary objection dated April 26, 2023 merited. The same is hereby allowed.
25. In the foregone, the instant petition is hereby struck out with no orders as to costs.
26. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 5<sup>TH</sup> DAY OF MARCH 2024.**

**G. M. A ONGONDO**

**JUDGE**

**Present**

Aoleon Abisai holding brief for R. Abisai, learned counsel for the 3<sup>rd</sup> respondent

Mr. Ayugi, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

Mr. Kefa, learned counsel for the petitioner

Luanga, Court Assistant

