



**Murathi v Murathi & 4 others (Environment & Land Petition
E008 of 2022) [2024] KEELC 4584 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4584 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION E008 OF 2022**

**JG KEMEI, J
JUNE 3, 2024**

BETWEEN

LOISE NJOKI MURATHI PETITIONER

AND

PAULINE WANJUE MURATHI 1ST RESPONDENT

SIMON NGURE MURATHI 2ND RESPONDENT

DISTRICT LAND REGISTRAR, KIAMBU 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

ODHIAMBO JA T/A PRIME LINE SURVEYS 5TH RESPONDENT

RULING

Petitioner's Notice of Motion dated 30/6/2022

1. Pursuant Articles 22, 23, 40, 47 and 159 of *the Constitution* of Kenya, Sections 1A and 1B *Civil Procedure Act* and Section 13 of the *Environment and Land Court Act*, the Petitioner/Applicant prays for Orders THAT;
 - a. Spent.
 - b. Spent.
 - c. This Honourable Court be pleased to issue interim conservatory orders restraining the 1st and 2nd Respondents by their servants, agents, assigns or otherwise howsoever from alienating, surveying, disposing or adversely dealing with the suit properties Land Reference No. Kiambaa/Ruaka/3656, Kiambaa/Ruaka/3657, Kiambaa/Ruaka/3658 and Kiambaa/Muchatha T. 328 pending the hearing and determination of the Petition.



- d. This Honourable Court be pleased to order that the Petitioner's witness Janet Wambui Muhu's evidence be heard de benese on account of her advanced gage and medical conditions.
 - e. Costs of the Application be in the cause.
2. The application is based on the grounds on the face of it outlining the historical background of the suit properties; particulars of fraud levelled against the 1st and 2nd Respondents alleging loss of titles; irregular dealings over LR No. Kiambaa/Ruaka/884; particulars of fraud by the 1st, 2nd, 3rd and 5th Respondents in Kiambaa/Ruaka/884; irregular dealings over LR Kiambaa/Muchatha T.328 and particulars of fraud/negligence by the 1st, 2nd and 3rd Respondents in Kiambaa/Muchatha T.328. These grounds are replicated in the Supporting Affidavit as summarised below.
 3. The Applications is supported by the detailed affidavit of even date of Loise Njoki Murathi, the Petitioner who averred that she and her late husband Stephen Murathi Muiruri (Stephen) enjoyed joint proprietorship of several properties including part of the suit property LR No. Kiambaa/Ruaka 884 (hereinafter Parcel 884) which was later subdivided to give rise to LR Nos. Kiambaa/Ruaka/3656, Kiambaa/Ruaka/3657, Kiambaa/Ruaka/3658 and Kiambaa/Muchatha T.328 belonging to her late husband. That the 1st Respondent purports to be the 2nd wife of the late Stephen and the 2nd Respondent is her son.
 4. The deponent went ahead to give the historical background of the suit properties which shows subdivisions of Kiambaa/Ruaka/437 was first registered on 26/2/1964 in favour of Muhu Kigoto, the Petitioner's father. That the property was later subdivided on 15/1/1998 and green card opened with the resultant subdivision Kiambaa/Ruaka 1381 and 1382 respectively to Mary Kanyi Muhu and Janet Wambui Muhu who were co-wives and registered proprietors equally. Copies of the green card and mutation forms for Kiambaa/Ruaka 437 leading to Kiambaa /Ruaka 1381 & 1382 are annexed as '4'. That Janet Wambui Muhu, the registered owner of Kiambaa/Ruaka 1382 is the Petitioner's mother and had other children and allotment of properties as follows; Loise Njoki Murathi – Title No. 1626, Johnson Muturi Muhu – Title No. 2869, Irene Ruguru Muhu – Title No. 1748 and Margaret Mbari Muhu – Title No. 1387.
 5. On the other hand, it was further deposed that Mary Kanyi Muhu, the registered owner of Kiambaa/Ruaka 1381 had two children with the following allotments; Samuel Mbugua Muhu – Title No. 1799 and Robert Kariuki Muhu – Title No. 1831. That further subdivision of the property resulted in new parcels Kiambaa/Ruaka/1614 (registered under Mary Kanyi Muhu) and Kiambaa/Ruaka/1615 from Kiambaa/Ruaka/1533 to which the late Stephen was registered as the owner to hold in trust for the Petitioner. See the copy of official search for Kiambaa/Ruaka/1615 and mutation form for Kiambaa/Ruaka/1533 annexed as '6'.
 6. The Petitioner deposed that she underwent customary marriage with the late Stephen in January 1974 and were gifted with Kiambaa/Ruaka/1626 by her father Muhu Kigoto (now deceased). That this wedding gift though registered in late Stephen's name, by virtue of their marriage, was encumbered with a resultant trust in the Petitioner's favour. That the said marriage was blessed with six issues namely; Janet Wambui Murathi, Catherine Mukuhu Murathi, Wilson Ngunge Murathi, Agnes Nyambura Murathi, Mercy Wanjiru Murathi and Harrison Muhu Murathi all born between the years 1974 and 1987. Copies of their birth certificates are annexed as bundle '8'. That in 1991, the Petitioner's husband purchased a property Kiambaa/Ruaka/884 from one Stephen Ndugu Kinuthia to assist in medical aid of Stephen Ndugu's son. Additionally, she the Petitioner avowed that her marriage was characterized by domestic abuse and violence culminating into her assault and eviction from the



matrimonial home by the late Stephen in May 1995 which coincided with the time the 1st Respondent was introduced as a co-wife.

7. That later Stephen died on 7/9/2018 and in an attempt to succeed his estate, the Petitioner sought to inquire about the title documents for the suit properties of the deceased to which the 1st Respondent alleged that they were lost. It is based on the information of lost titles, that the Petitioner proceeded to file a report at Karuri Police Station vide OB No. 27/18/10/2018 in respect of the following titles; Mshindi Rd Ngara LR 209/2490/26, Limuru Township LR 12020/27, Ruaka/Kiambu/33, Kiambaa/Ruaka/3656, Kiambaa/Ruaka/3657, Kiambaa/Ruaka/3658, Kiambaa/Ruaka/1615, Kiambaa/Ruaka/4457, Kiambaa/Ruaka/4458 and Kiambaa/Muchatha/T.328.
8. That based on the information from the 1st Respondent on lost titles, the Petitioner proceeded to apply for replacement of the said titles yet, unbeknown to her, the 1st and 2nd Respondents had connived to register a fraudulent trust in favour of the 1st Respondent. That it is against that background that the Respondents filed Thika Misc App. No 40 of 2020 seeking vesting orders for the suit property in favour of the 2nd Respondent. Additionally, the Petitioner detailed the illegal and irregular dealings over LR No. Kiambaa/Ruaka/884 as enumerated below;
 - a. On 5/9/1990 parcel LR No. Kiambaa/Ruaka/884 was registered in the name of the late Stephen as the sole proprietor.
 - b. On 22/5/1991 the ownership of the parcel changed to tenancy in common with equal ownership between the Petitioner and the late Stephen – see copy of title marked as ‘14’.
 - c. The tenancy in common ownership was dissolved on 7/4/1993 when the property was transferred to a Company called Ruaka Estate Ltd which was jointly owned by the Petitioner and late Stephen. The CR12 is annexed and marked ‘15’.
 - d. On 5/3/1998 the suit property was fraudulently transferred from Ruaka Estate Ltd to the late Stephen, Pauline Wanjue Murathi and the Petitioner as trustees for Simon Ngure Murathi (deceased son). See copy of green card marked as ‘16’.
 - e. On 22/1/2010, the title deed, green card for Parcel 884 was closed down giving rise to Kiambaa/Ruaka/3656, Kiambaa/Ruaka/3657 and Kiambaa/Ruaka/3658. See copy of mutation for Parcel 884 marked as ‘17’.
9. The deponent went ahead to particularise fraud and/or negligence by the 1st, 2nd, 3rd and 5th Respondents to wit; subdividing Parcel 884 without the Petitioner’s consent and/or authority; effecting transfer of the suit properties without a board resolution and/or copy of sale agreement signed by all Directors of the Company; divesting the Company assets in favour of a non-shareholder without basis; effecting transfer of the property using falsified documents namely wrong ID numbers in the title documents to her detriment; entering a trust in favour of the 2nd Respondent without a trust deed, signed by the Petitioner or the purported registered owners. That the 1st and 2nd Respondents in concert with the 3rd Respondent’s officials unlawfully and un-procedurally and fraudulently dealt with parcel Kiambaa/Muchatha T.328 by registering an unlawful trust in favour of Harrison Muhu Murathi without the knowledge and consent of the registered owners; without requisite trust deeds, Land Control Board consent and board resolution as required by law; use of forged identification documents and signatures on the alleged transfers.
10. In the end the Petitioner stated that upon noticing the blatant fraud between the Respondents, and being unable to plead fraud in the Thika Misc App. No 40 of 2020, she opted to file the instant Petition



to ventilate all the material issues in controversy. That she never appeared before any Land Control Board for purposes of approving transfer of any suit property from Ruaka Estate Ltd to the alleged trustees in favour of the 2nd Respondent herein. That neither did she ever execute any trust deed or consent to any such deed and thus the Petition raises serious constitutional questions on the validity of the creation of the impugned trusts and the prayers therein. Accordingly, it is only just and fair that the conservatory orders be granted as prayed in the motion to avert potential irreparable loss. That some of the parcels e.g. Kiambaa/Ruaka/3657 and Kiambaa/Ruaka/3658 are now valued at Kshs. 102M and Kshs. 65.5M respectively as shown by valuation reports marked '20' and '21'.

11. Lastly, the Respondents will not suffer any prejudice if the motion is granted as drawn. Further that it is also in the interest of justice that the Petitioner's mother who is advanced in age be heard de benese as a matter of urgency.
12. The 1st Respondent filed her Notice of Motion dated 18/7/2022 opposing the Petition and instant Application. She also urged the Court to strike out the Petition.
13. The 2nd Respondent filed his Grounds of Opposition dated 18/7/2022 on grounds that;
 - a. The Petition as filed does not in any way meet the threshold spelt out in Locus classicus of Anarita Karimi Njeri and Rule 10 (2) of Mutunga Rules.
 - b. The Petition as pleaded has a semblance of a constitutional dispute but rather seeks redress of a purported transgression that could be addressed through a normal suit.
 - c. The Petition as filed is a calculated attempt to circumvent the imitation of time as per the Limitations of Actions Act.
 - d. The Petition is res sub judice.
 - e. The Petitioner lacks locus standi to file the Petition.
14. In addition to the Grounds of Opposition above, the 2nd Respondent contemporaneously filed his Notice of Motion dated 17/10/2022 seeking in the main to strike out the Petition.

The 1st Respondent's Notice of Motion dated 18/7/2022

15. The 1st Respondent's application is expressed under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) craving for Orders that;
 - a. The Petition dated 30th June 2022 be struck out as being an abuse of the process of Court.
 - b. The costs of this Application be borne by the Petitioner.
16. The Application is based on grounds that the Petitioner is guilty of abuse of Court process by instituting multiple suits revolving same issues namely; In Thika Misc App. No E040 of 2020 where the Petitioner unsuccessfully filed review dated 22/11/2021 seeking to stay the orders of the Court rendered on the 4/11/2021; In Kiambu HC Civil Suit No. E029 of 2021 (O.S) where the Petitioner sought inter alia a declaration that the named properties acquired during the pendency of her marriage were held beneficially and in trust for her; The instant Petition seeking inter alia cancellation of trust deed in favour of the 2nd Respondent, declaration that subsequent transactions on the suit properties are null ab initio, that Ruaka Estate Ltd is the bona fide owner of Kiambaa/Ruaka/884, Order for cancellation and rectification of register for suit properties to revert to Ruaka Estate Ltd and permanent injunction against the Respondents from interfering with the quiet possession of the suit properties.



17. That the Petitioner's application is an after-thought, fatally defective and an abuse of Court process; the Petition is sub judice in light of similar live matters before this Court and Kiambu High Court in contravention of Section 6 of the Civil Procedure Act. That the Petitioner's response in Thika Misc App. No. E040 of 2020 raised the issues of fraud and the same was adequately dealt with.
18. Reiterating the above grounds, the 1st Respondent Pauline Wanjue Murathi swore her Supporting Affidavit of even date and annexed the Petitioner's application for review dated 22/11/2021 filed in Misc. App E040 of 2020 as annexure PWM-1, copy of application of Civil Suit No. E029 of 2021 (O.S) as PWM-2, copy of application for Letters of Administration dated 15/1/2020 in respect of the estate of late Stephen as PWM-3 and copies of the Petitioner's Replying Affidavit and Ruling in Thika Misc. App. No E040 of 2020 as PWM-4.

The 2nd Respondent's Notice of Motion dated 17/10/2022

19. Akin to the 1st Respondent's motion, the 2nd Respondent in the main urges this Court to strike out the Petition dated 30/6/2022 in its entirety. In the alternative and without prejudice, he prays that Kiambu/Ruaka/3657 and Kiambu/Ruaka/3658 be taken out of these proceedings the same having been dealt with in Thika ELC Misc. App No. E040 of 2020.
20. The Application is premised on the grounds that this Court having pronounced itself in Thika Misc App No. E040 of 2020 vide a Ruling dated 4/11/2021, the Court is functus officio as regards Kiambu/Ruaka/3657 and Kiambu/Ruaka/3658; the said Ruling has not been appealed against or vacated; this Court on 7/9/2022 dismissed the Petitioner's application for Review in Misc App No. E040 of 2020; that consequently any question on ownership of the two parcels being 3657 and 3658 in light of the vesting orders in the 2nd Respondent's name is Res Judicata.
21. Further that parcel Kiambaa/Muchatha/T.328 is registered in the Petitioner's and 1st Respondent's names holding it in trust for Harrison Muhu Murathi, who has not been enjoined in the instant proceedings and any adverse orders against him would stand in the face of his rights. That in so far as prayers No. 5, 6, 7 and 8 of the Petition are in respect to Ruaka Estate Ltd, the Petitioner lacks locus standi to institute this suit in her own name/capacity since Ruaka Estate Ltd is a separate legal entity. That in any event, prayer 1 in the Petition respecting the title for parcel Kiambaa/Ruaka/884 issued on 5/3/1998 is time barred by dint of Section 7 of the Limitation of Actions Act.
22. The Application is supported by the Affidavit of Simon Ngure Murathi, the 2nd Respondent. He rehashed the forgoing grounds of the Motion and annexed a copy of this Court Ruling dated 4/11/2021 in Misc App No. E040 of 2020 and Ruling dated 7/9/2022 as SNM-001 and SNM-002 respectively.
23. It would appear that the 5th Respondent filed a Notice of Motion dated the 17/10/2022 however the Court on preparing the ruling did not sight the same on record. Counsel for the 5th Respondent undertook to regularise the filing of the said motion but up till the delivery of the Ruling none was placed on record. The Court will therefore deem the application as abandoned.

The Written Submissions

24. The Petitioner through the firm of Mwangi & Kihang'a Advocates filed omnibus submissions dated 18/7/2023 in support of her Application for conservatory orders and in opposition of the 1st and 2nd Respondents' motions for striking out the Petition. Three issues were drawn for determination namely; whether the Petition should be struck as prayed; whether the Petitioner has demonstrated sufficient



grounds to grant conservatory orders and whether the Petitioner is entitled to the reliefs sought in the Application dated 30/6/2020.

25. On the first issue, the Petitioner response is in the negative submitting that despite the findings of this Court in Misc App E040 of 2020, the issues touching on fraud can only be dealt with in a substantive suit hence the Petition. That those issues on fraud have never been conclusively heard and determined. Regarding Kiambu HC Civil Suit No. E029 of 2021 (OS), the Petitioner argued that the same was filed to determine her matrimonial contribution in her late husband's estate, a claim beyond the jurisdiction of this Court. Moreover, that the 3rd, 4th and 5th Respondents are not parties to the aforementioned suits and the prayers in the Petition are thus distinct.
26. Opposing the Grounds of Opposition dated 18/7/2022, the Petitioner maintained that a glean of the Petition clearly outlines the constitutional breaches under Articles 40, 45 and 47 of *the Constitution* of Kenya in line with the holding in Anarita case (supra). Defending the filing of the Petition and the nature of declaratory prayers sought, the Petitioner cited the case Fred Munialo Maelo Vs. Mathew Wamalwa Wafula & 2 Others [2020] eKLR where the Court held that it is not a principle in law that a constitutional Petition cannot be filed if there is an alternative remedy but rather that each case must be considered on its own peculiar facts.
27. Denying the plea of limitation of time under Section 7 of the *Limitation of Actions Act*, the Petitioner submitted that computation of time starts when she became aware/discovered the fraudulent actions. In this case that she became aware of the fraud upon being served with the application in Misc App E040 of 2020. That in this case the impugned entries were made on 2/1/2010 and the period of 12 years for filing a suit is yet to lapse.
28. In a similar breath, the Petitioner refuted the averment that the Petition is subjudice urging that the matter, issues and parties in the Petition are materially different from those of any other pending case.
29. On the issue of lacking locus standi to sue, the Petitioner argued that Article 22 of *the Constitution* of Kenya expanded the scope of locus standi for constitutional Petitions and allows private individuals to seek redress for violations of constitutional rights. As a result, she submitted that she has requisite standi to sue on her own behest and even further file a representative suit on behalf of others under Art 22.
30. The Petitioner's second issue is answered in the positive. That the Petitioner went to great details to particularize historical background of the suit properties and fraudulent actions thereon. That the properties face imminent danger by way of sale or charge and therefore the prayer for conservatory order is merited. That the Respondents will not suffer any prejudice should conservatory order issue to preserve the status quo.
31. On the last issue, the Petitioner reiterated that she has satisfied the conditions for granting conservatory orders as summarized above. That the prayer for taking Janet Wambui Muhu's evidence de benese has not been opposed by the Respondents. In the end the Petitioner prayed that the 1st and 2nd Respondents' Applications and Grounds of Opposition be dismissed and her application dated 30/6/2020 be allowed with costs.
32. On the other hand, the firm of Gichigo & Kamau Associates filed the 1st Respondent's submissions dated 10/11/2023. Two issues were drawn for determination namely; whether conservatory orders should issue and whether the Petition should be dismissed.
33. Reciting the preconditions for grant of an injunction as stated in the case of Giella Vs. Cassman Brown & Co. Limited (1973) EA 358, the 1st Respondent submitted that the Petitioner has not established a



prima facie case and the Petitioner lacks locus standi to sue on behalf of Ruaka Estate Ltd. That issuing conservatory orders in relation to parcel Kiambaa/Mucatha T.328 in Harrison Muhu's name would be prejudicial to his constitutional rights noting that he is not a party in these proceedings. That there is evidence showing that the Petitioner was aware of the subdivision of Kiambaa/Ruaka/884.

34. On whether the Petition should be dismissed, it was submitted that it is an abuse of Court process considering that in the Kiambu case, the Petitioner seeks declaration that the suit properties are matrimonial properties which were held in trust for her. Relying on the ingredients of abuse of Court process as discussed by Mativo J as he then was in *Satya Bhama Gandhi Vs. Director of Public Prosecutions & 3 Others* [2018] eKLR, the 1st Respondent stated that the Petitioner is guilty of filing multiple suits over the same matter and the same parties.
35. Equally the 2nd Respondent through the firm of Ndegwa & Ndegwa Advocates filed submissions dated 10/11/2023. Just like the 1st Respondent, the 2nd Respondent contended that the Petitioner has not satisfied the criteria for granting injunctive orders sought. That Harrison Muhu is not enjoined in these proceedings to warrant injunctive orders in respect of Kiambaa/Muchatha T.328.
36. On whether the Petition and Application should be struck out, the 2nd Respondent's answer is in the affirmative that the Petition relates to some properties whose ownership is Res Judicata following the Rulings in *Thika Misc App No. E040 of 2020*.

Analysis & determination

37. Having considered the Motions, submissions and entire record before Court, the main issue for determination is whether the Petition should be struck out, if the answer is in the negative, whether the Petitioner has met the threshold to grant conservatory Orders as prayed.
38. In determining the first issue I shall consider the following sub issues in turn;
 - a. Whether the Petitioner possesses the requisite locus standi to file the Petition.
 - b. Whether the Petition satisfies the criteria laid down in the *Anarita* case supra.
 - c. Whether the Court is functus officio as far as *Kiambu/Ruaka/3657* and *Kiambu/Ruaka/3658* are concerned.
39. Does the Petitioner possess the requisite capacity to sue in the manner she has? Her answer is in the affirmative citing Article 22 of *the Constitution* of Kenya. She cited the case of *Mohamed Feisal & 19 Others Vs. Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police station & 7 Others* [2018] eKLR to support the position that she is entitled to sue on her own behalf and on behalf of others (who are not specified in this case).
40. Article 22 Constitution of Kenya inter alia provides;
 - “2. Enforcement of Bill of Rights
 - (1) Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
 - (2) In addition to a person acting in their own interest, Court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;



- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.”

41. The 1st and 2nd Respondents contend that the Petitioner lacks capacity to sue for and or behalf of Ruaka Estate Ltd. A look at the CR12 dated 24/8/2020 for the Ruaka Estate Ltd relied on by the Petitioner shows that she and her late husband Stephen were the co-Directors and shareholders in the Company.
42. A glean of annexure 16 as contained in the supporting Affidavit of the Petitioner shows the historical root of Parcel 884. It was the Petitioner’s averment that Parcel 884 was bought from a neighbor who was residing next to the Petitioner’s matrimonial home sometime in 1991. The first entry shows that Stephen Murathi was registered as the proprietor and a title deed issued in his favor on 5/9/1990. On 22/5/1991 the said parcel was registered in the joint names of Stephen Murathi and the Petitioner herein with each of them having 63.5 shares respectively. Two years later in 1993 the parcel of land was registered in the name of Ruaka Estate Limited and a title issued thereto. Subsequently on 5/3/1998 Ruaka Estate Ltd transferred its ownership to Loise Njoki Murathi, Stephen Murathi and Pauline Wangui Murathi as trustees for Simon Ngure Mwathi, then a minor and a title deed was issued.
43. The question then is who is the right person to bring a suit with respect of a Company asset? It is trite that a limited liability Company is a legal person having separate existence from its shareholders. It can sue and be sued in its own name. Once a Company is incorporated it exist as a legal person from that date of incorporation; it can acquire its own property, and has rights and liabilities separate from those of its members. Simply put, it is a juristic person. This was aptly discussed in the case of *Salomon Vs. A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22 where at page 52 Lord Mac Naghten was unequivocal that –

“The Company is at law a different person altogether from the subscribers to the memorandum and through it may be that after incorporation the business is precisely the same as it was before, and the same person are managers ... the Company is not in law the agent of the subscribers or trustee for them nor are the subscribers as members liable in any shape or form except to the extent and in the manner provided by Act.”

44. The Court of Appeal in the case of *Amin Akberali Manji & 2 Others Vs. Altaf Abdulasul Dadani & Another* [2015] eKLR discussed at length the issue of locus in relation to a limited liability Company. It held thus:-

“.... The centuries-old case of *Salomon vs. Salomon Company Limited* [1895-99] All ER 33 laid that principle to rest. There is also no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to the Company, is the Company itself. Again, that was established over 160 years ago in *Foss vs. Harbottle* [1843] 67 ER 189 (the Foss case), popularly referred to in Company law as “the rule in Foss v. Harbottle” (the rule). The rule was restated by Jenkins L. J. in the case of *Edwards Vs. Halliwell* [1950] All ER 1064 as follows:-

“The rule in Foss-v-Harbottle, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a Company or association of persons is prima facie the Company or the association



of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the Company or association and on all its members by a simple majority of the members, no individual member of the Company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the Company or association is in favour of what has been done, then cadit quaestio; or if the simple majority challenges the transaction, there is no valid reason why the Company should not sue.”

45. In the case of Arthi Highway Developers Ltd Vs. Westend Butchery Ltd & 6 Others Civil appeal No. 246 of 2013 the Court of Appeal followed the summing up of the rule by Lord Denning M.R in *Moir vs. Wallerstainer* [1975] 1 All ER 849 at pg 857, thus:-

“It is a fundamental principle of our law that a Company is a legal person with its own corporate identity, separate from the Directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the Company itself is the one person to sue for the damage. (Emphasis mine by underlining). Such is the rule in *Foss V. Harbottle* [1843] 2 Hane 461. The rule is easy enough to apply when the Company is defrauded by outsiders. The Company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the Company is the only person who can sue.”

46. In *Apex Finance International Limited and Another Vs. Kenya Anti-Corruption Commission NKU HC JR No. 64 of 2011* [2012] eKLR, the Court cited a decision of the Supreme Court of Nigeria, *Goodwill and Trust Investment Ltd and Another v. Witt and Bush Ltd Nigerian SC 266/2005* which captured the fundamental nature of the issue of capacity. The Court observed that:

“It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed, the parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the Court the Court lacks jurisdiction to hear the suit, and, “where the Court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”

47. In the case of *Christopher Mutiembu Machimbo & 3 Others Vs. County Surveyor, Trans-Nzoia & 4 Others* [2022] eKLR the Court held that unless there is evidence of a Company being non-existent, the rebuttable assumption is that a Company holds the status of an independent legal entity separate from its owners and anyone who purports to sue individually lacks locus standi to institute the suit and such suit is for striking out.

48. A keen perusal of the Petition reveals that the same was brought by the Petitioner in her personal capacity. It has not been expressed as a representative suit or an action by a trustee. The Company search shows that the Company is in existence and the Petitioner is a shareholder and director of the Company. Also it is to be noted that the Petitioner has not disclosed that she is suing on behalf of the Company but the alleged beneficiaries of the Company’s actions.

49. I agree with the decision in *Apex Finance International Limited* (supra) that the question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. I find that the provisions of Article 22 of *the Constitution* of Kenya cannot be called in aid of the Petitioner in this case.



50. In my considered view the Ruaka Estates Limited being a legal person with its own corporate identity, separate from the Directors or shareholders and with its own property rights and interests to which alone it is entitled, ought to be the right party to sue. Consequently I find that the Petitioner lacks the capacity to sue for the Company as alleged.

Whether the Petition satisfies the criteria laid down in the Anarita case (supra).

51. On the question as to whether the Petition as drawn meets the requisite threshold for constitutional Petitions, the leading authority in this regard is the case of Anarita Karimi Njeru Vs. Republic [1979]eKLR where the Court outlined the standard for drafting constitutional pleadings 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.”

52. That position was affirmed by the Court of Appeal in the case of Mumo Matemu Vs. Trusted Society of Human Rights Alliance & 5 Others [2013]eKLR. In addition, the Supreme Court confirmed the importance of complying with the stated principle by holding as follows in Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR:

“(349) ...Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

53. Mativo J (as he then was) in the case of Kiambu County Tenants Welfare Association Vs. Attorney General & Another [2017] eKLR stated that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.
54. The Petitioner claims infringement of her rights under Articles 40, 45, 47, 48 and 58 of *the Constitution* of Kenya. She has not with precision enumerated how the rights have been breached and by who. Her Petition which is replicated in her Notice of Motion contains a detailed list of sub divisions and distribution of suit properties owned joint by late Stephen Murathe. The succession proceedings of her husband’s estate by her own concession, are still ongoing.
55. The Court of Appeal in *Mugendi Vs. Japheth & 3 Others (Civil Appeal 65 of 2020)* [2022] KECA 574 (KLR) dismissed an appeal challenging the orders of the Environment and Land Court that dismissed a Petition for wanting in terms of threshold of constitutional Petition and held that the appellant’s complaints were premised on the adjudication process and not on any constitutional violations.



56. The Court of Appeal in the case of Gabriel Mutava & 2 Others Vs. Managing Director Kenya Ports Authority & Another [2016] eKLR stated thus:

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.

... this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights....

Of course violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.”

57. The gist of the Petitioner’s case as I can gather from the Petition is that the properties which she alleges to have owned or acquired during her marriage with her deceased husband have been dealt with fraudulently and illegally. Indeed particulars of fraud and illegality have been impleaded under para 32, 36, 41, 42, 55 of the Petition. The prayers sought include inter alia declaration of title, cancellation and rectification of title, mesne profits all of which are provided by Statute.

58. The totality of the Petition is that the controversies raised are best determined in an ordinary civil suit so that parties may present rival evidence which can be tested through cross examination to determine its veracity. In my considered view the dispute cannot be resolved through affidavit evidence in a manner suggested by the Petitioner. I find that the constitutional jurisdiction of the Court has been improperly invoked.

59. It is commonly accepted that this Court already determined Thika ELC Misc App. E040 of 2020 filed by the 2nd Respondent seeking vesting orders in his favor pursuant to a trust registered on 22/1/2010 for parcels 3657 and 3658. The Petitioner submits that the trust deed was fraudulently created without her consent and knowledge. Her attempt to set aside the Court orders by way of Review was dismissed on 7/9/2022. To that end therefore I am of the view that this Court is functus officio.

60. Final orders for disposal

- a. The Notice of Motions dated the 18/7/22 and 17/10/22 are allowed to the extent that the Petition and the Notice of Motion dated the 30/6/2022 be and are struck out.
- b. The costs shall be borne by the Petitioner in favour of the 1st and 2nd Respondents

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 3RD DAY OF JUNE, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI



JUDGE

Delivered online in the presence of;

Kihanya for Petitioner

Gichingo for 1st Respondent

Ms. Munyoki HB Mwangi Ndegwa for 2nd Respondent

3rd, 4th and 5th Respondents - Absent

Court Assistants – Phyllis & Oliver

