



**Saha & 45 others v National Land Commission & 2 others (Environment & Land Petition E016 of 2023) [2024] KEELC 5229 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5229 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION E016 OF 2023  
SM KIBUNJA, J  
JULY 10, 2024**

**BETWEEN**

**JONATHAN DZUYA SAHA & 45 OTHERS ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**SENIOR REGISTRAR OF TITLES ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 3<sup>rd</sup> respondent, filed the notice of preliminary objection, dated the 11<sup>th</sup> October 2023, raising two grounds that actually constitute one ground, that the suit offends the doctrine of exhaustion, as the petitioners have admitted the pendency of a historical injustice claim, based on the suit property before the National Land Commission, and therefore, under article 67(2) of the Constitution 2010, the court is without jurisdiction to hear and determine this petition.
2. The court issued directions on the 5<sup>th</sup> February 2024, on the filing and exchanging submissions. The learned counsel for the 2<sup>nd</sup> respondent and petitioners filed their submissions dated the 27<sup>th</sup> February 2024 and 15<sup>th</sup> March 2024 respectively, which the court has considered.
3. The issues for determinations by the court on the 3<sup>rd</sup> respondent's preliminary objections are as follows:
  - a. Whether the court is with jurisdiction in the petition in view of the doctrine of exhaustion.
  - b. What orders to issue.
  - c. Who bears the costs?



4. The court has carefully considered the ground on the preliminary objection, submissions by the learned counsel for the 3<sup>rd</sup> respondent and petitioners, superior courts decisions cited thereon, the pleadings filed and come to the following findings:

- a. That the 3<sup>rd</sup> respondent has submitted that the petitioners have admitted through their pleadings that they had lodged their claim of historical injustice with the 1<sup>st</sup> respondent, and that it was still pending determination. That as the 1<sup>st</sup> respondent has powers under article 67(2) of the Constitution to “initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress”, then this court is without jurisdiction. On their part, the petitioners submitted that this court has jurisdiction to hear and determine the petition, and relied on the case of Henry Wambega & 733 others v The Hon. Attorney General & 9 others, in which *inter alia* the court stated that there was nothing in the Constitution 2010 or the National Land Commission Act ousting the jurisdiction of the court or barring a person from presenting a petition relating to a claim on historical injustice to the court.
- b. The learned counsel for the 3<sup>rd</sup> respondent relied on the case of Jeremiah Memba Ocharo v Evangeline Njoka & 3 others [2022] eKLR, where the court relied on the case of Republic v Independent Electoral and Boundaries Commission (IEBC) & others, exparte The National Super Alliance (NASA) eKLR, and Mombasa Civil Appeal No. 166 of 2018, Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR, in which two principles to the doctrine of exhaustion were espoused as follows:

- “1. The High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.”
2. The jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J, (as he then was), in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
62. In the instant case, the petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”



And, submitted that as this case before the court is a claim for historical land injustice that falls within the mandate of the 1<sup>st</sup> respondent. That there is need to await for the determination of the petitioners' claim filed with the 1<sup>st</sup> respondent, and to proceed with the petition the court will be usurping the powers of the 1<sup>st</sup> respondent thereby violating the Constitution that the petitioners have relied on in their petition.

- c. The court has perused the pleadings in the petition and amended petition dated the June 12, 2023 and July 7, 2023, respectively, the depositions in the affidavit in support of petition and amended affidavit in support of petition sworn by Jonathan Dzuya Saha, the 1<sup>st</sup> petitioner, on the 5<sup>th</sup> June 2023 and 7<sup>th</sup> July 2023 respectively, and confirmed that they indeed allude to the existence of complaints lodged by the petitioners with the National Land Commission, 1<sup>st</sup> respondent, on the same subject matter as is in this instant petition. The court has further taken judicial notice that the 3<sup>rd</sup> respondent's contention on the existence of the said complaints lodged by the petitioners with the 1<sup>st</sup> respondent has not been disputed by the petitioners in their submissions.
- d. The court is therefore satisfied that the preliminary objection raised by the 3<sup>rd</sup> respondent arises from the clear implications from the pleadings, and being a challenge on the court's jurisdiction, it meets the definition set in the case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. That is because the issue being of jurisdiction can be decided without considering any factual evidence but only the law, and if upheld, it is capable of determining this petition.
- e. The learned counsel for the petitioners has submitted that the 1<sup>st</sup> respondent does not have the initial and exclusive mandate on matters falling under article 67(2) of the Constitution, while this court does. That the violations the petitioners have raised are current and not of the past and are being carried out by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents while demarcating and allocating the land to third parties, and the court should reject the preliminary objection and allow the petition to be heard in court. The court has perused the petitioners' pleadings especially paragraphs 6 to 11 of the amended petition dated 7<sup>th</sup> July 2023 and 3 to 8 of the amended affidavit in support of petition, and it is crystal clear the petitioners' root of claim over the suit property is their occupation of the said land for three generations since 1900. It is also apparent from the said averments and depositions that the petitioners lodged their claim with the 1<sup>st</sup> respondent first on the 4<sup>th</sup> October 2017 who responded on 9<sup>th</sup> October 2017 promising to carry out due diligence on the status of the land before reverting with the way forward. Secondly, the petitioners lodged a historical claim on the 1<sup>st</sup> September 2021 and 30<sup>th</sup> November 2022 with the 1<sup>st</sup> respondent over the same land.
- f. That even though at paragraph 12 of the amended petition the petitioners accuse the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for being in the process of demarcating and allocating the suit property to third parties, thereby putting their own claim at real risk, the fact remains that their claim is over title to the suit property based on their long period of occupation over generations, and not one premised on current violations of fundamental rights or freedoms by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as claimed in the petitioners' submissions. The petitioners' claim does not therefore fall within the exemptions to the general principles of exhaustion. That as the complaints lodged by the petitioners with the 1<sup>st</sup> respondent had not been determined one way or the other by the time this petition was initially filed of the 12<sup>th</sup> June 2023, the court agrees with the 3<sup>rd</sup> respondent that the petitioners have contravened the doctrine of exhaustion by approaching this court before the 1<sup>st</sup> respondent could pronounce itself on their pending



claim. The court's jurisdiction has therefore, been invoked prematurely. The Preliminary Objection has merit and should be upheld.

g. That though costs ordinarily follow the events in civil claims unless otherwise for good cause directed, in this petition, I find it fair and just for each party to bear their own costs.

5. That flowing from the above conclusions, the court find and holds that:

a. The 3<sup>rd</sup> respondent's preliminary objection dated the 11<sup>th</sup> October 2023 has merit and is upheld.

b. That petition herein is struck out.

c. That each party to bear their own costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10<sup>TH</sup> DAY OF JULY 2024.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

**In The Presence Of:**

Petitioners : Mr. Tindi

Respondents : M/s Omboga For Kisingo For 3<sup>rd</sup> Respondent

Leakey – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

