



**Ondari v Chief Magistrate, Naivasha Law Court & 3 others; Settlement Fund Trustees (Now the Directorate of Land Adjudication and Settlement) & 2 others (Interested Parties) (Environment & Land Petition E001 of 2024) [2024] KEELC 6360 (KLR) (Environment and Land) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6360 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND PETITION E001 OF 2024**

**MC OUNDO, J**

**OCTOBER 3, 2024**

**IN THE MATTER OF ARTICLES 2, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 48, 49, 50, 53 AND 159 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE PETITIONERS UNDER ARTICLES 25, 27, 28, 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF RULES 4, 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION AND FUNDAMENTAL RIGHTS AND FREEDOMS) (PRACTICE AND PROCEDURE) RULES 2013**

**AND**

**IN THE MATTER OF SECTION 4, 6 AND 12 OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015**

**BETWEEN**

**LILIAN NYABOKE ONDARI ..... PETITIONER**

**AND**

**THE CHIEF MAGISTRATE, NAIVASHA LAW COURT ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> RESPONDENT**

**THE OCS KONGONI POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

**PASOLAI OLE NGURUNA ..... 4<sup>TH</sup> RESPONDENT**



**AND**

**THE SETTLEMENT FUND TRUSTEES (NOW THE DIRECTORATE OF LAND ADJUDICATION AND SETTLEMENT) ..... INTERESTED PARTY**

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

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

**JUDGMENT**

1. Vide a Petition dated the 31<sup>st</sup> January, 2024, the Petitioner herein sought from court the following orders;
  - i. The court issues a declaration that the Respondents have violated the Petitioner's Constitutional rights.
  - ii. A declaration be and is hereby issued that the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents have, in the manner they have investigated, charged, prosecuted and handled the dispute of ownership of L.R Naivasha/Moi Ndabi/739 acted in breach of *the Constitution* and the law.
  - iii. A declaration that the proceedings in Naivasha CM Criminal Case E816/2023 are based on malice, illegality as against the Petitioner and therefore un-constitutional.
  - iv. A Declaration that Naivasha/Moi Ndabi/739 belongs to the Petitioner and her successors in title and consequently the 4<sup>th</sup> Respondent vacates the parcel or be evicted therefrom.
  - v. An order of prohibition prohibiting the Respondents from continuing the prosecution of the Petitioner in Naivasha CM Criminal Case No. E816 of 2023, Republic v Sikona Ole Kupele & Lilian Nyabate Ondari.
  - vi. An order of certiorari does issue quashing the decision to charge the Petitioner in Naivasha CM Criminal Case No. E816 of 2023, Republic v Sikona Ole Kupele & Lilian Nyabate Ondari.
  - vii. An order of prohibition directed at all the Respondents prohibiting them from instigating, instituting or carrying out any criminal proceedings in connection with the ownership of L.R Naivasha/Moi Ndabi/739 outside the jurisdiction and mandate of the court.
  - viii. The court issues such orders as are just and expedient in the circumstances of the instant Petition.
  - ix. That the Respondents be directed to bear the costs of the Petition.
2. The Petition was supported by an Affidavit of equal date sworn by Lilian Nyambate Ondari, the Petitioner herein, who reiterated the contents of the Petition to the effect that in the year 2008 she had applied to the Settlement Fund Trustees (SFT) for allocation of land in Moi Ndabi settlement scheme wherein she had been allocated parcel No. 739 which later became Naivasha/Moi Ndabi/739 (suit property). That she received a letter of allotment dated 15<sup>th</sup> October, 2008 allocating her 2.0 hectares on condition that she was to pay a sum of Kshs. 32,237/= upfront or by installment. That she had chosen the installment mode of payment wherein after she had deposited the required 10 percent, SFT had allowed her to occupy the suit property as she continued paying the amount that had been financed by SFT. She completed the payment on 4<sup>th</sup> November, 2014 and was issued with the final account statement.



3. That earlier on 16<sup>th</sup> July, 2014 the SFT had issued her with Discharge of Charge and Transfer of the suit property in a settlement scheme, which documents had been transmitted directly to the Land Registrar, Naivasha while copies of the same had been sent to her.
4. That since her parents lived in Oljorai, Gilgil Sub-County, she had on 31<sup>st</sup> January, 2019 exchanged the suit property with one Sikona Ole Kupele, the proprietor of parcel No. Naivasha/[Oljorai/1998](#), who had been interested in moving to Moi Ndabi. That subsequently, on 31<sup>st</sup> January, 2019, they had executed and registered the cross transfers of the respective parcels of land.
5. That in the year 2023, Sikona Ole Kupele sold his land to one Ann Wanjiru Kigo, who then become the registered owner the suit property on 6<sup>th</sup> March, 2023. That on the 8<sup>th</sup> July 2023, the OCS Kongoni Police Station had summoned the Petitioner pursuant to a complaint by the 4<sup>th</sup> Respondent on the ownership of the suit property. That on arrival at the said police station, she had found Sikona Ole Kupele there and learnt that he had been in custody for about a week over the same complaint. She also learnt that the 3<sup>rd</sup> Respondent herein had declared them fraudsters, wherein he had installed the complainant, the 4<sup>th</sup> Respondent herein as the owner of the suit property on the strength of the list of allottees as drawn by the former Provincial Commissioner, I.K Chelanga. He however refused to share the document with them terming it as evidence of the state.
6. That upon being released from custody by the court on 10<sup>th</sup> July, 2023, she had embarked on the process of verifying her documents to check if there had been any error in her allocation and titling process. The subsequently, the 3<sup>rd</sup> Interested Party herein had issued her with a certified copy of the Green Card exhibited herein. There were no documents or reference to the 4<sup>th</sup> Respondent as proprietor to the parcel of land.
7. That thereafter, she had tasked her advocate on record to check on the allotment process from the 1<sup>st</sup> Interested Party herein and accordingly, on 25<sup>th</sup> October, 2023, the 1<sup>st</sup> Interested Party had in writing issued her with the copies exhibited herein and a confirmatory letter that she was the sole allottee of the suit property.
8. She deponed that the decision to prefer charges of fraud by obtaining registration of the suit property without a statement from the 3<sup>rd</sup> interested party had betrayed the real motive of the pending criminal case, to install the 4<sup>th</sup> Respondent as the owner of the suit property and deny her the right to own and deal with the said land.
9. That further, she had confirmed from her co-accused that the 4<sup>th</sup> Respondent had never resided anywhere in the vicinity of the suit property up to the time he had been installed therein as the owner by the 3<sup>rd</sup> Respondent in July, 2023. That the charges filed in Naivasha Law Courts against her were un-constitutional and irregular as they had sought to circumvent and or avoid the authority and jurisdiction of the Environment and Land Court which court had the jurisdiction to decide disputes in relation to ownership of land. That further, the 4<sup>th</sup> Respondent had no unique or ancestral claim to the suit property as the same had been public land belonging to the Government of Kenya and managed by the 1<sup>st</sup> Interested Party herein.
10. In response to the Petition, the 2<sup>nd</sup> Respondent filed its Notice of Preliminary Objection dated 14<sup>th</sup> February, 2024 as well as Grounds of Opposition dated 15<sup>th</sup> February, 2024.
11. The Notice of Preliminary Objection, was premised on the following grounds;
  - i. That the Petition is incompetent, misconceived and otherwise an abuse of the due process of the court.



- ii. That the court lacks the requisite jurisdiction to entertain the said Petition as it offends Section 13 of the *Environment and Land Court Act* which confers jurisdiction upon the court.
  - iii. That the orders sought by the Petitioner cannot issue since the Petition is improperly on record and is a nullity.
  - iv. That the basis of the instant Petition is arising out of criminal case number E816 of 2023, R v Sikona Kupele and Lilian Nyaboke Ondari that is pending before the Chief Magistrate Court.
  - v. That the court cannot properly preside on the matter without entering into the criminal arena of the case number E816 of 2023, a province to which the court lacks jurisdiction.
  - vi. That the entire Petition is premised on the criminal case before the Chief Magistrate's court and so are the orders sought herein.
12. In its Grounds of Opposition, the 2<sup>nd</sup> Respondent had asserted that it had a Constitutional mandate under Article 157 of *the Constitution* to institute criminal proceedings against any person provided that sufficient evidence had been placed before him and that the Petitioner herein had not demonstrated any of her Constitutional rights that had been violated by the 2<sup>nd</sup> Respondent in instituting the said criminal case in Chief Magistrate Court Criminal Case No. E816/2023. That further, no malice had been demonstrated on the part of the 2<sup>nd</sup> Respondent by the Petitioner to the effect that the said charges were based on malice or had been founded on any illegality being that the 2<sup>nd</sup> Respondent was not interested in the ownership of the suit property but that the alleged crime that had been committed around the suit property hence the Criminal Case number E816/2023 was properly before the trial court.
13. That the Petitioner had not demonstrated that she had not or was likely not to be afforded a fair hearing pursuant to Article 50 of *the Constitution*. That the Petitioner had also not challenged the competence of the charges, the 2<sup>nd</sup> Respondent to institute the said charges and/or the competence of the court to hear and determine the matter in the criminal case E816/2023 fairly.
14. That further, the charges that were before the Chief Magistrate's Court Naivasha criminal case No. E816/2023 were not about ownership of land but conspiracy, fraud and obtaining money by false pretense thus the orders sought in the instant Petition were ultra vires the jurisdiction of the court. That subsequently, the present Petition was not properly before the court as the court lacked jurisdiction under Article 162 (2) of *the Constitution* and Section 13 of the *Environment and Land Court Act* and therefore the same should be dismissed for being devoid of merit and improperly before the court.
15. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties filed their Grounds of Opposition and a Response to the Petition both dated 5<sup>th</sup> March, 2024 opposing the Petition on the following grounds:
- i. That the Petition and Application fell short of the threshold set out in the case of Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272 as it did not disclose adequate particulars in support of the alleged violations of *the Constitution* to enable the court to grant the reliefs sought.
  - ii. That the Petitioner failed to give sufficient evidence on how she would be prejudiced were the prosecution of Naivasha Criminal case No. E816 of 2023 to continue.
  - iii. That neither the Petition nor the Application had established a prima facie case against them.



- iv. That both the Petition and the Application were frivolous, lacked merit, were premature, grossly exaggerated and an abuse of court process.
16. In their Response to the Petition, they denied each and every allegation contained in the Petition putting the Petitioner to strict proof that they had violated her rights. They urged that they had only performed their statutory duties as provided by the law and therefore the instant Petition ought to be dismissed with costs.
17. The 4<sup>th</sup> Respondent on the other hand vide his Replying Affidavit dated 3<sup>rd</sup> April, 2024 sworn by Pasolai Ole Nguruna, deponed that the instant Petition lacked merit, had been brought in bad faith and should be dismissed with costs. That the Petition had failed to meet the test of Constitutional Petition laid down in the case of Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154, and further, the Petitioner did not specify which of her Constitutional rights had been violated and how they had been violated by the Respondents or the Interested Parties.
18. That he was the owner of all that parcel known as Naivasha/Moi Ndabi/739 (suit property), having been allocated the same by the Government, through the then Rift Valley Provincial Commissioner Mr. Ishmael Chelan'ga on 22<sup>nd</sup> December, 1994 wherein he had been in peaceful and open possession of the same as his home for 29 years. That at the time of allocation, the plot had been known as plot numbers 1064 and 1065 measuring 2.5 acres each thus making a total of 5 acres. He explained that at the time of allocation in the year 1995, he was also known by his ancestral name Nakiliya Nkururuna hence Nakiuliya Nkururuna and Pasolai Ole Nkururuna referred to one and the same person. That all his neighbors had equally been beneficiaries of the allocation by the Government on 22<sup>nd</sup> December, 1994 wherein they all held similar letters of allocation done on same day.
19. That after his allocation, he had made endless trips to the offices of the 1<sup>st</sup> Interested Party herein in order to be given the green light to make payment for processing of his Title deed wherein he had always been taken in circles because some people in the said office had interest in the suit property. He explained that before the 1<sup>st</sup> Interested Party could sign Transfer Documents to have individual title processed in the Moi Ndabi scheme area and particularly in the area that they occupied, one was required to surrender the Letter of allocation in order to confirm the issue of physical occupation of the property so as to be given a go ahead to make the payments.
20. The frustrations by some officers of the 1<sup>st</sup> Interested Party issue titles to him was in collusion with the Petitioner wherein they were bent on dispossessing him and some of his neighbors their land. That the Petitioner did not have the letter of allocation dated 22<sup>nd</sup> December, 1994 since she had never been allocated the suit property.
21. His affidavit was supported by an Affidavit herein annexed and sworn by his neighbor of over 30 years one Mr. Charles Ole Koroe who had deponed that the Petitioner was a complete stranger who had never occupied the suit property thus the Petitioner's allegations that he (4<sup>th</sup> Respondent) had been installed in the suit property by the 3<sup>rd</sup> Respondent were misleading and false. He denied ever executing any transfer documents or transferring the suit property to any person including the Petitioner herein.
22. That the Petitioner could not claim to have been legally allocated the land parcel in the year 2008 when the same had already been allocated to the 4<sup>th</sup> Respondent in the year 1994 who had already occupied the property for over 14 years and therefore the suit property had not been up for allocation.
23. That in any event, the 1<sup>st</sup> Interested Party's action had trampled on his rights to legitimate expectation and right to fair administrative action as they could not purport to allocate the suit property when the same had already been allocated and he had been in peaceful possession of the same for over 30 years.



24. The Petitioner herein had never occupied the suit property even for a single day. That in laying her claim over the suit property, the Petitioner had relied on the purported exchange of land vide agreements dated 4<sup>th</sup> March 2015 and 17<sup>th</sup> April, 2012, between to herself and one Sikona Ole Kupele who had been her (Petitioner's) co-accused in Naivasha CMCR E0816 of 2023. That a green card that had purported to transfer two title deeds in respect of the suit property, one in favour of the Petitioner and the other one in favour of one Sikona Ole Kupele and on the same day the 31<sup>st</sup> January 2019, had been found in possession of the Petitioner. That it had been based on these forged document among others and after investigations by the Police that the Petitioner had been charged alongside her co-accused. That the title deed being waved to the court by the Petitioner was a product of fraud.
25. That the Petitioner had not demonstrated what loss she stood to suffer should the police be allowed to proceed with their investigations and the matter proceeds to a full trial. That in any case, witnesses had not even testified hence the Petitioner did not know the nature of their testimonies and the eventual findings of the court yet she was seeking that the court bars the said witnesses from testifying against her.
26. He placed reliance on Section 24 of the *National Police Service Act* No. 11A of 2011 to depone that it was trite that the court ought not to usurp the Constitutional mandate of the 3<sup>rd</sup> Respondent to investigate any matter that in the Respondent's view raised suspicion of the occurrence or imminent occurrence of a crime such as the matter at hand in which the Petitioner had forged documents. Further reliance was placed in the decided case of Republic v Chief Magistrate Milimani & Another Ex-parte Tusker Mattresses Ltd & 3 others [2013] eKLR.
27. Regarding the orders of injunction and eviction that had been sought by the Petitioner against him, the 4<sup>th</sup> Respondent deponed that the Petitioner having averred at paragraphs 7 and 8 that she had sold the suit property and that the same had now been registered in the name of a third party, she did not have any locus standi to seek injunctive orders or eviction orders since she did not have a recognizable interest in law with regard to the suit property. That further, the transactions that had been alluded to by the Petitioner at paragraphs 6, 7 and 8 of her supporting Affidavit being the purported exchange and sale of land to the current registered owner in the year 2019 had been illegal, null and void ab initio as Section 134 (7) of the *Land Act*, 2012 prohibited any transfer of any land acquired in a settlement scheme established under the Act, or any other law, such as the suit property herein, except through a process of succession. That this was to ensure that internally displaced persons and beneficiaries of public settlement schemes did not sell off the parcels of land and later re-emerge elsewhere claiming to be landless and in need of settlement. He thus deponed that all the Petitioner's transactions that had been alluded to had been illegal hence he urged the court not to sanitize the said illegality.
28. He also deponed that he reserved his right to file a fully competent suit as against the Petitioner, one Sikona Ole Kupele, the current registered owner of the suit property one Anne Kigo and the 1<sup>st</sup> Interested Party herein, seeking in among others, cancellation of title as the Petitioner had deliberately left out those parties from the proceedings so as to avoid their interrogation. That however, it would not be proper in law to substantively litigate over a suit property in a matter in which the fraudulently registered owner was not a party to. He thus prayed that the instant Petition be dismissed with costs.
29. On 6<sup>th</sup> May 2024, directions were taken to dispose of the Petition by way of written submissions, wherein only the Petitioner and the 4<sup>th</sup> Respondents complied and filed their submissions which I shall summarize as herein under.



## Petitioners Submissions

30. The Petitioner, vide her submissions dated 20<sup>th</sup> June, 2024, summarized the factual background of the matter in question before placing reliance on the provisions of Section 13 of the *Environment and Land Court Act*, 2011 to submit that the court was clothed with the jurisdiction to determine the instant Petition and that the Constitutional Articles cited in the Petition were compelling. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as well as the interested parties herein were bound in the performance of their public duties, to act pursuant to the National values and principles provided for in Article 10 of *the Constitution*. That whereas Article 25 of *the Constitution* established a free and fair trial as a fundamental right, the criminal charge and trial had been filed for purposes of establishing an illegal status quo on the suit land by conferring the 4<sup>th</sup> Respondent with the physical ownership of the suit land that he had never owned or occupied, hence discriminating against the Petitioner which was contrary to the provisions of Article 27 of *the Constitution*.
31. She submitted that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents had been attempting to negate her rights as enshrined under Article 40 of *the Constitution* as read together with Sections 24 and 25 of the *Land Registration Act*. That further, the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had denied her the right to fair administrative actions guaranteed under Article 47 of *the Constitution* as read together with Sections 4, 6 and 12 of the Fair Administrative Actions Act by creating and initiating a process purporting to serve a just cause with the sole motive of handling an advantage to the 4<sup>th</sup> Respondent by placing him in possession of the suit land. That further, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had robbed the Petitioner her right to equal protection and benefit of law as guaranteed under Article 50 (1) of *the Constitution* by siding with the 4<sup>th</sup> Respondent in a land ownership dispute.
32. She contended that the 2<sup>nd</sup> Respondent had breached its public duty as enshrined under Article 157 of *the Constitution* to refer parties to the Environment and Land Court wherein it had instead conferred the possession of the suit land to the 4<sup>th</sup> Respondent. That the 2<sup>nd</sup> Respondent had also breached the principles of the exercise of prosecutorial powers under Section 4 of the *Office of the Director of Public Prosecutions Act* by preferring charges without evidence, usurping the powers of the Environment and Land Court and conferring ownership of the suit land to the 4<sup>th</sup> Respondent. That in fact, the 4<sup>th</sup> Respondent had conceded the Petition herein by filing Naivasha CM ELC E028 of 2024 on 3<sup>rd</sup> April, 2024, contemporaneously with the filing of his response to the instant Petition.
33. She thus urged the court to find that the institution and continuous criminal proceedings in Naivasha CM Criminal case E816 of 2023 against her was an abuse of the court process and that an order recalling and quashing the court process would secure the ends of justice.
34. That it was uncontroverted that the suit land was Government land managed by Settlement Fund Trustees, the 1<sup>st</sup> Interested Party herein wherein the same had never been managed by the defunct provincial administration for the 4<sup>th</sup> Respondent to claim ownership by allotment therefrom. She thus submitted that in view of the report filed as LN 05, from the 1<sup>st</sup> Interested Party, the Petitioner was entitled to the prayers in the Petition and a recall of the process that had been initiated by the 1<sup>st</sup> Respondent since the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had ignored the information in the said document and proceeded to initiate the criminal process.
35. It was her submission that the 4<sup>th</sup> Respondent had laid a claim to the suit land without filing or exhibiting any official document that connected him to the suit land since the purported letter of allotment that he had exhibited and marked as PN2 dated 3<sup>rd</sup> April, 2024 had no reference to the suit



land, the number 887 having been crossed out and number 739 inserted. That she had thus established a case for the issuance of the orders proposed in the Petition and sought that the court grants the same.

#### 4<sup>th</sup> Respondent's Submissions

36. The 4<sup>th</sup> Respondent vide his submissions dated 10<sup>th</sup> June, 2024 framed his issues for determination as follows:
- i. Whether the Petition interferes with the independence of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
  - ii. Whether the instant Petition violates the doctrine of Constitutional avoidance.
  - iii. Whether the Petition met the Constitutional threshold set out in *Anarita Karimi Njeru v Attorney General (No. 1) 1979 1 KLR 154*.
37. On the first issue for determination, the 4<sup>th</sup> Respondent submitted in the affirmative to the effect that the instant Petition as framed and the prayers as sought therein had intended to usurp the Constitutional and statutory powers of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. That there had been nothing before the court demonstrating that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had been in breach of the National Values and Principles of Governance in the conduct of the said investigations and subsequent charging of the Petitioner in the criminal proceedings before the subordinate court. That further, the Petitioner had failed to demonstrate that in the conduct of the said investigations and charging, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had denied her the right to be heard, or the right to equal protection of the law.
38. That the 2<sup>nd</sup> Respondent in the exercise of his mandate under Article 157 of *the Constitution* and the *office of the Director of Public Prosecutions Act*, had the right to make the decision to charge based on evidence contained in the file and could also direct further investigations upon review of a file, or even order closure of investigations where there was not enough evidence. That the 3<sup>rd</sup> Respondent on the other hand was a Constitutional body created under the *National Police Service Act* and under Article 245 of *the Constitution* whose lawful mandate was to conduct investigations in any particular offences.
39. That subsequently, the instant Petition was a misuse of the judicial process and judicial time as there were other ripe or real issues to be determined and that the prayers that had been sought therein violated the provisions of *the Constitution* as they had sought to unlawfully curtail the Constitutional and statutory powers of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. That were the orders sought herein granted, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants would be gravely and irreparably prejudiced and denied the right to exercise their lawful Constitutional and Statutory mandate. Reliance was placed on the decisions in the case of *Justus Mwenda Kathenge v Director of Public Prosecutions & 2 Others [2024] eKLR* and *Republic v Chief Magistrate Milimani & another Ex-parte Tusker Ltd & 3 Others [2013] eKLR*.
40. On the second issue for determination as to whether the instant Petition had violated the doctrine of avoidance, he placed reliance in the decided case of *Kiriwa Wa Ngugi & 19 others v Attorney General & 2 others [2020] eKLR* to submit in the affirmative. That approaching the court through a Constitutional Petition as in the present case was not the correct way to challenge the proceedings and or conduct judicial review of decisions that had been made in other matters that had been conducted before different independent Constitutional offices. That the underlying principle of Constitutional avoidance was rooted in the idea of judicial restraint and the respect for the separation of powers. That it recognized that Constitutional issues should be addressed only when necessary and that courts should, if possible, interpret laws in a way that upheld their Constitutionality rather than striking them down.
41. He thus submitted that the Petitioner could address all the concerns raised in the Petition through a land suit if indeed there existed any triable issues. That further, the Petitioner had a forum before the



Chief Magistrate court to answer to the charge since the said court was competent to determine the issues that had been raised in the instant Petition. Reliance was placed in the decided case of Bernard Murage v Fine Serve Africa Ltd & Others [2015] eKLR.

42. On the third issue for determination as to whether the instant Petition had met the Constitutional threshold, reliance was placed in the Anarita Karimi Njeru's case (supra) to submit in the negative. That courts had repeatedly stated that if a person was seeking redress from the High Court on a matter which involved a reference to *the Constitution*, it was important that (s)he sets out with a reasonable degree of precision that of which he complained, the provisions said to be infringed and the manner in which they were alleged to be infringed. Further reliance was placed in the Court of Appeal's decision in the case of Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.
43. That whereas the instant Petition had referred to certain Articles of *the Constitution* in its title, it had provided little or no particulars as to the allegations and the manner of the alleged infringements. That no details or specifics of the requirements had been enumerated nor were any identification made of the specific requirements that were allegedly disregarded, making it impossible to determine what Constitutional or legal provisions had been contravened and or mount any response or defence to the same.
44. Reliance was placed on the provisions of Section 107 of the *Evidence Act* to submit that the burden of proof lay with the person who alleged. That the onus was on the Petitioner, when filing her cause of action, to prove the same hence it was not enough to only write down the particulars. That further, parties ought not to simply bind documents and exhibit them in their affidavits but they must explain the content to the court for relevance.
45. That it had been apparent that the Petitioner's Petition as drafted did not meet the requirement set down in the Anarita Karimi's case (supra) hence the court could not aid the Petitioner who had not been diligent in her cause.
46. In conclusion, he submitted that the Petition was wrongly before the court thus undeserving of the prayers sought and the same should be dismissed with costs.

#### **Determination.**

47. Having considered the Petition, the responses thereto, the submissions, the authorities cited and the relevant law, I find that I need to determine in the first instance whether claims of statutory violations could give rise to constitutional violations and whether the Court has jurisdiction to entertain the Petitioner's Petition herein.
48. The threshold of what constitutes a constitutional Petition has been established in the case of Anarita Karimi Njeru vs The Republic [1979] eKLR where the court had held that a Constitutional Petition should set out with a degree of precision the Petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed.
49. This principle was later reaffirmed by the Court of Appeal in the case of Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR where the Court had stated as follows:-

“It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the constitution* of Kenya and the *Ethics and Anti-corruption*



Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”

50. It is clear from her Petition that the Petitioner seems to be dissatisfied with the investigations that were carried out and her subsequent prosecution in a criminal case pending at Naivasha Chief Magistrates Court in Criminal Case No. E816 of 2023 being Republic v Sikona Ole Kupele & Lilian Nyabate Ondari.
51. Her bone of contention being that as an allottee of parcel of land No. Naivasha/Moi Ndabi/739, she had on 31<sup>st</sup> January, 2019 exchanged the same with one Sikona Ole Kupele, the proprietor of parcel No. Naivasha/Oljorai/1998 wherein on the 31<sup>st</sup> January, 2019, they had executed and registered the cross transfers of the respective parcels of land. Subsequently on the 8<sup>th</sup> July 2023, the Officer Commanding Kongoni Police Station (OCS) had summoned her pursuant to a complaint by the 4<sup>th</sup> Respondent on the ownership of the land parcel No. Naivasha/Moi Ndabi/739 wherein she had been charged with the offence of fraud by obtaining registration of the suit property. That the real motive of the criminal case was to install the 4<sup>th</sup> Respondent as the owner of the suit property and deny her the right to own and deal with the said land contrary to the provisions of Article 40 of the Constitution.
52. That the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had denied her the right to fair administrative actions guaranteed under Article 47 of the Constitution as read together with Sections 4, 6 and 12 of the Fair Administrative Actions Act by creating and initiating a process purporting to serve a just cause with the sole motive of handling an advantage to the 4<sup>th</sup> Respondent by placing him in possession of the suit land. That further, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had robbed her the right to equal protection and benefit of law as guaranteed under Article 50(1) of the Constitution by siding with the 4<sup>th</sup> Respondent in a land ownership dispute.
53. Her argument was that since the institution of the criminal proceedings in Naivasha CM Criminal case E816 of 2023 against her was an abuse of the court process, and violated her constitutional rights, the court should prohibit the Respondents from continuing with her prosecution. That further the court ought to issue an order of certiorari quashing the decision to charge her in the criminal proceeding at the Naivasha Chief Magistrates court and thereafter there be an order of prohibition directed at all the Respondents prohibiting them from investigating, instituting or carrying out any criminal proceedings in connection with the ownership of L.R Naivasha/Moi Ndabi/739 outside the jurisdiction and mandate of the court.
54. In response to the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein challenged the same on the basis that it fell short of the threshold set out in the case of Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272 as it did not disclose adequate particulars in support of the alleged violations of the Constitution to enable the court to grant the reliefs sought. That further, they had performed their statutory duties as provided by the law.
55. The 4<sup>th</sup> Respondent on the other hand was categorical that he was the owner of the parcel of land known as Naivasha/Moi Ndabi/739 (suit property), having been allocated the same by the Government, on 22<sup>nd</sup> December, 1994 wherein he had been in peaceful and open possession of the same as his home for the last 29 years. That fraudulent land sale agreements dated 4<sup>th</sup> March 2015 and 17<sup>th</sup> April, 2012, between the Petitioner and one Sikona Ole Kupele and a forged green card that had purported to transfer two title deeds in respect of the suit property, one in favour of the Petitioner and the other one in favour of one Sikona Ole Kupele her co-accused amongst other forged documents had been found in possession of the Petitioner which documents had been the basis of the criminal charge preferred against her alongside her co-accused.



56. That the provisions of Section 24 of the *National Police Service Act* No. 11A of 2011 were clear and therefore it was trite that the court ought not to usurp the Constitutional mandate of the 3<sup>rd</sup> Respondent to investigate any matter that in the Respondent's view raised suspicion of the occurrence or imminent occurrence of a crime such as the matter at hand in which the Petitioner had forged documents.
57. It is clear that the Petition is not a pleading with specificity on matters related to or seeking redress with reference to *the Constitution* or an infringement of the Petitioner's Constitutional right but rather, it is clear that the Petitioner is challenging her arraignment in court over a criminal matter related to forgery of documents in relation to land parcel identified as Naivasha/Moi Ndabi/739 which she obtained through an alleged fraud.
58. I find that the determination that the Petitioner seeks herein are orders whose resolution requires the full trial hearing and the interpretation of a statute rather than through a Constitutional Petition because a constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. The particular question to be decided herein so as to put this matter into the ambit of a Petition was whether the state was liable for acts committed by its agents while on duty. In this case, I find the answer in the negative as constitutional rights protect individuals from governmental injury and regulate the discretion of the government to inflict injury, which evidence I find has not been adduced herein.
59. A criminal justice system is a network of systems and processes aimed at managing persons accused of committing crimes until when such persons, if found culpable, are eventually released. The criminal justice system is comprised of multiple interrelated pillars, consisting of law enforcement, forensic services, the courts and correctional services. The main pillars in the criminal justice system included investigations, arrest, arraignment before a court of law, trial and sentencing and post-sentence services.
60. Article 243 of *the Constitution* established the National Police Service to be comprised of the Kenya Police Service and Kenya Administration Service. The National Police Service was under the command of the Inspector General. The Inspector General enjoyed operational autonomy in respect to the conduct of any investigation, law enforcement and employment matters.
61. The Director of Public Prosecutions under Article 157(4) of *the Constitution* has the power to direct the Inspector General to investigate any matter of criminal conduct and the Inspector General has to comply. Once the National Police Service have conducted and completed their investigations and made recommendations then, unless sanctioned by the DPP to arrest suspects or to undertake further investigations over the matter, their role ends in the criminal justice system. The criminal justice system in Kenya is firmly anchored in *the Constitution* and the law such that the police would be failing in their constitutional mandate to detect and prevent crime.
62. They only need to establish reasonable suspicion before preferring charges. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, any Court would be reluctant to intervene as its function, when a charge is placed before it, would be to conduct the intended trial to determine the veracity and the merit of any evidence tendered against an accused person.
63. In the case of *Godfrey Paul Okutoyi & Others vs. Habil Olaka & Another* (2018) eKLR Chacha, J held that:-

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being



a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional Petition. A party should only file a constitutional Petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

64. In the case of Bernard Murage -vs- Fine Serve Africa Ltd & others (2015) eKLR the Court held that:-

“Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.

65. Indeed the Court of Appeal in the case of Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited [2013] eKLR made the following observation:-

“...it is an established practice that where a matter can be disposed of without recourse to *the constitution, the constitution* should not be involved at all.....the courts will not normally consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to the applicant under some other legislative provision, or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights....”

66. The issues raised by the Petitioner herein, in my opinion and in accordance to the case law herein above cited would best be dealt with in the appropriate forum in the manner allowed by the applicable statutory law and procedure in this case, the Penal Code but not through a Constitutional Petition.

67. The Supreme Court in Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR in defining the principle of constitutional avoidance had stated as follows:-

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court KetrIDGE AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]: I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

68. From the facts before me, there is no evidence to show that the Respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations and prosecution against the Petitioner. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct, which amounts to an offence and on that account is deserving punishment. (See *Republic v Commissioner of Police & another Ex parte Michael Monari & another* [2012] eKLR) the fact that Courts must at all times guard against improper transmission of normal disputes or ordinary issues of litigation being clothed as Constitutional Petitions, I find that this Petition does not raise any constitutional issue, indeed it offends the Principle of Constitutional Avoidance and is hereby dismissed with costs.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 3<sup>RD</sup> DAY OF OCTOBER 2024.**



**M.C. OUNDO**  
**ENVIRONMENT & LAND – JUDGE**

