Ramtu v Bakari & 6 others (Constitutional Petition 59 of 2019)
[2024] KEELC 6917 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6917 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION 59 OF 2019

LL NAIKUNI, J

OCTOBER 16, 2024

BETWEEN

OMAR BAKARI RAMTU ..... PETITIONER

AND

BAKARI MOHAMED BAKARI ..... 1ST RESPONDENT

HAMADI NASSORO BAKARI ..... 2ND RESPONDENT

WARUI GITARI KINYA ..... 3RD RESPONDENT

HUNINGTON LIMITED ..... 4TH RESPONDENT

CHIEF LAND REGISTRAR ..... 5TH RESPONDENT

THE DIRECTOR LAND ADJUDICATION AND SETTLEMENT .... 6TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 7TH RESPONDENT

RULING

I. Introduction

1. This Honorable Court is tasked with the determination of the Notice of Preliminary objection dated 28th June, 2024 bythe Chief Land Registrar, the Director Land Adjudication and Settlement and Honourable Attorney General, the 5th, 6th and 7th Respondents/Applicants herein respectively.

2. Upon service of the Notice of Preliminary objection having been effected, the Petitioner responded through filing of Submissions. The Honourable Court shall be dealing with it indepth at a later stage of the Ruling.

II. The 5th, 6th and 7th Respondents/Applicants case

3. The 5th, 6th and 7th Respondents/Applicants raised a 2 paragraphed objection on the following grounds: -

    a. That the cause of action herein is barred by limitation and contravenes the express provisions of section 4(4) and 7 of the Limitation of Action Act, Cap. 22.

    b. That the Petition contravenes the doctrine of Constitutional Avoidance and ought to be struck out with costs.

IV. Submissions

4. On 2nd July, 2024 while the Parties were present in Court, they were directed to have the Notice of Preliminary objection dated 28th June, 2024 be disposed of by way of written submissions. Pursuant to that, by the time of penning down this Ruling the Honourable Court would only access the submissions by the Petitioner. Thus, on 16th September, 2024 a ruling date was reserved for on 16th October, 2024 by Court accordingly.

A. The Written Submissions by the Petitioner

5. The Petitioner through the firm of Messrs. Marende Necheza & Company Advocates filed their written submissions dated 12th July, 2024. Mr. Ondieki Advocate submitted that the 5th, 6th and 7th Respondents filed a preliminary objection on the above stated grounds.

6. The Learned Counsel submitted that the submissions would solely focus on the 2nd ground of the Notice of Preliminary objection. This was because once the Petitioner successfully showed that the Petition never contravened the Doctrine of Constitutional Avoidance and that his Constitutional rights may have indeed been violated then the ground that his cause of action is time barred will be rendered mute. This was because there was no time limit within which a party could file a claim for violation of constitutional rights. They relied on the Court of Appeal case of:- "Peter N.*Kariuki – Versus - Attorney General [2014]eKLR, Civil Appeal No. 79 of 2012*" where it was so held. In "Kamlesh Mansuklal Damji Pattni & Another – Versus - Republic 2013] eKLR", the High Court explained that *the Constitution* did not set a time limit within which applications for enforcement of fundamental rights can be brought. In the case of:- "Dominic Arony Amolo – Versus - Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S) [2010] eKLR", the Court argued that the law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights protected in the Bill of Rights.

7. The main underlining issue in this Petition was the Petitioner's right to property which is guaranteed by Article 40 of *the Constitution*. J. Otieno-Odek in the Court of Appeal case of "Elizabeth Wambui Githinji & 29 others – Versus -Kenya Urban Roads Authority & 4 others [2019] eKLR" had this to say on the limitation of time on claims of violation of property rights;

> " In my view, subject to the limitations in Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of limitation period. More specifically in relation to property rights, subject to Article 40 (6) of *the Constitution*, the protection of the right to property is guaranteed. Accordingly, I find that the trial judge erred in invoking the concept of limitation as an issue that could bar to violation of property rights under the appellants from asserting their claim Article 40 of *the Constitution*."

8. Accordingly, the question most pertinent was whether the Petition contravenes the doctrine of Constitutional Avoidance because if not, it could not be time barred. On whether the Petition contravened the doctrine of Constitutional Avoidance, the Learnd Counsel submitted that in their reply to Petition dated 4th November, 2020 at Paragraph 4, the Respondents claimed that the Petition herein raises no Constitutional issue and has merely been coached as a constitutional petition to defeat limitation under the provision of Section 7 of the *Limitation of Actions Act*. We submit that this is not the case. The truth of the matter was that the Respondents had misconstrued the situation and have gotten it the other way round. If anything, the doctrine of Constitutional Avoidance supported the decision to file the Petition.

9. The Supreme Court in the case of "Communications Commission of Kenya & 5 others – Versus - Royal Media Services Limited & 5 others [2014] eKLR" defined the doctrine of Constitutional Avoidance as follows;

> " The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". 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 – Versus - Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge 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."(emphasis by the Learned Counsel)

10. The Supreme Court also cited the case of "Ashwander – Versus - Tennessee Valley Authority, 297 U.S.288,347 (1936)" where the U.S Supreme Court held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of. Similarly, in the case of "KKB – Versus - SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling)", Mativo, J.(as he then was) had this to say about the doctrine:

> " In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause." (emphasis by the Learned Counsel)

11. It was clear from the above that the doctrine was only applicable where the Petitioner had an alternative remedy to constitutional reliefs. The rationale behind the doctrine was that the Bill of Rights is applicable to all legal disputes and this necessitates the establishment of a mechanism that ensures not every legal dispute will have sought constitutional remedies which should only be reserved for more serious matters. In the case of:- "Communications Commission of Kenya & 5 others – Versus - Royal Media Services Limited & 5 others" cited above the Supreme Court held;

> " in Ashwander – Versus - Tennessee Valley Authority the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of. {Currie and de Waal} opine that the principle of constitutional avoidance is of crucial importance in the

application of the Bill of Rights. The author's state: - "When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so." (emphasis by the Learned Counsel)

12. The Learned Counsel submitted that according to the above statement, the threshold for the doctrine to be invoked was twofold. The Petitioner must have an alternative remedy and the matter should not be so serious as to invoke the jurisdiction of the Constitutional Court. One without the other will not suffice. Even where the dispute is not serious, Constitutional reliefs are granted where the Petitioner has no alternative remedy. After all, the Bill of Rights always applies in a legal dispute.

13. Accordingly, when the issue was so serious to warrant Constitutional reliefs the doctrine could also not be invoked even where alternative remedies were available. Lenaola, J had this to say in "Uhuru Muigai Kenyatta – Versus - Nairobi Star Publications Limited [2013] eKLR";

> " I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG – Versus - S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions. The complaint in this case is not so serious as to attract Constitutional sanction."

14. Accordingly, the Learned Counsel submitted that the doctrine of Constitutional Avoidance could not be invoked in this case. Firstly, the Petitioner had no alternative remedy as the Respondents have readily acknowledged that he will be time barred should he pursue other legal courses. Secondly, even if there were alternative remedies available, the issues raised and reliefs sought in the Petition was serious enough to warrant the Constitutional Petition. The underlining issue in the Petition is the Petitioner's right to property enshrined by the provision of Article 40 of *the Constitution*. The seriousness of the right to property was so much so that J Ouko P had this to say in the Court of Appeal case of "Elizabeth Wambui Githinji & 29 others – Versus - Kenya Urban Roads Authority & 4 others [2019] eKLR";

> " Just as the sanctity of a person's property in the English common law was recognized in the famous dictum that "an Englishman's home (or occasionally, house) is his castle and fortress", *the Constitution* and land laws in Kenya protect, as fundamental the right to acquire and own property of any description; and in any part of Kenya...."

15. For emphasis, he cited William Pitt,1st Earl of Chatham who stated that;

> " The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail-its roof may shake-the wind may blow through it-the storm may enter-the rain may enter-but the King of England cannot enter."

16. He stated further that:-

> " In Kenya the attachment to land is passionate, emotional and almost fanatical. Nations, neighbours, siblings, spouses and even strangers fight over land. In some instances, the disputes degenerate into bloodshed and death."

17. He echoed the sentiments of the Court in the case of:- "Gitamaiyu *Trading Company Ltd – Versus - Nyakinyua Mugumo Kiamban Co. Ltd & 11 others Civil Appeal No. 84 of 2013*", where it was stated that;

> " Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities."

18. Thus, the Learned Counsel contended that the right to property was a serious constitutional issue was well established in their jurisdiction. In "Rutongot Farm Limited – Versus - Kenya Forest Service & 3 others [2018] eKLR", the court expressed that;

> "once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of *the Constitution* is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution." (emphasis by the Learned Counsel).

19. Similar sentiments were echoed in the case of:- "Chemei Investments Limited – Versus - The Attorney General & Others Nairobi Petition No. 94 OF 2005 at para.64", where the Court held;

> " *The Constitution* protects a higher value, that of integrity and the rule of law (emphasis by the Learned Counsel). These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milankumar Shah and 2 others vs. City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05)where the Court stated as follows, "we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel (emphasis added) which schemed to disregard the applicable law and the public interest."

20. The Learned Counsel submitted that the upshot was that the Respondents could not invoke the doctrine of Constitutional Avoidance to bar this Court from determining this Petition as the threshold for invoking the doctrine could not be met in the circumstances of this case. Furthermore, since Constitutional claims can never be time barred, they prayed that the Court dismisses the Notice of Preliminary Objection with cost to the Respondents and determine the Petition on its merits.

V. Analysis and Determination

21. The Honourable Court has keenly considered the application by the Petitioner and the Preliminary Objection dated 28th June, 2024 raised by the 5th, 6th and 7th Respondents herein, the written submissions and cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

22. For the court to attain a reasonable, fair and equitable decision, it has crafted four (4) issues that fall for determination in the Notice of Preliminary objection: -

    a. Whether the Preliminary objection is raised on pure points of law.

    b. Whether the Constitutional Petition is barred by the *Limitation of Actions Act*?

c. Whether the Constitutional Petition is in contravention of the Doctrine of Constitutional Avoidance.

d. Who bears the Costs of the Notice of Preliminary objection dated 28th June, 2024?

Issue No. a). Whether the Preliminary objection is raised on pure points of law

23. Under this substratum the Honourable Court shall examine the merits of the Preliminary objection raised by the 5th, 6th & 7th Respondents. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description. Considering the nature of a Preliminary Objection, I will start by analyzing its merits first. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

24. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

25. The above legal preposition has been made graphically clear in the now famous case of "Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696", the court observed that: -

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue."

26. The same position was held in the case of "Nitin Properties Ltd – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257" where the Court held that;

> " A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion."

27. Similarly, in the case of "United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396", the Court held that;

> " A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed."

28. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of

"In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003" where the Court held that;

> " A Preliminary Objection cannot be raised if any facts has to be ascertained."

29. I have further relied on the decision of "Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR":- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

    (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

    (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

    (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

30. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the Respondent herein which are the cause of action herein is barred by limitation and contravenes the express provisions of section 4(4) and 7 of the Limitation of Action Act and that the Petition contravenes the doctrine of Constitutional Avoidance and ought to be struck out with costs. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection is on the doctrine of constitutional avoidance and limitation of time.

Issue No. b). Whether the constitutional petition is barred by the *Limitation of Actions Act*

31. From the classicus locus' case of "Mukisa Biscuits (Supra)" decision, it is clear that a plea of limitation can rightly be raised by a preliminary objection contrary to the submission by the Petitioner. In order to determine whether or not the suit is time barred, one has to look at the pleadings.

32. The subject of this litigation is the Petitioner's claim as contained in the Petition dated 20th December, 2019 and filed on 24th December, 2019. In the background to the Petition, the Petitioner has stated as follows:-

    a. The Petitioner resided on Plot Title Number Kwale/ Shimoni Adj/378 (suit property) and had been residing thereon since time immemorial having been born thereon.

    b. The Petitioner stated that his late father Mwaramtu Bakari Invited the 1st and 2nd Respondents father's were not to acquire any interest in the suit property.

    c. During demarcation he was in Dar es Salam and his father had passed on and the 1st and 2nd Respondents' father Mohamed Bakari Bweko (deceased) illegally registered their names as owners without involving the Petitioner herein and/or his consent.

    d. After realizing that the 1st and 2nd Respondents had registered their names illegally he reported to the area chief.

    e. The matter was handled by the area chief who resolved that the suit property be divided equally between the Petitioner and Mohamed Bakari Bweko (deceased).

f. The matter was also handled by the elders and the judgment adopted by the Court in Land Award No. 3 of 1998 Omar Bakari Ramtu – Versus – Mohamed Bakari Bweko on 5th November, 1998.

g. He continued living on the suit property until sometime in September, 2019 when he realized that the suit property had been transferred to the 4th Respondent herein by the 3rd Respondent without his knowledge, authority and/or consent.

h. Upon further inquiry he learnt that the 1st and 2nd Respondents sold the suit property to the 3rd Respondent.

i. Upon conducting a search at the Department of Land Adjudication and Settlement he further realized that the suit property had been illegally allocated to Mohamed Bakari Bweko (Deceased) and Abdallah Bakari Bweko (Deceased) to his exclusion.

j. His rights over the suit property had been infringed upon by the Respondents herein and he had been deprived of his half share of the suit property.

1. The Petitioner has given the alleged particulars of breach of his constitutional right and sought the following prayers:-

    a. A declaration that the Petitioner is entitled to half share or Plot Title Number Kwale/ Shimoni Adj/378 being 8.6 HA.

    b. A declaration that the registration of the 1st and 2nd Respondents father's names as owners during demarcation being Mohamed Bakari Bweko, Nassoro Bakari Bweko, Abdalla Bakari Bweko (all Deceased) was illegal and in breach of the Petitioners Constitutional rights.

    c. A declaration that the sale and transfer of the whole of the suit property Title Number Kwale/Shimoni Adj/378 to the 3rd & 4th Respondents herein was illegal and in breach of the Petitioners constitutions rights.

    d. An order that the Title Number Kwale/Shimoni Adj/378 be revoked and the same be subdivided into2 in favour of the Petitioner herein for 8.6HA and Title deed be issued.

    e. In the alternative the Petitioner be compensated the market value of half share of Title Number Kwale/Shimoni Adj/378 being 8.6HA.

    f. Costs of the Petition be provided for

34. The provision of Section 4 of the Limitation of Action Act, Cap. 22 provides as follows:

> " The following actions may not be brought after the end of six year from the date on which the cause of action accrued –
>
> a) Actions founded on contract;
>
> b) Actions to enforce a recognizance
>
> c) Actions to enforce an award;
>
> d) Actions to recover a sum by way of penalty or forfeiture or sum by way of penalty or forfeiture;

e) Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued; provided that an action for libel or slander may not be brought after the end of twelve months from such date.

3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.

4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due... "

35. Additionally, the provision of Section 7 of the *Limitation of Actions Act* also provides that:-

" An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

36. While the provision of Section 26 of the same Act stipulates thus:

" Where, in the case of an action for which a period of limitation is prescribed, either-

a) The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

b) The right of action is concealed by the fraud of any such person as aforesaid; or from the consequences of a mistake, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it....."

37. Therefore, as to whether the instant Petition is time barred, the question of limitation of time in regard to allegations of breach of human rights and fundamental freedoms has in many cases been raised by the state. In the case of "Joan *Akinyi Kaba Sellah and 2 others – Versus - Attorney General, Petition No. 41 of 2014*", the Learned Judge observed inter - alia that in a line of cases such as "Dominic Arony Amollo – Versus - Attorney General, Nairobi High Court Misc. Civil Case No. 1184 of 2003 (OS) 2010 eKLR", "Otieno *Mak' Onyango – Versus - Attorney General and another, Nairobi HCCC No. 845 of 2003*, (unreported)", courts have consistently held that there is no limitation with respect to Constitutional Petitions alleging violation of fundamental rights.

38. Further although the provision of Article 67 of *the Constitution* of Kenya, 2010, does not place a time limit within which redress under that provision may be sought. But does that mean that time for seeking redress for constitutional violation is forever at large? It does not. This issue was dealt with in the case of:-"Wellington Nzioka Kioko – Versus - Attorney General [2018] eKLR", whereby this Court, in an appeal arising from a decision of the High Court on a Petition for a declaration that the fundamental rights and freedoms of the Petitioner therein had been violated, upheld the High Court that institution of a claim over 30 years after the cause of action had arisen constituted inordinate delay. The Court expressed that whereas it concurred that there is no time limitation in respect of

Constitutional Petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The Court adopted, with approval, a decision of the High Court in the case of "James *Kanyita Nderitu – Versus - A.G and another, Petition No. 180 of 2011*" where Majanja, J. expressed that:

> " Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of *the constitution* is entitled to consider whether there has been inordinate delay in lodging the claim. The court further stated that the court is obliged to consider whether justice will be served by permitting a respondent whether an individual or the state, in any of its manifestations, should be vexed by an otherwise stale claim."

39. The point was further successfully made in the case of:- "Abraham Kaisha Kanzila alias Moses Savala Keya t/a Kapco machinery services and Milamo investments limited – Versus - Government Central Bank of Kenya and 2 others, Misc. Civil Application 1759 of 2004" where the court observed:

> " In my view failure by a constitutional court to recognize general principles of law including, limitation expressed in *the constitution* would lead to legal awarding or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a 'constitutional issue' after the expiry of the prescribed limitation periods".

40. In this case, the Petitioner has stated that he sued the Respondents and a Judgment which was adopted by the Court was issued on 5th November, 1998. The Petition therefore was aware of the land issue between him and the Respondents way back before 1998. In this regard I agree with the Respondents' sentiments that the Petition is time barred since the cause of action arose more than 21 years before the Petition was actually filed in 2019. The Petitioner admitted that he was aware of the Judgment of the case he filed in 1998. Whether a Constitutional Petition has been instituted within a reasonable time is a question for determination based on the particular circumstances of each case having regard to such considerations as the length of delay; explanation for such delay; availability of witnesses; and considerations as to whether justice will be done. This particular one in my view was instituted with inordinate delay and the said delay was not explained by the Petitioner. Even without considering the other ground of objection raised, which is strictly on "the doctrine of constitutional avoidance, applying the law of limitation, undoubtedly, it is clear to me that this suit is statute barred. It must be struck out.

Issue No. c). Whether the Constitutional Petition is in contravention of the Doctrine of Constitutional Avoidance

41. Notwithstanding the above conclusion, for the sake of the matter being determined on its own merit, the Honourable Court will decipher on "the Doctrine of Constitutional Avoidance" being the "pari materia" core subject matter of the objection raised herein. I must admit that this is an area of law where jurisprudence has been extensively developed by our courts and internationally. Fore and foremost, I wish to cite the case of "Kiriro wa Ngugi & 19 others – Versus - Attorney General & 2 others [2020] eKLR" dealt extensively with the larger concept of non-justifiability. It remarked that the concept of non-justifiability is comprised of three doctrines namely the Political Question Doctrine, the Constitutional-Avoidance Doctrine (also referred to as the Constitutional-Avoidance Rule or the doctrine of exhaustion) and the Ripeness Doctrine.

42. On the Constitutional-Avoidance Doctrine, the Court had the following to say: -

105. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black's Law Dictionary, 10th Edition at page 377 defines it as:

> The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.

106. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:

> (256) The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.

43. The doctrine of constitutional avoidance, therefore, deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. That is also referred to as "the doctrine of exhaustion".

44. A 5-Judge Bench sitting in "Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR" elaborately dealt with the doctrine of exhaustion. The Court stated as follows: -

> 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:
>
> 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly – Versus - Karume [1992] KLR 21 in the following oft-repeated words:
>
> > Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
>
> 43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.
>
> This is Geoffrey Muthiga Kabiru & 2 others – Versus - Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:
>
> > It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The

> exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

45. he Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
>
> > What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)
>
> 60. As observed above, the first principle is that 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.
>
> 61. The second principle is that 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 in Night Rose Cosmetics (1972) Limited – Versus - 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.

46. Now applying this legal principles to the instant case. From the filed pleadings, The Petitioner has submitted that in their reply to petition dated 4th November, 2020 at paragraph 4, the Respondents claimed that the Petition herein raises no Constitutional issue and has merely been coached as a

Constitutional Petition to defeat limitation under the provision of Section 7 of the *Limitation of Actions Act*. I hold that this is not the case. The truth of the matter was that the Respondents have misconstrued the situation and have gotten it the other way round. If anything, the doctrine of Constitutional Avoidance supports the decision to file the Petition. It was clear from the above that the doctrine is only applicable where the Petitioner had an alternative remedy to constitutional reliefs. The rationale behind the doctrine is that the Bill of Rights is applicable to all legal disputes and this necessitates the establishment of a mechanism that ensures not every legal dispute will have sought constitutional remedies which should only be reserved for more serious matters.

47. I do agree with the Respondents though as seen above the prayers sought by the Petitioner in this Petition are not necessarily those that have to be dealt with by a constitutional Petition can be dealt with under a civil suit. Further there was a Judgment already issue in this dispute in the year 1998. If dissatisfied by it the Petitioner out to have appealed rather than file this Petition with inordinate delay without leave of Court. I must take refuge in the provision of Article 10 (1) of *the Constitution*. The provision, in a mandatory manner, provides that the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*, enacts, applies or interprets any law or makes or implements public policy decisions. The provision of Article 3 of *the Constitution* calls upon everyone to respect, uphold and defend *the Constitution*.

48. Having said so, and in the unique circumstances of this case, and further being alive to the legal position that statutory provisions ousting Court's jurisdiction must be construed restrictively. Thus, I find and hold that, the Petitioner has failed to demonstrate any of the exceptions to the doctrine of exhaustion. This is one such case where even if there are constitutional issues that arose, the bulk of the issues are not constitutional based and the Petitioner should exhaust other means of redress before approaching this ELC Constitutional Court. To this extend, I find the second ground of opposition by the Respondents merited. The suit cannot succeed.

Issue No. b). Who bears the Costs of the Notice of Preliminary objection dated 28th June, 2024

49. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Rule 26 (1) & (2) of *the Constitution* of Kenya (Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules, 2013 (also referred to as "the Mutunga Rules") state as follows:-

    26 (1). The award of costs is at the discretion of the Court.

    (2). In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.

50. Additionally, the provision of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

51. In the present case, and based on the ratio from the above Mutunga Rules, this being a matter brought under *the Constitution* Petition, the Honourable Court reserves the discretion to award the Respondents the costs of the Preliminary objection.

V. Conclusion and Disposition.

52. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders: -

    a. Thatthe Notice of Preliminary objection dated 28th June, 2024 be and is hereby found to have merit and is hereby allowed and the same is upheld with costs.

    b. Thatthe Petition dated 20th December, 2019 and filed on 24th December, 2019 be and is hereby struck out.

    c. Thatthe costs shall be in favour of the 5th, 6th and 7th Respondents.

    It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 16TH DAY OF OCTOBER 2024.

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HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. No appearance for the Petitioners.

c. Mr. Wagah Advocate holding brief for Mr. Makuto Advocate for the 5th, 6th and 7th Respondents.