



**Oduor & another v Ofula & another (Environment & Land Petition  
E001 of 2022) [2023] KEELC 17087 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17087 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND PETITION E001 OF 2022**

**DO OHUNGO, J**

**MAY 3, 2023**

**BETWEEN**

**RAEL OTIENO ODUOR ..... 1<sup>ST</sup> PETITIONER**

**ROSEMARY NALIKA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**STANLEY KEFA OFULA ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioners moved the court through petition dated February 1, 2022 wherein they averred that the first petitioner is the legal representative of the estate of Augustine Oduor Apudo (deceased) who was registered as proprietor of land parcel number South/Wanga/Bungasi/418 (the suit property) on February 14, 1969. They further averred that from 1969 to 2010, the petitioners and other deceased's heirs enjoyed peaceful, quiet and uninterrupted occupation and use of the suit property until August 12, 2010 when the first respondent filed a dispute before the South Wanga Division Land Disputes Tribunal claiming that the deceased held the suit property in trust for one Apolo Ofula, the first respondent's father and the tribunal made a determination directing that the petitioners be evicted from the suit property .
2. The petitioners further averred that they were never heard in the tribunal and that they only learnt of the tribunal matter from the Senior Principal Magistrate's court at Mumias when the first respondent sought execution of tribunal's finding through Mumias Senior Principal Magistrate's Court Miscellaneous Land Application No. 48 of 2010. That the Magistrate's Court adopted the tribunal's decision without according the petitioners a hearing and further dismissed their application



to review or vacate the decree. The petitioners cited articles 22, 40, 50 and 258 of *the Constitution* of Kenya 2010 and prayed for the following orders:

- a. A declaratory order do issue in terms that the South Wanga Division Land Dispute Tribunal which heard the dispute concerning the claim by the first respondent on land parcel number South/Wanga/Bungasi/418 was bereft of any jurisdiction to entertain the dispute.
  - b. A declaration do issue to the effect that all proceedings before the South Wanga Land Dispute Tribunal and the Senior Principal Magistrate Court at Mumias over land parcel South/Wanga/Bungasi/418 are and remain a nullity and void ab initio for all purposes.
  - c. An order that the costs of this petition and costs of the lower court be recovered from the first respondent.
  - d. The honourable court do grants (sic) any other relief in the matter deemed to be necessary to meet the ends of justice.
3. The petition is supported by an affidavit jointly sworn by the petitioners wherein they reiterated the contents of the petition. They further annexed copies of deceased's certificate of death, grant of letters of administration ad litem issued to the first petitioner on April 13, 2021 in respect of the deceased's estate, certificate of search in respect of the suit property as of March 25, 2021, proceedings and decision of the Land Dispute Tribunal case, a letter dated March 16, 2021 from the first respondent's advocates demanding that the second petitioner and others vacate the suit property and order issued on January 25, 2021 by the Senior principal Magistrate's Court at Mumias adopting the tribunal's decision. They deposed that the second petitioner is the mother to the first petitioner continues to be in occupation of the suit property where the first petitioner's father was buried and that the first respondent is currently threatening to evict them from the suit property.
  4. In response to the petition, the first respondent filed an answer to the petition as well as a replying affidavit which he swore on February 25, 2022. He contended that the petitioners lack locus standi to institute the petition since the letters of administration do not allow them to prosecute the current petition. Further, that the dispute on title ownership is not a constitutional issue to be determined by this court and that the second petitioner was aware of the dispute before the tribunal having attended the first meeting and participated in the Magistrate's Court proceedings hence there was no denial of the right to be heard. That if the petitioners were dissatisfied with the decision of the Magistrate's Court, they had the options of review and appeal.
  5. The first respondent also took the position that the petition is res judicata and that the petitioners have not demonstrated how their constitutional rights and fundamental freedoms were violated, threatened, or infringed upon. The first respondent therefore urged the court to dismiss the petition with costs.
  6. The petition was canvassed through written submissions. Although evidence of service was availed, the second respondent neither responded to the petition nor participated in its hearing. The petitioners and the first respondent duly filed submissions.
  7. The petitioners argued that the petition is res judicata since it largely focuses on ownership of the suit property, an issue yet to be determined. They further argued that the South Wanga Disputes Tribunal did not have jurisdiction to determine the dispute in view of section 3(1) of the *Land Disputes Tribunal Act*. They relied inter alia on the case of *Asman Maloba Wepukbulu & another v Francis Wakwabubi*



*Biketi* Civil Appeal No. 157 of 2001 Kisumu. They therefore urged the court to allow the petition as prayed.

8. In response, the first respondent argued that this court lacks jurisdiction to issue the orders sought since the subordinate court's decision could only be challenged on appeal. Reliance was placed inter alia on the decisions of the Supreme Court *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and *In the Matter of Interim Independent Electoral Commission* [2011] eKLR.
9. The first respondent further argued that the orders sought cannot be issued since the petitioners are not the legal representatives of the deceased's estate and that the grant of letters ad litem was limited to prosecution of the miscellaneous cause and not this petition. Finally, relying on *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* [2014] eKLR, he argued that the petition does not meet the requisite threshold of a constitutional petition since the petitioners have failed to demonstrate constitutional infractions. He therefore urged the court to dismiss the petition with costs.
10. I have considered the petition, the affidavits, and the submissions of parties. The issues that arise for determination are whether this court has jurisdiction and whether the reliefs sought should issue.
11. The centrality of jurisdiction in all proceedings cannot be overstated. Without jurisdiction proceedings come to a certain end and the court cannot make any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.
12. Pursuant to Rule 10 (2) (b), (c) and (d) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, a petitioner moving the constitutional court is required to disclose the facts that he relies upon, the constitutional provision violated, and the nature of injury caused or likely to be caused to him or to the person in whose name the petition has been instituted.
13. Further, caselaw has refined the manner of moving the constitutional court with the result that procedural law relating to constitutional petitions is that a person seeking redress on a matter which involves a reference to *the constitution* must set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to have been infringed. See *Anarita Karimi Njeru v Republic* [1979] eKLR.
14. The Court of Appeal reiterated those procedural requirements in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where it stated:

Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. ...

(43) The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. ... No particulars were enumerated. ....

(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the petition before the High Court



did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test ....

15. A perusal of the petition herein reveals that besides simply mentioning articles 22, 40, 50 and 258 of the Constitution of Kenya 2010, the petitioners have not stated which provision of the Constitution has been infringed or is threatened. The closest they come to alleging a violation of the Constitution is their feeble and indirect claim that they were not accorded a hearing by the tribunal and the subordinate court. I say feeble because the petitioners themselves later state that they were heard by the subordinate court in an application to challenge the adoption of the award. Their attempt falls short of the requirement of reasonable precision in framing of issues in constitutional petitions.
16. There is yet another aspect of the jurisdictional question in this matter. The petitioners have sought to invoke the constitutional jurisdiction of the court. The question that emerges is whether they have adequate statutory avenues for resolution of the dispute. If they do, then the statutory options for redress must be followed and the constitutional court will decline to entertain the dispute. This is what is called the principle of constitutional avoidance. It counters the practice of bringing ordinary disputes to the constitutional court. The import of its application is that an ordinary claim disguised as a constitutional matter and filed in the constitutional court is a claim filed in the wrong court, in a court without jurisdiction. See Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR and Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR.
17. It is trite that a case filed in a court without jurisdiction is dead on arrival and cannot be resuscitated. See Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR.
18. At the core of the dispute is the award of South Wanga Division Land Disputes Tribunal on October 28, 2010 in Claim Number 5 of 2010. The first respondent herein was the claimant while the second petitioner was among the objectors. The award was made under the Land Disputes Tribunals Act, 1990 (repealed). Section 8 of the Act provided a right of appeal to the Appeals Committee constituted for the province and ultimately to the High Court. In its award, the tribunal did not deal with title to registered land but focused on issues of occupation and use, all of which were well within its jurisdiction. Even if the tribunal had exceeded its jurisdiction, there is an adequate statutory route to resolve that kind of a dispute by institution of judicial review proceedings under sections 8 and 9 of the Law Reform Act as well as under the Civil Procedure Rules. Whereas an order of judicial review is one of the reliefs that a court exercising the constitutional jurisdiction can grant under article 23 (3), it must be remembered that relief is a secondary issue in any proceedings. A party must first bring a valid claim within the jurisdiction of the court. It is only after surmounting the jurisdictional handicap that reliefs fall for consideration. Reliefs, however desirable, can only be issued in a case that is properly before the court.
19. I find that this matter was wrongly filed as a constitutional petition and that consequently, this court, while exercising the constitutional jurisdiction, does not have jurisdiction to determine the matter.
20. In the result, I strike out the petition with costs to the first respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 3<sup>RD</sup> DAY OF MAY 2023.

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:



Ms Anono for the petitioners

Ms Aligula holding brief for Mr Oduor for the first respondent

No appearance for the second respondent

Court Assistant: E. Juma

ELC Petition No. E001 of 2022 (Kakamega) Page 2 of 2

