



Bamaftah & another v Cabinet Secretary, Ministry of Lands, Public Works and Housing and Urban Development & 7 others (Environment and Land Constitutional Petition E012 of 2023) [2023] KEELC 21412 (KLR) (7 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21412 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E012 OF 2023
LL NAIKUNI, J
NOVEMBER 7, 2023

BETWEEN

FARID FARAJ AWADH BAMAFTAH 1ST PETITIONER

AL MAHRA INDUSTRIES LIMITED 2ND PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF LANDS, PUBLIC WORKS AND HOUSING AND URBAN DEVELOPMENT 1ST RESPONDENT

PRINCIPAL SECRETARY, STATE DEPARTMENT OF LANDS AND PHYSICAL PLANNING 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

THE LAND REGISTRAR, KILIFI COUNTY 4TH RESPONDENT

THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICE, KILIFI COUNTY 5TH RESPONDENT

THE DIRECTOR OF SURVEYS 6TH RESPONDENT

THE NATIONAL LAND COMMISSION 7TH RESPONDENT

THE ATTORNEY GENERAL 8TH RESPONDENT

RULING

I. Introduction

1. Before this Honourable Court for its determination is an objection raised by the Honourable Attorney General, the 8th Respondent herein. The objection was brought to Court through a Notice of



Preliminary dated 26th May, 2023 challenging the legal basis of the filed Constitution Petition instituted by the Petitioners herein - Farid Faraj Awadh Bamaftah and Al Mahra Industries limited

II. The objection by the 8th Respondent

2. Fundamentally, the three (3) Paragraphed Notice of Preliminary Objection by the 8th Respondent raised the following objections:-
 - a. That, the Petition offends Doctrine of Constitutional avoidance.
 - b. That, the Petition is a simple claim for land alleging illegality of a settlement scheme but is disguised as a constitutional petition and hence should not have been filed as a constitutional petition but as an ordinary plaint.
 - c. That, the matter can be properly decided on another basis other than through a constitutional petition.

III. Submissions

3. On 20th June, 2023 while the Parties were present in Court, they were directed to have the Notice of Preliminary Objection dated 26th May, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 26th July, 2023 a ruling date was reserved on Notice by Court accordingly.

A. The Written submissions of the 1st and 2nd Petitioners

4. The 1st and 2nd Petitioners through the Law firm of Messrs. Khalid Salim & Company Advocates filed their written submissions dated 26th July, 2023. Mr. Khalid Salim Advocate commenced their submissions by stating that the Petitioners filed a Notice of Motion Application dated 9th May 2023 and filed on 11th May 2023 wherein they prayed for the following orders:
 - a. That this matter be certified as urgent, service of this application upon the Respondents be dispensed with and the Application be heard ex-part in the first instance. (Granted)
 - b. That pending hearing and determination of this application inter partes, this court be pleased to issue a temporary conservatory order restraining, prohibiting, and stopping the 4th Respondent (the Registrar of Lands, Kilifi County) their agents, officers and any third person from entering upon or trespassing, encroaching, constructing any structures, offering for sale, selling, disposing of, charging, sub-dividing, dealing, alienating, occupying, managing, letting or otherwise using, residing and remaining or in any way whatsoever from interfering with parcel of land known Mtwapa/ Maweni Settlement Scheme/874, 875, 876, 877, 878, 879, 880, 851, 853, 861, 863, 865, 867, 869, 871, 873, 860, 862, 864, 866, 868, 870, 872, 898, 897, 901, 903, 905, 907, 909, 911, 895, 894, 900, 902, 904, 906, 908, 910, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 937, 938, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978 and 979. (Granted)
 - c. That pending hearing and determination of this application inter partes, this court be pleased to issue a temporary conservatory order restraining,



prohibiting, and stopping the Respondents and any third party jointly and severally, their agents, officers and any person acting under them from further from interfering in any way whatsoever, including trespassing into, encroaching and or developing the 1st and 2nd Petitioners property known as Plot No. Sub Division No. 4730 (Original No. 527/2) Section III Mainland North, CR No. 38340. Mtwapa Kilifi and the parcels of land known as PLOT Nos. LR Nos. 5517 Section III Mainland North, LR No. 51693, 5518 Section III Mainland North CR No. 51694, LR No. 5519 Section III Mainland North CR No. 51695, LR No. 5520 Section III Mainland North CR No. 51696, LR No. 5521 Section III Mainland North CR No. 51697, LR No. 5522 Section III Mainland North CR No. 51698, LR No. 5523 Section III Mainland North CR No. 51692, LR No. 5524 Section III Mainland North CR No. 51699. Or any other subdivisions thereon, however so registered to persons other than the Petitioners. (spent)

- d. That pending hearing and determination of this Petition this court be pleased to issue a temporary conservatory restraining, prohibiting, and stopping the 4th Respondent (the Registrar of Lands, Kilifi County) their agents, officers and any third person from entering upon or trespassing, encroaching, constructing any structures, offering for sale, selling, disposing of, charging, sub-dividing, dealing, alienating, occupying, managing, letting or otherwise using, residing and remaining or in any way whatsoever from interfering with parcel of land known Mtwapa/Maweni Settlement Scheme/874, 875, 876, 877, 878, 879, 880, 851, 853, 861, 863, 865, 867, 869, 871, 873, 860, 862, 864, 866, 868, 870, 872, 898, 897, 901, 903, 905, 907, 909, 911, 895, 894, 900, 902, 904, 906, 908, 910, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 937, 938, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978 and 979.
- e. That pending hearing and determination of this Petition, this court be pleased to issue a temporary conservatory order restraining, prohibiting, and stopping the Respondents and any third party jointly and severally, their agents, officers and any person acting under them from further from interfering in any way whatsoever, including trespassing into, encroaching and or developing the 1st and 2nd Petitioners property known as Plot No. Sub Division No. 4730 (Original No. 527/2) Section III Mainland North, CR No. 38340. Mtwapa Kilifi and the parcels of land known as PLOT Nos. LR Nos. 5517 Section III Mainland North, LR No. 51693, 5518 Section III Mainland North CR No. 51694, LR No. 5519 Section III Mainland North CR No. 51695, LR No. 5520 Section III Mainland North CR No. 51696, LR No. 5521 Section III Mainland North CR No. 51697, LR No. 5522 Section III Mainland North CR No. 51698, LR No. 5523 Section III Mainland North CR No. 51692, LR No. 5524 Section III Mainland North CR No. 51699. Or any other subdivisions thereon, however so registered to persons other than the Petitioners.
- f. That the OCS and the Sub County Commander, Mtwapa Police Station be ordered to ensure compliance with the Orders of this Honourable Court.



5. The said application is supported by an affidavit sworn by the 1st Petitioner Farid Faraj Bamaftah sworn and dated on 9th May 2023. The 1st -6th, and the 8th Respondents, through the offices of the Honourable Attorney General opposed the said application through Grounds of Opposition dated 7th June 2023 and filed on 8th June 2023. The said Respondents also filed a Notice of Preliminary Objection dated 26th May 2023 and filed on 31st May 2023. Other than the Grounds of Opposition in response to the application, the Respondents never filed any other responses in the form of a Replying Affidavit to respond to the concrete factual issues raised by the Petitioners in the said application. Thus, in the absence of a Replying Affidavit on facts, the Respondents were deemed by law to have admitted to the factual issues and concerns raised by the Petitioners. The Learned Counsel humbly invited this Honourable Court to take the above into consideration when it retired to consider the merits of the Petitioners application herein above.
6. The Learned Counsel submitted that the Petitioners filed the application wherein they claimed that their constitutional rights as enshrined under the Constitution were infringed and violated by the Respondents actions. The Petitioners had raised serious constitutional issues and enumerated the constitutional provisions violated by the Respondents. The Petitioner had raised serious breaches of the Constitution by the Respondents and had raised at least 27 grounds under which there were instances of breaches of the Constitution by the Respondents. In addition, the Petition relied and raised provisions of 25 Articles of the Constitution of Kenya depicting and in relation to the impugned violation, threat and denial of the fundamental rights by the Respondents herein .
7. The Learned Counsel further submitted that it was thus evident that the Petition raised serious Constitutional issues that this Honourable Court would ultimately need to look into at the hearing of the Petition. To dismiss the Petition at this juncture would amount to shutting the doors of justice to the Petitioners despite the Constitutional issues raised in the Petition. This Honourable Court was also mandated by the provision of Article 159 of the Constitution not to take into account technical objections but rather substantively deal with the issues that had been raised by the Parties in their matters.
8. The Learned Counsel submitted that the 1st Petitioner was and remained the registered owner of Plot No. Subdivision No. 4730 (original No. 527/2) Section Iii Mainland North, Mtwapa Kilifi Cr No. 38340 (Hereinafter referred to as “The 1st Suit Land”) situate in Mtwapa within Kiifi County. The 1st Petitioner’s legal interest over the aforesaid parcel of land was affirmed by Justice Sila Munyao in “Mombasa ELC Case No. Mombasa ELC No. 26 of 2021 - Farid Faraj Awadh Bamaftah – Versus - Kilifi County Government whereby the Court declared the 1st Petitioner as the absolute and indefeasible owner thereof. While the 2nd Petitioner was and remained the legal and beneficial owner of Land Reference Nos. LR Nos. 5517 Section III Mainland North, No. LR No. 51693, 5518 Section III Mainland North CR No. 51694, LR No. 5519 Section III Mainland North CR No. 51695, LR No. 5520 Section III Mainland North CR No. 51696, LR No. 5521 Section -III Mainland North CR No. 51697, LR No. 5522 Section HI Mainland North CR No. 51698, LR No. 5523 Section III Mainland North CR No. 51692, LR No. 5524 Section III Mainland North CR No. 51699. All the aforementioned properties were sub divided from LR No. 4729 Section III Mainland North (Hereinafter referred to as “The 2nd Suit Land”). The 1st Petitioner and the Respondents parcel of land above mentioned lie adjacent to each other.
9. The Petitioner’s case was that on March/April 2023, the Respondents, contrary to the Petitioners constitutional rights to their respective properties, illegally, unlawfully and without any due process provided for by the law, undertook an illegal survey over an already surveyed area, including the areas where the Petitioners land lied and created an illegal settlement scheme known as Mtwapa



Maweni Settlement Scheme and issued duplicate titles over the same portion of land thus infringing on the Petitioners' Constitutional rights. The Petitioners Constitutional rights that had been infringed and violated by the Respondents had well been stated in both the Petition and the application. The Petitioner claimed that there was real fear and risk of invasion and dealings with the parcels of land created by the said illegal scheme and was thus prudent that conservatory orders be issued restraining any dealings thereon in order to preserve the said land from illegal development, and/or invasions.

10. According to the Learned Counsel, the Respondents objection was merely that the Petitioners case ought not to have been filed as a Constitutional Petition but as a Plaint. According to the Respondents, the issues raised by the Petitioners could also be dealt with if the case was filed as an ordinary suit. For that reason, it was the Respondents view that the case offended the doctrine of constitutional avoidance. In its Grounds of Opposition, the Respondent claimed that the application had not met the threshold for issuance of conservatory orders. The Respondent was also claiming that the application had not met the threshold for issuance of a temporary injunction. The Respondent asserted that they were performing their mandated statutory obligation.
11. From the said issues of objection, the Learned Counsel responded to them as follows. Firstly, whether the Preliminary Objection was properly raised by making reference to the case of: "Mukisa Biscuits Manufacturing Ltd – Versus - West End Distributors (1969) EA 696" was notorious on the issue of what constituted a preliminary objection. The Learned Counsel submitted that the Preliminary Objection raised by the 8th Respondent was not premised on any law. The Respondents had not relied on any provision of the law to support their Objection. Therefore, the Petitioners asked the Court to dismiss the Respondents objection for having not satisfied the principles enunciated in the above-mentioned matter. In fact, the objection raised by the Respondents could only be determined during the substantive hearing of the Petition. It was only then that the Court would be properly seized of the matter to determine the question whether the Petition raised Constitutional issues that require determination by the Court.
12. It was thus the submission of the Learned Counsel that the Preliminary Objection concerned itself with the substance of the Petition as opposed to raising issues of law. The argument by the Respondent that there was no constitutional issues in land related matter never held water. The Respondent had deliberately chosen to ignore the serious constitutional concerns that had been raised as to the manner in which the scheme was created. Instead of dealing with the Constitutional issues raised, they had instead chosen to trivialize the matter. It was prudent for the Court to allow the Petition to proceed for hearing for the Court to ultimately determine whether or not the scheme was created in contravention to the provision of *the Constitution* and ultimately amounted to an infringement and violation of the Applicants constitutional rights.
13. Secondly, on whether the Petition offended the Doctrine of Constitutional Avoidance, the Learned Counsel averred that it was worth to note that the circumstances of the above matter were similar to the Constitutional Case between "Zinj Limited – Versus - The Attorney General & Others ELC Petition No. 2 of 2010 (Malindi)" which matter went all the way to the Supreme Court for hearing and determination. The above matter raised similar Constitutional issues as the ones raised in this Petition. It was filed as a Petition since the issues raised therein were not just ordinary issues, but constitutional concerns about the manner in which the Government of the Republic of Kenya created an illegal scheme over an area where it had been issued with a Certificate of Title.



14. In the Appeal to the Supreme Court Petition No.1 of 2020, the Judges of the Supreme Court in holding that the Constitutional Rights of Zinj Limited had been violated by the Government of the Republic of Kenya where the said Judges stated as follows:

“There is nothing on record to show that any of these mandatory processes were followed before a portion of the suit property was acquired. This being the case and despite the Appellants (The AG) protestations to the contrary, we must reach the conclusion, in agreement with the trial court, that the issuance of the titles over a portion of the suit property, in favour of third parties was unlawful, unprocedural and an egregious violation of the Respondents rights to property.

15. They therefore had no doubt that the issuance of the titles to third parties over a portion of the suit’s property, amounted to a violation of the provision of Articles 40 (3) (a) and (b) of *the Constitution* of Kenya, 2010. The Learned Counsel invited the Honourable Court to be guided by the Ruling of both the Court of Appeal as well as the Supreme Court in the above matter and, proceed to dismiss the Objection by the Respondents and allow the Petition to proceed for hearing so that the issues raised could then be determined substantively as opposed to throwing out the Petition beforehand, and without looking into the issues to even determine whether it raised constitutional concerns.

16. The Respondents had an obligation to demonstrate the manner and the process employed for the creation of the scheme which was now the subject of challenge in this Petition. The Petition was majorly concerned with the constitutionality or otherwise of the process used by the Respondents in creating the scheme and issuance of the titles. *The Constitution* of Kenya, 2010, under the provision of Articles 60 (1) (b) of *the Constitution* provides for the principles of land policy to include security of land rights. The 1st Petitioner herein had been and continued to be the legal and beneficial owner of all that property known as Plot No. Sub Division No.4730 (Original No.527/2) Section III Mainland North, CR No.38340 situate in Mtwapa within Kilifi County – the 1st Suit Land - who has been declared as the and confirmed by Justice Sila Munyao in Mombasa ELC No.26 of 2021 between Farid Faraj Awadh Bamaftah – Versus - Kilifi County Government as the absolute and indefeasible owner of the subject property.

17. The Learned Counsel averred that the provision of Article 22 of *the Constitution* provides for the protection of fundamental rights and freedoms in the Bill of Rights while the provision of Article 40 also provide for the protection of right to property and that the state shall not deprive a person of property unless the deprivation is according to the law. Thus, it was the Learned Counsel’s contention that the Respondents act of creating a settlement scheme and issuance of titles over their land without following the due process provided for under *the Constitution* and the Law amounted to an infringement and a violation of the rights as provided for under *the Constitution*.

18. As such the Petition had sought appropriate reliefs as provided under the provision of Article 23 of *the Constitution* of Kenya, 2010. To buttress on this point, the Learned Counsel cited the case of:- “CNM – Versus - WMG (2018) eKLR”, where the issue of Constitutional avoidance was dealt with as follows:-

“The question is whether the argument forces the Court to consider constitutional rights and or values.”

19. It was the Learned Counsel’s submission that the Petition raised serious Constitutional issues that the Court ought to determine at the hearing of the Petition. Additionally, he relied on the



case of:- “Southlake Panorama Limited – Versus - Kenya Electricity Company Limited & 3 Others [2021]eKLR” the Court stated as follows on the aspect of jurisdiction on Constitutional matters:

“The Constitutional jurisdiction of the Court is a very specific jurisdiction which is open to general claims. It is invoked pursuant to Article 22(1) and 23 of *the Constitution* of *the Constitution*. The relief that a court exercising the constitutional jurisdiction can grant are clearly spelt out by Articles 22 (3)....”

20. This Honourable court has jurisdiction in this matter as provided for under *the Constitution* as well as the *Environment and Land Court Act* which empowers this Honourable to deal with the constitutional issues relating to land. The Petitioners stated that if this Honourable Court decided to apply the Doctrine of Constitutional Avoidance in this matter, then it would be denying itself and the Petitioners the opportunity to determine the facts of the case and examine the interest involved. As the Court of Appeal acknowledged in the case of “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”.

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.

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) Ltd Nairobi County Government & 2 others* [2018] eKLR.

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.

21. The Learned Counsel submitted that the Petitioners stated that issuance of duplicate titles to third parties over their parcel of land without following the due process of law amounted to impunity, contravention of the provisions of *the Constitution*, the *Lands Act*, the *Land Registration Act* as well as the *Survey Act*. The Petitioners also stated that the actions of the Respondents amounted to illegal and unlawful compulsory acquisition of the Petitioners land without following the due process under *the Constitution* as well as the provisions of the *Land Act*, No. 6 of 2012 and the *Land Registration Act*, No. 3 of 2012. The Respondents’ action was tantamount to compulsory acquisition without compensation contrary to the provision of Article 40 (3) of *the Constitution* of Kenya, 2010.



22. The Petitioners were claiming that their fundamental right as provided in *the Constitution* were being threatened by the Respondents. Therefore, they sought the intervention of this honorable court in the protection of their rights.
23. Thirdly, on whether the application had met the threshold of issuing conservatory orders, the Learned Counsel submitted that as there was no response to the factual issues raised in the application by any of the Respondents. Hence, the Learned Counsel prayed that the application be allowed as prayed. To support the argument, the Learned Counsel cited the case of:- the Court in Nairobi Civil Appeal 151 of 2011 “Invesco Assurance Co. Ltd – Versus - MW (Minor suing thro’ next friend and mother (HW) [2016] eKLR” defined a conservatory order as follows:
- “A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”
24. Further, he referred Court to the case of:- “Centre for Rights Education and Awareness (CREAW) & another – Versus - Speaker of the National Assembly & 2 others (2017) eKLR” the Court was emphatic that:-
- “A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”
25. The Petitioners averred that they stood to lose their rights over their parcels of land and suffer tremendous loss and damage-as there was a real risk of losing their property to persons holding illegal titles over the sub - divisions. Further, in the case of “Centre for Rights Education and Awareness (CREAW) (Supra) it was held that:
- “A party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.” It was also stated that an applicant seeking conservatory orders needs to prove that the substratum of the Petition will be rendered nugatory if orders are not granted.
26. The Petitioners herein stated that there had been several attempts to invade the Petitioners’ parcel of land with the aim of gaining forceful possession. The 1st Petitioner stated that he had over the past years made several reports concerning trespass over his parcel of land to Mtwapa Police Station. They stated that their legal rights to property had been infringed and would continue to be infringed by the Respondents through their unlawful actions of invading their parcels of land and proceeding to illegally and unlawfully survey and subdivide the same. The Applicants/Petitioners stated that they were apprehensive that if the orders sought herein were not granted, then the Respondents shall continue with their illegal activities with the Petitioners/Applicants land being invaded by third parties on the foundation of such illegalities occasioning him even further loss and damage and rendering the Petition an academic exercise.
27. The Learned Counsel submitted that the Petitioners stated that they had demonstrated prejudice that it would suffer if the orders sought were not granted. The Petitioners had demonstrated ‘a prima facie



case” with likelihood of success. And that the substratum of the Petition would be rendered nugatory if the conservatory orders sought were not granted. There was evidence that the grant of the conservatory orders sought would enhance constitutional values and objects specific to the rights and freedoms in the Bill of rights.-

28. The Learned Counsel averred that the provisions of Article 23 (3) of *the Constitution* provided that if the proceedings were brought under the provision of Article 22, that a Court may grant appropriate relief, including a conservatory order, therefore, to the extent that the present Petition was premised on an allegation of denial, violation, and threatened violation of the bill of rights there was a basis for issuance of the conservatory order sought.
29. In conclusion, the Learned Counsel submitted that they had proved that the balance of convenience tilted in their favor, as they had shown that Preliminary Objection raised by the Respondents was Improperly raised and thus should be dismissed and in any case the Petitioners had demonstrated that their matter was properly placed before this Honorable court and prayed that their application be allowed and the orders sought be granted.

IV. Analysis and Determination

30. I have considered the Notice of Preliminary Objection dated 26th May, 2023 on an objection raised by the 8th Respondent herein and the rival submissions, a myriad of authorities to boot by the 1st and 2nd Petitioners herein, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes.
31. In order to attain an informed, fair and just decision on the raised objection, the Honourable Court has crystalized the subject matter into the following three (3) issues for its determination. These are: -
 - a. Whether the objection raised by the 8th Respondent dated 26th May, 2023 meets the threshold of an objection as founded in Law and precedents.
 - b. Whether *the Constitution* Petition by the 1st and 2nd Petitioners offend the Doctrine of Constitutional Avoidance.
 - c. Who bears the Costs of the objection.

IssueNo. a). Whether the objection raised by the 8th Respondent dated 26th May, 2023 meets the threshold of an objection as founded in Law and precedents.

32. In determining the objection from the 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.
33. 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.....”
34. 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. ”.

35. The same position was held in the case of “Nitin Properties Ltd vs 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.”

36. Similarly in the case of “United Insurance Company LTD vs 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 .”

37. 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 thus:

“ A Preliminary Objection cannot be raised if any facts has to be ascertained.”

38. 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.

39. I need to point out that an objection may be raised at any stage of the proceedings so long as it conforms to the above well laid out legal standards. 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 8th Respondent herein. Simply put, the 8th Respondents holds that the issues raised by the Petitioners herein being the violation, threat and denial of their fundamental rights by the Respondents of not only having taken away their parcels of the suit land, declaring it a settlement scheme but also allocated and issued title deeds to several individuals herein. In a quick rejoinder, the 8th Respondent has raised an objection asserting that from the surrounding facts and inferences thereof, there is nothing Constitutional in terms of value and object about the matters and the reliefs raised from the filed Petition. To them, they strongly hold that on the contrary, these are issues that would be dealt with in an ordinary suit filed through a Plaint rather than a Constitutional Petition. Resultantly, they have averred that in so doing, the Petitioners have offended the Doctrine of Constitutional Avoidance.



Ideally, without belabouring the point, the Honourable Court is fully satisfied that the objection raises pure points of law – the Doctrine of Constitutional Avoidance.

Issue No. b). Whether *the Constitution* Petition by the 1st and 2nd Petitioners offend the Doctrine of Constitutional Avoidance.

40. Under this Sub heading, the Doctrine of Constitutional Avoidance is the main substratum. Therefore, for the sake of clarity, its significant that the Honourable Court re – looks into the concept a little bit indepth. In “S Woolman & M Bishop, Constitutional Law of South Africa (2013)” Pages 3 to 21, the term “Constitutional Avoidance’ has been defined as “a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved”. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.
41. The doctrine of avoidance was fortified in the case of: “Sports and Recreation Commission – Versus - Sagittarius Wrestling Club and Anor 2001 (2) ZLR 501 (S)” in which Ebrahim JA said the following: -
- “...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an 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..”
42. Additionally, the doctrine of constitutional avoidance was expounded by the “Supreme Court in Communications Commission of Kenya & 5 others – Versus - Royal Media Services Limited & 5 others [2014] eKLR”. The Court held as follows: -
- (256) 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.”
- (257) Similarly the U.S. Supreme Court has 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 (Ashwander – Versus - Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).
- (258) From the foundation of principle well developed in the comparative practice, we hold that the 1st-, 2nd and 3rd Respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.



43. 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.”

44. It can be discerned from the foregoing that where another legal course is available, through which a matter can be properly decided and which can give an applicant the relief he seeks, such course should be pursued and the constitutional court should decline to determine a constitutional issue in such matter.

45. I have felt it needful to further cite the case of:- “Uhuru Muigai Kenyatta – Versus - Nairobi Star Publications Limited [2013] eKLR”, Lenaola, J. (as he then was) stated:

“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.

46. Now turning and applying these legal ratio to the instant case. The Petitioners have strongly submitted that the circumstances of their matter are squarely similar and in tandem to the Constitutional Case of:- “Zinj Limited – Versus The Attorney General & Others ELC Petition No. 2 of 2010 (Malindi)” which matter went all the way to the Supreme Court for hearing and determination. To them, their instant case raised similar and identical Constitutional issues as the ones raised in this Petition. It was filed as a Petition since the issues raised therein were not just ordinary issues, but constitutional concerns about the manner in which the Government of the Republic of Kenya created an illegal scheme over an area where it had been issued with a Certificate of Title.

47. I differ in opinion with that held by the Petitioners herein. The Honourable Court has thoroughly considered the surrounding facts and interferences and distinguished the legal ratio in the “Zinj Limited” case and the filed Petition as filed and the prayers sought by the Petitioners. Fundamentally, and without any iota of doubt or contradiction, the Petition raises issues which are purely matters of ownership over the suit land and other such related issues which to me are civil in nature and whose remedies ought to be found and fall squarely onto ordinary readily to be redressed in a civil court. The Petitioner ought to have filed a civil suit as opposed bypassing the same and coming to the constitutional court.

48. Having found that there exists a remedy in civil law, which the Petitioner ought to have pursued, this Court must refuse to be bogged down by a matter which is so plainly provided for under statute. In this regard, I associate myself with the sentiments expressed by Mativo, J. (as he then was in “Mombasa



Petition No. E002 of 2022, Jean Bosco Muhayimana & Another – Versus - Jimmy Irenga aka Jimmy Mwachugha & Others. (unreported)” The Learned Judge stated:

“The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In Kenya, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of *S – Versus - Mhlungu* (supra) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay 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. And 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.”

49. I similarly agree with Mutungi, J, who in the case of “*Grays Jepkemoi Kiplagat – Versus - Zakayo Chepkoga Cheruiyot* [2021] eKLR”, had this to say about the practice of filing constitutional petitions in claims that are civil in nature:

“Although I have in my foregoing discussion adverted to grounds (c) and (d) of the preliminary objection that there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court.”

50. Having considered the foregoing, I find and hold that the Petitioner’s claim which is founded on issuance of the Certificate of Title and the ownership of land. Equally, the compensation contemplated in Article 23 of *the Constitution* may only be available to a party who proves denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under Article 22. Accordingly, the Petition is not properly laid before this Court as a constitutional issue. As such, this Court invokes the doctrine of avoidance and declines jurisdiction.

Issue C: Who bears the costs of the Petition dated 9th May, 2023 and the Preliminary Objection dated 26th May, 2023

51. It is trite that costs always follow the event. Rule 26(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that the award of



the costs is at the discretion of the Court. Sub Rule (2) provides that 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. In determining whether or not to award costs therefore, this Court must be mindful not to hinder the advancement of constitutional justice. The Court has found that the claim herein is a civil claim couched as a constitutional petition and ought not to have been filed in this Court in the first place. The Respondents are therefore entitled to costs for defending a needless petition.

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. That the Preliminary objection dated 26th May, 2023 is found to have merit and is hereby sustained.
 - b. That for avoidance of doubt, the Petition dated 9th May, 2023 as filed is struck out for offending the doctrine of Constitutional Avoidance.
 - c. That the Respondents have the costs of the Petition dated 9th May, 2023 and the Costs of the Preliminary objection dated 26th May, 2023.

It is so Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 7TH. DAY OF NOVEMBER, 2023.

HON. JUSTICE L.L. NAIKUNI (MR.)

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, Court Assistant;
- b. M/s. Iman Advocate holding brief for Mr. Khalid Salim Advocate for the Petitioners.
- c. Mr. Penda Advocate for the Respondents

RULING: ELC CONST. PETITION NO. E012 OF 2023 Page 7 of 7 HON JUSTICE LL. NAIKUNI (JUDGE)

