



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
PETITION NO.E007 OF 2021

**IN THE MATTER OF PROVISIONS OF ARTICLES 2(1) AND (6), 10, 22(1),
23, 35, 40(1), AND 232 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL CONSTITUTIONAL
RIGHTS GUARANTEED BY ARTICLES 23, 27, 35, 40(1), OF THE CONSTITUTION**

AND

IN THE MATTER OF PROVISIONS OF ARTICLES 2(5) OF THE CONSTITUTION

BETWEEN

KERENKE OLE TUMPES.....PETITIONER

AND

- 1. MONICAH WAMBUI KINUTHIA.....1ST RESPONDENT**
- 2. TIMOTHY BABU KINUTHIA**
Sued in their capacity as representatives of the Estate
of STEPHEN KINUTHIA, deceased.....2ND RESPONDENT
- 3. KINUWA CO. LTD.....3RD RESPONDENT**
- 4. YOUGH TRADERS LTD.....4TH RESPONDENT**
- 5. YOUNG TRADERS (TIGONI) LTD.....5TH RESPONDENT**
- 6. KINUTHIA HOLDINGS LTD.....6TH RESPONDENT**
- 7. THE LAND REGISTRAR, NGONG LAND REGISTRY.....7TH RESPONDENT**

RULING

This ruling is on the Notice of Preliminary Objection dated 20th September, 2021 filed by the counsel to the first to sixth Respondents challenging the Petitioner's petition dated 5th August, 2021.

The Preliminary Objection is based on four grounds namely;

1. The application and entire petition offends the provisions of *Article 21* of the *Constitution of Kenya, 2010*.

2. The application herein and the entire petition, being of a purely civil nature, is a preserve of and ought to follow the route of **Articles 165 (3) (a) and 162 (2) (b)** of the **Constitution of Kenya**, read with **Section 13 (1) and (2) (a), (d) and (e) of the Environment and Land Court Act** and be determined as such.

3. The application and the Petition is bad in law as it offends the provisions of the Limitation of Actions Act and is incompetent, frivolous and vexatious and an abuse of the process of Court hence lacks merit and ought to be dismissed with costs to the 1st to 6th Respondents.

4. Under circumstances of this matter, this Honourable Court has no jurisdiction to hear and determine this matter as a Constitutional Court.

In support of the Preliminary Objection, counsel for the first to 6th Respondents relied on three authorities namely **Hon. Uhuru Muigai Kenyatta –vs- The Nairobi Star Publications Limited Petition Number 187 of 2012 (2013) eKLR, Kenya Bus Services Limited and 2 others (2005) eKLR and Nakuru ELC Petition No. 1 of 2020 Grays Jepkemoi Kiplangat –vs- Zakayo Chepkonga Kiplangat (2021) eKLR.**

The common thread in the above authorities can be summed up in a few words as follows;

“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The Court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or 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”.

In opposing the preliminary objection, the Petitioners Counsel filed written submissions dated 9th December, 2021.

In the submissions counsel relied on **Articles 21, 22, 258 (1), 67 (2), (e)** urging that this Court has jurisdiction to hear and determine the petition especially on the issue of historical land injustice.

Secondly, counsel urged that the Court should not look too much into procedure but into the substance of the petition and be guided by Article 159 of the Constitution and the overriding objective of civil litigation which is to be found in **Sections 1 A and 1B** of the **Civil Procedure Act**.

In his submissions dated 11/1/2022, counsel for the first to sixth respondents identified three issues for determination in the Preliminary Objection.

They are as follows;

- (a) Whether the issues raised in the instant application are a subject of private Law and which ought not to be pursued as a Constitutional Petition.
- (b) Whether a Constitutional Petition can be lodged between two private persons.
- (c) Who should meet the costs.

A look at the Petition shows that it seeks a writ of Mandamus to compel the first to sixth respondents to reinstitute the Petitioners land titles KAJIADO/OLCHORE-ONYORE 1994, 1995, 1996, 2775, 3527 and 3529 which he says they hold in trust for him. This is to be found at page 186; paragraph 84(E) of the Petition.

I have carefully considered the entire petition including the affidavits, annexures, submissions and case law. I know that it is a draconian move to strike out pleadings as it is a derogation of the right to a fair hearing guaranteed under **Article 50 (1)** of the **Constitution**.

The Court of Appeal has also in the case of **the Cooperative Merchant Bank Ltd –vs- George Frederick Wekesa Civil Appeal No. 54 of 1999** discouraged such practice.

However, striking out may be a way of giving the party who goes in through the wrong door a chance to start afresh and go through the right door. It is not an impediment to access to justice but a promotion of the same because when a party follows the right path, he reaches the destination faster.

I am persuaded by the authority of **Hon. Uhuru Muigai Kenyatta –vs- Nairobi Star Publications Limited (Supra)** that where other avenues exist, the Constitution avenue should not be used.

In this case, the Petitioner is seeking reliefs from private citizens first and foremost but not from the Government or Government bodies. He should therefore exhaust the other procedures of commencing his claim but not through a Constitutional Petition.

Finally, I find that it is too early to say grounds 3 and 4 of the Preliminary Objection are valid. Evidence in form of witness statements, pleading and probably viva voce evidence would be necessary to uphold grounds 3 and 4 of the Preliminary.

Consequently, I uphold the Preliminary Objection on ground number 2 which is sufficient to strike it out which I hereby do.

As for costs, I order that each party bears its own because litigation between the parties may take another form.

Order accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 1ST DAY OF MARCH, 2022.

M.N. GICHERU

JUDGE