



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION No. E001 OF 2021

ISAAC MAKOKHA OKEREPETITIONER

VERSUS

MUMIAS OUTGROWERS SACCO SOCIETY LIMITED.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF KAKAMEGA.....2ND RESPONDENT

STEPHEN OKERE OMULONGA3RD RESPONDENT

OMOTO S. WANZETSE WABUYABO4TH RESPONDENT

DANIEL MAELO MUNJUMA5TH RESPONDENT

RAJAB MAERO OTIENDE.....6TH RESPONDENT

MARGARET MUKOYA MMINI7TH RESPONDENT

THE COUNTY LAND SURVEYOR KAKAMEGA COUNTY8TH RESPONDENT

THE COUNTY LAND REGISTRAR

KAKAMEGA COUNTY9TH RESPONDENT

THE HON. ATTORNEY GENERAL10TH RESPONDENT

RULING

1. The petitioner herein moved the court through petition dated 10th February 2021. He averred in the petition that his late brother who passed away on 15th August 1969 was the registered owner of a parcel of land known as L.R No. South Wanga/Lureko/65 measuring approximately 70 acres. That following succession proceedings in 1978, the land was registered in the names of 5 beneficiaries including the petitioner with respective shares indicated. That save for the petitioner and one other beneficiary, all the other beneficiaries have since passed away. That the 1st to 7th respondents colluded with the 8th and 9th respondents to have the said parcel of land fraudulently subdivided and registered in the names of the 1st to 7th respondents. He alleged that his right to property and Article 47 of the Constitution were violated.

2. The petitioner therefore sought judgment for the following orders:

a) A declaration do issue to the effect that the respondents actions to subdivide L.R No. South Wanga/Lureko/948, 949, 2231, 2232, 2233, 2234, 2235, 2306, 2307, 2664, 2665, 2666, 2792, 2793, 2874, 2875, 3194, 3195, 3496, 3197, 3483, 3484, 3635, 3636, 4408 and 4409 are ultra vires and therefore null and void ab initio, and same be cancelled and the land to revert back to its original status as South Wanga/Lureko/65.

b) THAT the respondents do remove any structures erected thereon on the resultant subdivisions of L.R No. South Wanga/Lureko/65.

c) A declaration that the respondents should not interfere with L.R No. South Wanga/Lureko/65 and/or its resultant subdivisions in whatsoever manner.

d) Costs of this suit be borne by the respondents.

e) Any other remedy that the Court deem just and expedient to grant.

3. Together with the petition, the petitioner filed an application dated 10th February 2021, seeking conservatory orders.

4. The 5th respondent reacted to the petition by filing Notice of Preliminary Objection dated 14th March 2021. This ruling is in respect of the said objection.

5. The objection was pleaded as follows:

TAKE NOTICE THAT the 5th Respondent will at the earliest instance raise a preliminary objection on point of law seeking the dismissal with costs of the Petitioner's petition and application dated 10th February 2021 on the grounds that –

1. The Petition and the application raises no bonafide Constitutional issue.

2. The Petition and the application goes counter to the principle of 'Constitutional avoidance',

3. The Petitioner has not demonstrated the violation of his Constitution rights

4. The Petitioner's claim can be addressed in an ordinary civil suit and thus, this Court lacks jurisdiction to entertain the instant application and petition.

5. The issues raised in the Petition and the application are contentious issues that cannot be dealt with by a constitutional petition.

6. The Petitioner lacks the locus standi to litigate on the interest of Vitalis Wambere Shikunyi, Paulo Ateya Okere & Muninze Shikunyi who are deceased and the Petitioner has not taken letters of administration in respect to their estates.

7. The Petition and the application is thus an abuse of the, process of the Court.

6. The objection was canvassed through written submissions.

7. The 5th respondent argued that the petition raises no bona fide constitutional issue and instead focuses on fraud and illegality. He further referred *inter alia* to the Supreme Court case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** and argued that the petition is contrary to the principle of constitutional avoidance and that the issues of fraud and illegality concerning subdivision and transfer of land are matters that can be addressed by way of an ordinary suit.

8. The 5th respondent argued further argued that the issues of fraud and illegality which are raised in the petition are contentious matters that cannot be dealt with through a constitutional petition. Lastly, he argued that since the petitioner has not exhibited any letters of administration in respect the estates of Vitalis Wambere Shikunyi, Paulo Ateya Okere & Muninze Shikunyi who are deceased, the petition is incompetent to the extent that he purports to litigate on their behalf.

9. On their part, the 4th, 6th and 7th respondents filed their own Notice of Preliminary Objection dated 24th May 2021 generally raising the same grounds as those in the 5th respondent's objection. I must however point out that pursuant to the directions taken on 15th March 2021 before my sister N. A. Matheka J, this ruling is only in respect of the 5th respondent's preliminary objection. The 4th, 6th and 7th respondents also filed submissions in which they associated themselves with the 5th respondent's submissions.

10. In response, the petitioner filed brief submissions in which he argued that this court is equivalent to the High Court and that it therefore has jurisdiction to hear and determine the petition. He further argued that the question of whether the petition raises constitutional issues cannot be determined in preliminary objection. On locus standi, he argued that since he has brought this petition in defence of the constitution and the constitutional rights of the deceased persons, he has the capacity to bring the proceedings.

11. I have carefully considered the preliminary objection and the parties' submissions thereon. Only two issues arise for determination: whether the preliminary objection is a valid one and whether the court has jurisdiction to hear and determine the petition.

12. The law relating to preliminary objections has been settled since the now famous statement of Law JA in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** thus:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

13. Thus, a valid preliminary objection must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The petitioner has argued that the question of whether the petition raises constitutional issues cannot be determined in a preliminary

objection. Obviously, that cannot be a correct proposition. One only needs to look at the petition so as to determine whether it raises constitutional issues. There is no need, so to speak, to receive evidence to ascertain the averments in the petition. I have looked at the 7 grounds of the preliminary objection herein and I am satisfied that they raise pure points of law that can be determined solely on the basis of the material the petitioner had put on record as at the date the objection was filed. Consequently, I am satisfied that the objection herein is a valid preliminary objection, worthy of consideration.

14. The respondents contend that this court, sitting as a constitutional court, does not have jurisdiction to hear and determine the petition. Jurisdiction is literally the lifeblood of all litigation. Without it, a court or tribunal cannot take any further step save to declare its lack of jurisdiction and consequently bring the proceedings before it to a close. See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**.

15. The Supreme Court stated as follows in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**:

A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...

16. Pursuant to **Article 162** of the **Constitution** and **Section 13** of the **Environment and Land Court Act, 2011** this court has jurisdiction in matters to do with the environment and the use and occupation of, and title to, land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under **Articles 42, 69** and **70** of the **Constitution**. The court’s jurisdiction also extends to claims concerning breaches of other fundamental rights related to the environment and land. See **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR**.

17. While it is therefore correct, as argued by the petitioner, that this court has jurisdiction to hear and determine constitutional petitions, the petitioner must be alive to the devil in the detail. He must ask himself whether what he has placed before the court is a valid constitutional petition, for if it isn’t then it does not belong to the constitutional court.

18. One of the circumstances which would deprive the constitutional court of jurisdiction is the doctrine of constitutional avoidance, which the respondents herein have invoked. The said doctrine frowns upon the practice of bringing ordinary disputes to the constitutional court. The Supreme Court observed as follows in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**:

[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 v. 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.”

[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.

19. The effect of the doctrine of constitutional avoidance is that that where there are adequate statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain the dispute. In essence therefore, when formulating his claim, a claimant must pursue statutory relief where it is available through an ordinary suit as opposed to approaching the constitutional court.

20. In **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR** the Court of Appeal stated:

*... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in **Communications Commission** case (supra).*

[17] In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ...

21. The foundation of the petitioner’s case, as is manifest from the summary at the opening paragraphs of this ruling, is the allegation that some of the respondents colluded to have the suit parcel of land fraudulently subdivided and registered in the names of other respondents. Among the reliefs that the petitioner is seeking include declaration that the subdivisions are null and void, cancellation of the titles and orders for removal of structures on the land. Although he alleged that his right to property and Article 47 of the Constitution were violated, all that must be seen in the context of the foundation of his case: fraud and collusion in the subdivision and transfer of land.

22. The petitioner’s allegations fraud and collusion as well as prayers for cancellation of the titles and removal of structures on the land are matters that can be addressed in an ordinary suit under **Section 26** of the **Land Registration Act** which makes provisions on the

requirements for nullification of a certificate of title. Under the said provision, a title document can be nullified on grounds of fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

23. Additionally, it must be remembered that a constitutional petition is usually heard through affidavit evidence and written submissions, a procedure which is not appropriate to deal with allegations of fraud. Procedural law is clear that fraud is a serious and contentious issue which must be pleaded, particularised and strictly proven. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR**. There are ample provisions regarding the manner of pleading such a case in an ordinary suit within the **Civil Procedure Act** and rules made thereunder. A constitutional petition is not the right procedure for resolving such a case.

24. In view of the foregoing, I am satisfied that grounds 1, 2, 4, 5 and 7 of the preliminary objection have been established. The petition herein offends the doctrine of constitutional avoidance, thereby depriving this court of the jurisdiction to hear and determine it. A suit filed in a court devoid of jurisdiction is dead on arrival and cannot be remedied. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**.

25. In the end, I strike out the petition herein. Considering the nature of the dispute and taking into account that parties may have to litigate it in another case, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 2ND DAY OF NOVEMBER 2021.

D. O. OHUNGO

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

NO APPEARANCE FOR THE PETITIONER

NO APPEARANCE FOR THE 1ST, 2ND, 3RD, 8TH TO 10TH RESPONDENTS

MR AKWALA FOR THE 4TH, 6TH AND 7TH RESPONDENTS

NO APPEARANCE FOR THE 5TH RESPONDENT

COURT ASSISTANT: E. JUMA