



**Wakaba & another v Juma & 4 others (Constitutional Petition
E010 of 2023) [2024] KEHC 7505 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 7505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E010 OF 2023
DO CHEPKWONY, J
MAY 3, 2024**

BETWEEN

ELIZABETH WAIRIMU WAKABA 1ST PETITIONER

CHARLES KIARIE MUIRU 2ND PETITIONER

AND

**INSPECTOR CHARLES JUMA, KIAMUMBI POLICE STATION 1ST
RESPONDENT**

THE DCIO, KIAMUMBI POLICE STATION 2ND RESPONDENT

THE OCS KIAMUMBI POLICE STATION 3RD RESPONDENT

OFFICE DIRECTOR OF PUBLIC PROSECUTION 4TH RESPONDENT

THE HON ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. This Ruling is in respect to the Notice of Motion application dated 22nd March, 2023, the Notice of Preliminary Objection and the Notice of Motion application dated 27th April, 2023.
2. The Petitioners moved this Court through Petition dated 2nd March, 2023 seeking the following orders:-
 - a. A Declaration that the Petitioners' rights to dignity, freedom, freedom of movement and right to own property as guaranteed under Articles 28, 29(a), 29(d) and 40(1) of the Constitution of Kenya are threatened by the Respondents.
 - b. A Declaration that the Petitioners right to dignity and freedom and freedom from psychological torture as guaranteed under Article 28 and 29 (d) of the Constitution of Kenya are being violated by the acts of the Respondents.



- c. An Order barring the Respondents from further harassing the Petitioners and bar the Respondents either by themselves, their agents, servants and or employees or any police officer from any police station in the Republic of Kenya from investigating, arresting , charging or detaining the Petitioner in relation to the dispute between the Petitioners and the 6th Respondent.
 - d. Allows the Petitioner’s humble petition with costs against the Respondents.
3. The Petitioner similarly filed an Application through a Notice of Motion dated 2nd March, 2023 which was supported by the Affidavit of Elizabeth Wairimu Wakaba sworn on the same date. The Application seeks the following orders:-
- a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to issue an order restraining the respondents, their agents, servants, employees or any other police officer from within the Republic of Kenya from investigating, arresting, arraigning in court, prosecuting and or detaining the applicants/ petitioners herein in relation to the complaint lodged with the 2nd and 3rd respondents herein on or around 2nd February, 2023 by the 6th Respondent herein against the applicants/petitioners herein pending the interpartes hearing and determination of the petition herein.
 - d. That costs of the application be provided for.
4. Upon service of the Application and Petition, the 6th Respondent, 1st and 2nd Interested Parties filed a Notice of Preliminary Objection dated 20th March, 2023 wherein they cited the following grounds:-
- a. That the Petition as drawn does not raise any constitutional issue for determination by this court. The issues do not meet the threshold of constitutional issues. (See Ann Rita Karimi Njeru v Republic [1976-1980] 1KLR 1283 and emphasized in *Trusted Alliance Society of Human Rights v Attorney General and Others* [2015]eKLR.
 - b. That the Petition is entirely based on a land transaction relating to Residential Plot No. 543 Kamiti/Anwer. Rights and claims associated with land transactions cannot be initiated through Constitutional Petition but rather by a plaint before the Environment and Land Court pursuant to Article 162(2) (b) of the *Constitution* 2010 where each party will be given an opportunity to adduce evidence and produce documents and further, under Section 193A of the *Criminal Procedure* Act, Cap 75 Laws of Kenya (the CPC Act) any matter in issue in any criminal proceedings which is also directly or substantially in issue in any civil proceedings could not be a ground for any stay, prohibition or delay of the criminal proceedings. Concurrent proceedings allows for independent , simultaneous investigations and prosecution involving substantially the same matter and parties.
 - c. That the entire Petition is brought in bad faith and is thus frivolous, vexatious and an abuse of the court process hence a good candidate from striking out with costs.
5. The Petitioners further filed an Application through a Notice of Motion dated 27th April, 2023 seeking the following orders:
- a. That this Honourable Court be pleased to issue an order compelling the 1st Respondent - Inspector Charles Juma to release the 1st Applicant/Petitioner herein with immediate effect the



original documents for her suit land herein which he confiscated from her at the 2nd and 3rd Respondents office on 2nd February, 2023.

- b. That any further orders and directions to issue as the court may deem fit in the circumstances.
 - c. That the costs of this application be provided for.
6. The Petitioners filed a Replying Affidavit of Elizabeth Wairimu Wakaba sworn on 28th April, 2023 opposing the Notice of Preliminary Objection. According to the Petitioners, the said Preliminary Objection is frivolous, abuse of court process and waste of judicial time and resources.
 7. It is the Petitioners' contention that the Petition relates to the threat of violation by the Respondents and Interested Parties who subjected them to psychological torture, freedom of movement and liberty and right to fair trial of the Constitution of Kenya.
 8. The Petitioners hold that Section 193A of the Criminal Procedure Code, Cap 75 Laws of Kenya contradicts Article 50(1) and (2) (d) of the Constitution of Kenya in that if a criminal trial is to proceed alongside a civil trial on the same subject matter, it will be null and void and which is what this court is required to declare.
 9. It is the Petitioners' position that the issue herein is not subject for the Environment and Land Court and thus the Petition herein is not misplaced. They have urged the court to dismiss the Notice of Preliminary Objection and proceed to determine the Notice of Motion applications on their merits.
 10. For good order and tidiness in the proceedings, the court shall begin with addressing the Notice of Preliminary Objection before delving into the other applications since it has the effect/tendency of disposing of the application and Petition, both dated 2nd March, 2023.

Determination

11. The court has read and considered the Submissions filed by the 6th Respondent, 1st and 2nd Interested Parties dated 21st August, 2023 and the Petitioners dated 24th September, 2023 alongside the authorities cited therein to determine whether the Preliminary Objection raised by the 6th Respondent and 1st and 2nd Interested Parties in regard to this court's jurisdiction.
12. Preliminary Objection was discussed by the court in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696 which stated as follows:-

“---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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:-

“ 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.



13. In this case, the first ground in the Preliminary Objection is that the Petition has not raised any constitutional issue for this court to determine. For an issue to be considered constitutional, it has to meet the threshold of specificity as discussed in the case of *David Mathu Kimingi v SMEC International PTY Limited* [2021]eKLR where the court held thus;

“The main issue for determination in the application before me is whether the petition raises any issues on violation of the *Constitution* to meet the threshold of a Constitutional Petition. In the Petition while the Petitioner has cited Article 41 (1) of the *Constitution* as having been allegedly contravened, he has failed to specify the said provision and further give particulars of the said contravention within the body of the Petition. The Petitioner further alleges violation of his constitutional right under Article 23(3) in the Orders he seeks in the Petition yet the same is not averred with specificity and particulars given on how the Respondent violated the said right. It is my considered opinion that the Petitioner has failed to satisfy the threshold of specificity as espoused in the celebrated cases of *Anarita Karimi Njeru v Republic* (No.1) [1979] 1 KLR 154 and *Mumo Matemu v Trusted Society of Human Rights Alliance*, Civil Appeal No.290 of 2012 [2013] eKLR.”

14. In this case, the court finds that the Petitioners have not with specificity shown how their rights were violated or how they were subjected to psychological torture. They have also not provided any evidence or given any information on how their freedom of movement and liberty was restricted or whether or not they were detained or arrested and if so, for how long? All they have stated is that they were summoned at Kiamumbi Police Station over the refund of the payment of the purchase price of the property. In view of this, the Petitioners have not fulfilled the doctrine of specificity as required with regard to Petitioners on violation of the *Constitution*.
15. On the second issue of whether the Petitioners have been challenged that the claim they have raised herein is associated with land transactions. Having read through the entire Petition, the court finds that the subject matter of the Petition does not deal with the ownership, use and occupation of land which is a preserve of the Environment and Land Court as established under the *Constitution* and the Environment and Land Act. It is rather an issue of violation of human rights, freedom from psychological torture, freedom of movement and liberty which is a preserve of a Constitutional Court, which this court is.
16. However, the court having found that the Petition has not demonstrated the specifics and particulars on how their constitutional rights have been violated, it cannot entertain this Petition and the applications as they do not meet the threshold of the case of *Anarita Karimi Njeru v Republic* (No.1) [1979] 1 KLR 15.
17. The upshot is that the Notice of Preliminary Objection has merits and the same is hereby allowed. This then follows that the Petition dated 2nd March,2023 together with the Application dated 2nd March, 2023 and the Application dated 27th April, 2023 should not be entertained by this court. Consequently, they are all dismissed with costs to the Respondents.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED THIS 3RD DAY OF MAY, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:



No appearance for and by the Petitioners/Applicants
Mr. Olaka counsel for 6th Respondent and Interested Parties
Court Assistant - Martin

