



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC PETITION NO. 2 OF 2021

PATRICK BAYA MAITHA.....PETITIONER

VERSUS

CABINET SECRETARY INDUSTRY TRADE AND

ENTERPRISES DEVELOPMENT.....1ST RESPONDENT

MICRO AND SMALL ENTERPRISES AUTHORITY.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

This ruling is in respect of the respondent's Notice of preliminary objection dated 10th August 2021 on seeking to strike out the petition on the following grounds:

- 1. That the Petition as drawn does not meet the threshold of constitutional litigation as it does not disclose any public law issues. The petition raises issues of the tort of trespass and permanent injunction which are disputed and falls squarely within the realm of private law civil claim.***
- 2. That issues raised touching on matters of ownership can only be adequately addressed and/or redressed by way of civil suit. The Petitioner ought to file a civil suit for each party to prove and/or demonstrate their rights or claim to the suit property.***
- 3. That if anything given the nature of the matter this case is not well suited to be heard as a constitutional petition as the Respondents have extensively developed the property since possession and/or occupation in 2009 hence the suit is brought malafides so as to avoid the rigours of the usual civil process.***
- 4. That the proper forums and/or avenues in law ought to be explored and exhausted by the Petitioner.***
- 5. That the Petition is misconceived, incompetent and an abuse of the court process and the same ought to be struck out.***

By a Petition dated 8th February 2021 the petitioner filed this petition seeking for the following reliefs:

- a) An injunction restraining the respondents their servants, agents, hirelings or whosoever acting under their instructions from continuing with construction development and or from interfering with the applicant's peaceful enjoyment and use of the suit plots.***
- b) A declaration that the petitioner's plots of land being Kaloleni/Vishakani/1010, Kaloleni/Vishakani/1011 and Kaloleni/Vishakani/1012 belong to the petitioner absolutely.***
- c) A declaration that the Petitioner's rights under Article 40 of the Constitution of Kenya 2010 relating to the protection of the right to property have been violated by the respondents.***
- d) Costs of the Petition.***

In response, the Attorney General filed grounds of opposition dated 25th May 2021 and a Notice of Preliminary Objection dated 10th August 2021 which is the subject of this ruling.

Counsel agreed to canvas the Preliminary Objection vide written submissions which were duly filed.

RESPONDENT'S SUBMISSIONS

Counsel listed two issues for determination namely, whether the Petition has met the threshold of a Constitutional Petition and whether the Petitioner ought to have been filed a normal civil suit?

On the first issue, counsel submitted that the Petitioner has not sufficiently disclosed the genesis of this claim of violation of constitutional rights to property and that the alleged violation has not been demonstrated to the required standard as it was held in the **Anarita Karimi Njeru v Attorney General [1979] KLR 154**.

Counsel therefore submitted that the petitioner's claim does not meet the threshold for constitutional petitions and hence should be struck out.

Ms Munyony relied on the case of Kenya Agricultural and Livestock Research Organization (KALRO) -v- Edison Sonje Taura & 3 others [2021] eKLR where the court held that;

"There is no escaping that what the petitioner is seeking has no constitutional underpin at all. This is an apparently simple case of trespass and permanent injunction. It appears to me a clear civil dispute alleging the tort of trespass. It should have been commenced through a plaint and not a constitutional petition. It has been said time without number that the constitutional procedure process should not be subjected to abuse, where persons file all sorts of mundane civil disputes under the constitutional procedure process."

Counsel further cited the Gabriel Mutava & 2 Others vs Managing Director, Kenya Ports Authority (2016) eKLR where the Court of Appeal stated as follows: -

"Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes."

On the second issue counsel submitted that the suit is founded on the tort of trespass and ownership of land which can be adjudicated through a normal civil suit and not a petition. Counsel relied on the case of Edward Karanja Chogo & 2 others -vs- County Government of Kakamega [2018] eKLR where the court observed that;

"A constitution petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts then the petitioner ought to revert to a civil claim..."

Ms Munyony therefore submitted that a constitutional petition is meant to deal with clear cases where there is no need to further ascertain facts hence this petition should be struck out as it does not meet the set threshold.

PETITIONNER'S SUBMISSIONS

Counsel in response to the preliminary objection submitted that the petition has met the threshold of constitutional petitions as per the **Anarita Karimi Njeru -vs- The Republic (1979) eKLR** which principle was later restated by the Court of Appeal in the case of **Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** Counsel further submitted that the Petitioner has demonstrated that he is the registered owner of the suit land and that the 1st and 2nd Respondents have invaded the same infringing his rights under Article 40 of the Constitution of Kenya, 2010.

On whether the petition ought to have been filed as a normal civil suit, counsel cited the case of **Fred Munialo Maelo v Mathew Wamalwa Wafula & 2 others [2020] eKLR** where Boaz Olao J held that:

"Each case must be considered on its own peculiar circumstances and it is not a principle of law that a Constitutional Petition cannot be filed where there is another remedy which the Petitioner could have pursued. A party is also entitled to pursue the remedy that would be most efficacious in addressing the grievance which has been pleaded before the Court".

Similarly, counsel cited the case **RASHID ODHIAMBO ALOGGOH & 24 OTHERS.V. HACO INDUSTRIES LTD C.A CIVIL APPEAL NO 110 OF 2001**, where the High Court had refused to determine the issues raised in a Constitutional Petition because there were other lawful avenues through which the Appellants could have ventilated their claims. In allowing the appeal, the Court of Appeal held that the High Court erred in holding that the Appellants had other lawful avenues in which they could have ventilated their grievances.

Counsel therefore urged the court to dismiss the preliminary objection with costs to the petitioners.

ANALYSIS AND DETERMINATION

The issue for determination is whether the preliminary objection has merit. What constitutes a preliminary objection was determined in **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696** where the court explained 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 the contract giving rise to the suit to refer the dispute to arbitration... 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 Respondents’ preliminary objection is based on want of form to institute suit as the issues raised by the Petitioner do not disclose public law issues but private contentious matters that would be adequately addressed by way of a normal civil suit. Order 2 rule 14 of the Civil Procedure Rules, 2010 provides that no technical objection may be raised to any pleading on the ground of any want of form.

The issue raised can be canvassed during the hearing of the petition where the court will determine whether the petitioner’s rights have been violated or whether the petition meets the threshold. Locking out a litigant at a preliminary stage where the preliminary objection is not per se a preliminary objection as per the **Mukisa Biscuit case** (supra) would be an injustice

In the case of **Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR** the Supreme Court explained as follows regarding preliminary objections:

“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

In this case I find that the respondent wants to use the preliminary objection as a sword to win the case or to deny the petitioner an opportunity to be heard on merit. There is no harm in hearing the petitioner’s case on merit where the court can either allow or dismiss it.

In the Court of Appeal case of **Joel Kenduiwo v District Criminal Investigation Officer Nandi & 4 others [2019] eKLR**, upheld this court’s ruling that dismissed a similar objection on the want of form in view of the provisions of Order 2 Rule 14.

I find that the objection lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY DECEMBER, 2021

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.