



Kisang (Suing as the Legal Administrator of the Estate of the Late Isaiah Kibabii Mogin) v County Government of Elgeyo Marakwet & 4 others (Petition E006 of 2024) [2025] KEELC 5480 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5480 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

PETITION E006 OF 2024

L WAITHAKA, J

JUNE 26, 2025

**IN THE MATTER OF THE CONTRAVENTION OF
FUNDAMENTALL RIGHTS AND FREEDOMS UNDER ARTICLES
10,20,22,27,40,47,46,59,67,69 AND 70 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF LANDS ACT 2012 AND IN THE MATTER OF UNLAWFUL
ACQUISITION OF PRIVATE LAND AT KAPSOWAR ELGEYO MARAKWET COUNTY**

BETWEEN

**MOSES KIPKORIR KISANG (SUING AS THE LEGAL ADMINISTRATOR OF
THE ESTATE OF THE LATE ISAAH KIBABII MOGIN) PETITIONER**

AND

THE COUNTY GOVERNMENT OF ELGEYO MARAKWET . 1ST RESPONDENT

TRUSTEES OF AFRICAN INLAND CHURCH OF KENYA .. 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

THE CHIEF LAND REGISTRAR ELGEYO MARAKWET

COUNTY 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

RULING

Introduction

1. Before me for determination is the preliminary objection dated 14th March, 2025. Through the preliminary objection, the 1st respondent seeks to strike out the petition dated 9th December, 2024 on



two grounds. First, that the petition does not disclose the provisions of the constitution that have been infringed or likely to be infringed contrary to Rule 10[2] of the constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013 and as such does not meet the threshold of a constitutional petition as set out in the locus classicus case of Anarita Karimi Njeru v Republic [1979] eKLR. Secondly, that the petition is statutorily time barred offending the provisions of the Limitation of Actions Act.

2. Pursuant to directions given on 24th March 2025, the preliminary objection was disposed of by way of written submissions.

Submissions

The 1st and 3rd Respondents' submissions

3. The 1st respondent filed submissions on 9th April, 2025 while the 3rd respondent filed theirs on 28th May, 2025. Cumulatively, the 1st and 3rd respondents identified the following issues for the court's determination:
 - i. Whether the preliminary objection meets the requisite threshold;
 - ii. Whether the petition raises any constitutional issues
 - iii. Whether the petition is time barred.
4. On whether the preliminary objection meets the requisite threshold, the respondents cited the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, JSK v WKW [2019] eKLR and Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR to illustrate the requisite threshold and the tests that ought to be satisfied for a preliminary objection to succeed. They submitted that the preliminary objection raises two pure points of law. Firstly, that the petition offends the provisions of the Limitation of Actions Act and secondly that the petition does not disclose the provisions of the constitution that have been infringed or are likely to be infringed contrary to Rule 10[2] of the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013.
5. On whether the petition raises any constitutional issues, they submitted that the issues raised in the petition are for an ordinary land claim that can be determined under the relevant statutes and not under constitutional litigation. It is their case that the principle of constitutional avoidance holds that where it is possible to decide a case without reaching a constitutional issue, it should be done as an ordinary claim. They cited the cases of Republic v Paul Kibara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya limited, Sports Recreation Commission v Sagittarius Wrestling Club and Anor and KKB v SCM & 5 others [Constitutional Petition 014 of 2020] [2022] which relied on the case of S v Mhlungu 1995 [3] SA 867 [CC] 59.
6. They further submitted that in a constitutional petition, the particular rights and details of the alleged infringement and/or violations must be made clear, a position adopted in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR.
7. They submitted that in the petition before the court, the petitioners' allegations of violation of their constitutional rights are unfounded and without basis as the petitioner has not demonstrated that his rights under Article 40 and 47 of the constitution have been violated so as to successfully seek compensation on the basis of violation of constitutional rights. He has not clearly specified the constitutional provisions violated and the manner that they were violated by the respondents' action.



It is their submission that the petition has not met the threshold for constitutional petitions as set out in *Anarita Karimi Njeru v Republic* [1979] Eklr.

8. On whether the petition is time barred, they submitted that under Section 7 of the *Limitations of Actions Act* Cap 22, computation of the limitation period commences at the time the cause of action arises. From his pleadings, the suit properties were compulsorily acquired by the 1st respondent in 1972, therefore the suit was brought after 52 years ago and is therefore time barred. They relied on the case of *Dickson Ngige Ngugi v Consolidated Bank Ltd & another* [2020] eklr and Section 3[1] of the *Public Authorities Limitation Act*.
9. They further submitted that the petitioner has not stated the reasons that led to delay in instituting the instant suit. To buttress their point, they placed reliance on the cases of Mombasa Civil Case No. 128 of 1962, *Rawal v Rawal* [1990] KLR 275, *Abraham Kaisha Kanzila alias Moses Savala Keya t/a Kapco Machinery Services and Milamo investments limited v Government Central Bank of Kenya and 2 others* Misc. Civil Application 1759 of 2004 and *James Kanyita Nderitu v A.G and Another* Petition No. 180 of 2021, *Johnstone Ogechi v National Police Service* [2017] eKLR, Section 4[2] of the *Law of Limitation Act* and *Peter Ngari Kagume & others v Attorney General* [2009] eKLR.
10. The 2nd respondent did not file submissions and if it did, the same were not placed in the court file.
11. The 4th and 5th respondents informed the court that they were supporting the preliminary objection and would not file submissions.

Petitioner's submissions

12. The petitioner opposed the preliminary objection vide the submissions filed on 29th April, 2025 and identified one issue for court's determination; whether the preliminary objection raises a pure point of law as established in Mukisa Biscuit Case.
13. He submitted that the preliminary objection is fatally flawed, raises no pure points of law, is premature, an abuse of the court process and has failed the threshold established. He submitted that the preliminary objection revolves around the sufficiency of the pleadings and whether the claim is time barred which issues are not pure points of law as the court will be required to establish when the cause of action arose and whether the violations are continuous in nature.
14. He further submitted that the petition discloses constitutional violations such as the conduct of the respondents, nature of the land, history of occupation, absence of compensation, when the cause of action arose and whether the violations were continuous in nature as required under rule 10 [2] of *Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013* and *Anarita Karimi Njeru v Republic case*. Further, the petition outlines clear factual allegations of illegal compulsory acquisition of ancestral land by public institutions, failure to follow constitutional and statutory procedures for compulsory acquisition, lack of written notice and absence of fair compensation which are substantive constitutional questions.
15. On whether the petition is statute barred, the petitioner admits that is time barred, but submits that the argument of time bar, misconstrues the nature of constitutional litigation as constitutional violations especially those concerning fundamental rights and freedoms are not strictly bound by statutory limitations periods especially where there is a continuing violation or breach. He cited the case of *AG v Andrew Maina Gitbinji* [2016] KECA 817 [KLR], where the court affirmed that limitation of time does not apply where the actions complained of are ongoing or involve continued breach of fundamental rights as is the case in this petition because the petitioner and his family continue to face threats of invasion, tree felling and development of their ancestral land.



16. He submitted that the 1st respondent's preliminary objection has failed the test set out in the Mukisa Biscuit case as it invites the court to interrogate contested facts, including the history of the land ownership, the legality of the acquisition process and whether compensation was offered.
17. It is their contention that courts have since evolved from the decision of *Anarita Karimi Njeru v Republic* to the case of *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR where it was held:

“the principle in Anarita Karimi Njeru should not be used mechanistically to strike out petitions that present arguable constitutional issues. Courts should not overemphasize form over substance.”

Analysis and determination

18. The Preliminary objection by the 1st respondent is premised on the grounds that the petition does not disclose the provisions of the *constitution* that have been infringed or likely to be infringed and that the petition is statutorily time barred offending the provisions of the *Limitation of Actions Act*.
19. The legal principles that undergird a Preliminary objection were espoused in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd*, supra, 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.....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 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”

20. On whether the petition discloses the provisions of the *constitution* that have been infringed or likely to be infringed, I am guided by the following cases; *Anarita Karimi Njeru vs Republic* [1979] eKLR, *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR cited by the parties and *David Gathu Thuo vs Attorney General & Another* [2021] eKLR as quoted in the case of *Kadege v OCS Kilingili Police Station & 2 others* [Constitutional Petition 5 of 2022] [2024] KEHC 9176 [KLR] [30 July 2024] [Judgment] where the court held;-

“where the common thread was that if a person was seeking redress from the High Court on a matter which involved a reference to the *constitution*, it was important that he or she set out with a reasonable degree of precision that which he or she complained of, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

21. I have considered the petition and there is lack of clarity in the manner it is drafted. The petitioner has merely cited the articles in the *constitution* allegedly infringed but has not expounded on any of the articles. The petitioner has also failed to provide sufficient particulars of the alleged infringement of the Constitutional provisions. There is ambiguity on what the respondents have done to constitute infringement of the petitioner's rights in relation to the articles cited and there is generalization in the alleged constitutional violations. On particulars of the illegality and unconstitutionality by the respondents, none were listed for the 4th and 5th respondents. In the case of Kadenge supra, the court dismissed the petition for not meeting the threshold. Similarly, in the case of *Meru Cultural Center &*



17 others v Kisima Farm Limited & 24 others [Constitutional Petition E006 of 2022] [2023] KEELC 19863 [KLR] [20 September 2023] [Ruling] in dismissing the petition, the court held; -

“Moreover, the petitioners have not specified how each of the respondents has violated any of the petitioners’ Constitutional Rights. As rightly submitted by the respondents, the whole object of pleadings is to bring clarity to an issue. However, looking at the petition as drafted, it is difficult to decipher the issues the petitioners want the court to determine.”

22. On whether the petition is statutorily time barred, from the Mukisa Biscuit case, it is clear that a plea of limitation can be raised by a preliminary objection contrary to the submissions by the petitioner. To determine whether the suit is time barred, one needs to look at the pleadings. In the petition dated 9th December, 2024 and filed on 10th December 2024, the petitioner states;

“7. The petitioners’ deceased father [Isiah Kibabii Mogin] was the legal sole owner of all those parcels of land known as: -

- a. Moiben/Chebara/423 measuring 23.00 Ha
- b. Moiben/Chebara/424 measuring 0.7 Ha

8. That the petitioner avers that the above parcels of land were part and parcel of the ancestral land which parcels of land were acquired by petitioner’s late father through inheritance/life –interest which properties the petitioner together with his family have peacefully occupied.

9. That the petitioner further avers that on or about the year 1972 the 1st respondent without any colour of right unilaterally resolved to compulsorily to acquire the petitioner’s lawfully acquired private land namely Moiben/Chebara/423 measuring 23.00H without following the due process or procedure envisaged under the constitution of Kenya 2010 and the relevant provisions under the land act 2012

10. That the petitioner further states that on or about the year 2000, the 2nd respondent unlawfully and without any colour of right caused the parcel of land namely Moiben/Chebara/423 measuring 0.7 Ha to be registered in its name without following the due process of conveyancing as provided under the law of land”

23. Section 7 of the Limitations of Action Act Cap 22 provides that “an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

24. In this suit, the petitioner has stated that on or about 1972, the 1st respondent compulsorily acquired the petitioner’s land parcel Moiben/Chebara/423 measuring 23.00h without following the due process or procedure and later in the year 2000, the 2nd respondent unlawfully caused the same parcel of land measuring 0.7 Ha to be registered in its name. From the petitioner’s pleadings, he was aware that the cause of action arose in 1972 and 2000. I agree with the respondent’s submissions that this petition has been brought to court after the lapse of 52 years since the cause of action arose.

25. In the end, I find the petition has not disclosed the provisions of the constitution that have been infringed or likely to be infringed and is also is time barred. Consequently, I find the preliminary



objection merited and I strike out the petition and notice of motion dated 9th December 2024 with costs to the respondents

26. Orders accordingly.

DATED, SIGNED AND READ VIRTUALLY AT ITEN THIS 26TH DAY OF JUNE, 2025.

L. N. WAITHAKA

JUDGE

In the presence of;

Ms. Kosgei for the Petitioner

Mr. Onyango H/B for Mr. Yego for the 1st Respondent

N/A for the 3rd Respondent

Mr. Kutei H/B for Ms. Rop for the 4th and 5th Respondents

