



REPUBLIC OF KENYA



**Keittany & 8 others v Land Registrar Uasin Gishu & 5 others; Changwony
& 280 others (Interested Parties) (Environment and Land Petition
E002 of 2024) [2025] KEELC 6211 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND PETITION E002 OF 2024
CK YANO, J
SEPTEMBER 25, 2025**

BETWEEN

**YUSSUF K KEITTANY 1ST PETITIONER
FREDRICK CHEBET 2ND PETITIONER
MAURICE KIPCHUMBA KIMOSO 3RD PETITIONER
MILKA CHEBET CHEBELIENI 4TH PETITIONER
PIUS KIMUTAI CHEPTAIGET 5TH PETITIONER
PHILLIP C KIGEN 6TH PETITIONER
SAMWEL CHERUIYOT 7TH PETITIONER
BERNARD SEREM 8TH PETITIONER
JOHN K LAGAT 9TH PETITIONER**

AND

**LAND REGISTRAR UASIN GISHU 1ST RESPONDENT
DIRECTOR OF SURVEYS 2ND RESPONDENT
NATIONAL LAND COMMISSION 3RD RESPONDENT
MARTIN KOSGEI CHIRCHIR ALIAS SAVIMBI 4TH RESPONDENT
MORRIS KIPRUTO KIPRONO 5TH RESPONDENT
NATHANIEL KIBET CHEPKENER 6TH RESPONDENT**

AND



RULING

1. The 4th, 5th and 6th Respondents filed a Notice of Preliminary Objection dated 26th February, 2025, in response to the entire Petition dated 30.01.2024.
2. The Notice of Preliminary Objection was raised on the following grounds: -
 - a. That the Petition offends the Doctrine of Constitutional Avoidance.
 - b. That the Petition raises no bonafide constitutional issue.
 - c. That this Honourable Court lacks jurisdiction to entertain the instant Petition as the issues in dispute can be best addressed in an ordinary civil suit.
 - d. That the Petition is incompetent and fatally defective.
3. The Preliminary Objection was canvassed by way of written submissions. The 4th, 5th and 6th Respondents filed their submissions dated 17.03.2025 while the Petitioners filed their submissions dated 02.05.2025, which I have read, considered and summarized as hereunder.

4th, 5th and 6th Respondents' Submissions;

4. Counsel for the respondents submitted on 2 issues for determination, to wit; (i) Whether the preliminary objection is properly raised and (ii) whether the P.O. is merited.
5. On the first issues, counsel reiterated the definition of what amounts to a proper preliminary objection as outlined in the Mukhisa Biscuit case.
6. Counsel submitted that the P.O. was made on the assumption that the facts as pleaded by the petitioners were correct on the basis of the same and maintained that this court lacked the requisite jurisdiction to entertain the petition as filed.
7. It was his contention that the grounds raised in the preliminary objection are pure points of law and which do not require any further adducing of facts or evidence apart from what is already on the court record.
8. On the second issue of whether the P.O. was merited, counsel stated that the P.O. was mainly premised on the reason that the petition offended the doctrine of constitutional avoidance.
9. It was their claim that from the reliefs sought and the factual averments in the petition, the issues raised in the petition points to a dispute that cannot be resolved before the court sitting as a constitutional court. That the reliefs sought in the petition are calling upon the court to make several factual determinations and statutory interpretations rather than constitutional interpretations.
10. In this regard, they submitted that while every case has a constitutional underpinning, not every dispute ought to be filed as a constitutional petition. It was their contention that the issues presented in the petition can adequately be addressed through an ordinary suit, for instance, the prayer seeking the declaration that the titles issued to the 280 Interested Parties herein were obtained irregularly and a cancellation thereof.



11. They further argued that the foundation of the petitioners' case is that the process leading to the issuance of titles and allocation of different parcels of land was influenced by collusion, corruption, fraud and interference and was therefore illegally and unprocedurally acquired.
12. They thus contend that issues of fraud, undue influence and cancellation of titles are matters that can be best addressed in an ordinary suit under section 26 of the *Land Registration Act* and not through a constitutional petition. In this regard, they relied on the decision in the case of Isaac Makokha Okere vs Mumias Outgrowers Sacco Society Limited & 9 Others [2021] eKLR.
13. They also quoted and relied on the decision in the case of Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others [2014] eKLR and Sports and Recreation Commission vs Sagittarius Wrestling Club and Anor (2) ZLR 501 (S) in explaining the doctrine of Constitutional avoidance.
14. They further maintained that the petition does not also fall within the 3 exceptions of the doctrine of constitutional avoidance and hence the petitioners' claim should be instituted in an ordinary civil suit.
15. It was also their submission that the petition does not raise any bonafide constitutional issue and that the petition has not established or demonstrated the specific constitutional infringements suffered by the petitioners.
16. Counsel thus urged the court to allow the preliminary objection with costs and strike out the instant petition with costs.

Petitioners' Submissions;

17. Counsel for the petitioners submitted that a preliminary objection must be raised on pure points of law. That where an issue requires the court to refer to evidence, then that issue is not a point of law but one of fact requiring parties to be heard. That all the issues that the instant P.O. raises are issues of facts which require evidence to be adduced.
18. On the doctrine of Constitutional avoidance as raised by the Respondents; counsel acknowledged that under this doctrine, a court will avoid determining a matter on the basis of *the constitution*, where the dispute can properly be determined on other legal bases, such as civil suits.
19. He, however, stated that for the court to determine whether or not the issues raised in the petition can be addressed in ordinary civil suit, the court will be required to review the facts of the case as set out in the various affidavits filed by the parties hence the same does not amount to a pure point of law.
20. Counsel maintained that the petitioners' claim arises from a series of compulsory acquisitions undertaken by the government between the years 1972 and 1985. That as a result of the said acquisition, the petitioners surrendered their parcels of land but were never compensated. He thus contends that the question of compulsory acquisition and the issues of compensation thereunder are constitutional issues set out under Article 40 of *the constitution*.
21. That the issue of the compensation of the petitioners invokes the constitutional question as to whether or not the rights of the petitioners to own property has been violated and/or to what extent.
22. In addition, he submitted that the petition also raises other constitutional and public interest issues such as the conduct of the public officers involved in the process of acquisition and compensation, decimation of water catchment areas, cultural sites and traditional among others.



23. In conclusion, counsel maintained that the petition raises fundamental questions that directly impinge on clear constitutional provisions and not transactional issues that involve parties in their private capacities.
24. He consequently argues that this honourable court has the requisite jurisdiction to hear and determine the petition and the issues it raises therein.
25. It was also his contention that the 4th, 5th and 6th respondents are basing their argument on the form of the petition rather than the substance and thus relied on the provisions of Article 159 of *the Constitution*, which calls upon the court to pursue substantive justice.
26. In this regard, they relied on the decisions in the Supreme Court in the case of *Abidha Nicholus vs Attorney General & Others SCOK Petition No. E007 of 2023* and *William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others Muslim for Human Rights & 2 Others [2020] eKLR* in buttressing the fact that enforcement of fundamental rights and freedoms is a question which can only be determined by the High Court.
27. In the end, it was their submission that the P.O. is not merited and ought to be dismissed with costs.

Analysis and Determination:

28. Having carefully considered the grounds in the preliminary objection, the rival submissions thereto together with the various authorities cited in support of the rival positions, it is my considered opinion that the following issues arise for determination: -
 - i. Whether the notice of preliminary objection dated 26th February, 2025 meets the threshold of what amounts to a proper preliminary objection.
 - ii. Whether the Preliminary Objection is merited.
 - iii. Who should bear the costs of the preliminary objection.

Whether the Notice of Preliminary Objection dated 26th February, 2025 meets the threshold of what amounts to a Preliminary Objection;

29. The law on what constitutes a preliminary objection was outlined in the leading case of *Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696* where the Court defined Preliminary Objection as follows;

“...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.”

30. This position has been reiterated by the Supreme Court in the case of *Aviation & Allied Workers Union Vs Kenya Airways Ltd & 3 Others, Application No. 50 of 2014 [2015] eKLR* where it was held as follows;

“Thus, a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”



31. Guided by the above case laws, it is evident that a Preliminary Objection can only be raised on a pure point of law, which is argued on the assumption that there is no contest as to the facts as pleaded in the petition.
32. While the 4th, 5th and 6th respondents maintain that the preliminary objection raises pure points of law which do not require any further adducing of evidence, the petitioners contend that the preliminary objection is marred with factual issues which would require the court to refer to evidence adduced by the parties.
33. The question that therefore follows is whether the facts as pleaded by the petitioners can be said to be uncontested. The basis of the petitioners' claim is the process of land allocation within the Sergoit Holdings Grounds as compensation pursuant to a process of compulsory acquisition by the government. The petitioners contend that Sergoit Holdings Grounds was originally a communal land and whether or not the titles issued thereto to other third parties were issued unprocedurally and illegally.
34. Can it therefore be said that the facts briefly outlined above and contained in the petition are uncontested? That the facts are deemed agreed as prima facie presented in the pleadings? Can it be said that the respondents agree with the said facts as pleaded in the petition to be true? From a look at the rival submissions, that is not the position.
35. It has been held that a proper preliminary objection must not be blurred with factual details liable to be contested or proved by the process of evidence. A preliminary objection should not derive its foundation from factual information which stand to be tested by evidence. See the case of Oraro -vs- Mbaja (2005) 1KLR 141.
36. I have carefully considered the grounds in the preliminary objection as well as the rival submissions thereto, particularly, grounds (b) and (d) of the preliminary objection. In my considered opinion they are marred with factual issues which in my view may require the court to look at the evidence and/or exercise its judicial discretion.
37. Thus, based on the above, it is the finding of this court that grounds (b) and (d) in the notice of preliminary objection are not pure points of law and consequently do not meet the threshold/criteria of what should be raised as a preliminary objection. The same are therefore not merited.
38. However, in ground (c), the 4th, 5th and 6th respondents have raised an objection on the jurisdiction of this court to entertain the petition as filed. It is their claim that this court lacks the requisite jurisdiction to sit as a constitutional court and determine the petition by virtue of the doctrine of constitutional avoidance outlined in ground (a) of the preliminary objection.
39. The challenge on jurisdiction is a pure point of law as contemplated in the Mukhisa Biscuit case. Consequently, it is my finding that grounds (c) as read with (a) of the preliminary objection meets the threshold of what amounts to a proper preliminary objection.

Whether the Preliminary Objection is merited.

40. The second issue for determination is whether the preliminary objection as filed is merited on account of grounds (c) and (a). This court therefore seeks to determine whether the jurisdiction of this court to determine the petition is ousted by virtue of the doctrine of constitutional avoidance.
41. The 4th, 5th and 6th respondents contend that from the reliefs sought and the factual averments in the petition, the issues raised in the petition points to a dispute that cannot be resolved before the court



sitting as a constitutional court. That the reliefs as sought are calling upon the court to make several factual determinations and statutory interpretations rather than constitutional interpretations.

42. They went further to state that not every dispute ought to be filed as a constitutional petition even where the case has a constitutional underpinning. It was their contention that the issues presented in the petition can adequately be addressed through an ordinary suit, and gave an example of the prayer sought in the petition seeking a declaration that the titles issued to the 280 Interested Parties herein were obtained irregularly and a cancellation thereof.
43. The petitioners on the other hand submitted that the petition raises constitutional and public interest issues such as the conduct of the public officers involved in the process of compulsory acquisition and compensation, decimation of water catchment areas, cultural sites and traditional among others issues.
44. Further, that the issue of the compensation of the petitioners invokes the constitutional question as to whether or not the rights of the petitioners to own property has been violated and/or to what extent. They therefore maintained that the petition raises fundamental questions that directly impinge on clear constitutional provisions and not transactional issues that involve parties in their private capacities.
45. In determining this issue, this court is called upon to interrogate and review the issues raised in the petition as well as the prayers sought, which may not be the position for a proper preliminary objection. Be that as it may, this court acknowledges that a challenge on the jurisdiction of a court goes to the root of the case and I will therefore proceed to determine the same.
46. The jurisdiction of this court has been challenged on account of the doctrine of constitutional avoidance. The Supreme Court in *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* [2014] eKLR in defining the principle of constitutional avoidance stated as follows: -

“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 KetrIDGE 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.”
47. Guided by the above decision, the question that begs to be answered is whether the facts, issues and prayers sought in the petition are capable of being properly decided in an ordinary civil suit.
48. I have critically looked at the facts, issues and prayers sought in the petition. Even though this court is careful not to delve into the substantive merits of the petition at this interlocutory stage, I do note that the petitioners’ claim arises from the process of compulsory acquisition.
49. The petitioners contend that they surrendered their parcels of land to the government through the process of compulsory acquisition. That it was mutually agreed that compensation was to be by way/ in the form of allocation of alternative land within the Sergoit Holdings Grounds. The genesis of their claim is therefore the process of compensation and/or allocation of land to beneficiaries within the said area.
50. From a cursory look at the facts in the petition, the prayers sought and the Affidavit in support of the petition in totality, it is my considered opinion that the doctrine of constitutional avoidance does not apply in the instant case.



51. Even though some of the prayers sought touches on the interpretation of other statutes, for instance the *Land Registration Act*, the petitioners claim is majorly premised on the constitutional issues and violations arising from the process of compulsory acquisition, compensation thereto by way of allocation of land within the Sergoit Holdings Grounds and the resultant titles issued thereto by the National Land Titling programme.
52. This court is further mandated to ensure that any person who wishes to institute a claim through a Constitutional Petition has met the threshold set in the case of Anarita Karimi Njeru -vs- Republic 1976-1980 KLR wherein Trevelyan & Hancox, JJ, summarized it as follows;
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
53. Guided by the Anarita case above and reiterated in the case of Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR, it is clear that the petitioners are duty bound to set out their complaint against the respondents with precision and clarity to enable the court to ascertain whether or not a given right or fundamental freedom has been infringed as alleged.
54. I have carefully looked at the petition and it is evident that the petitioners at paragraphs 5.3 and 5.4 in the petition have sufficiently set out with a reasonable degree of precision the particulars of the alleged violations and the manner in which they allege were infringed.
55. In view of the foregoing, it is the finding of this court that the petition as filed does not offend the doctrine of constitutional avoidance and consequently, the preliminary objection is not merited.

Who shall bear the Costs of the Preliminary Objection;

56. It is a well settled principle that costs follow the event unless the court directs otherwise.
57. In this case, having held that the notice of Preliminary Objection is not merited, I find that the petitioners are entitled to the costs.
58. In conclusion, it is the finding of this court that the Notice of Preliminary Objection dated 26th February, 2025 is not merited and is hereby dismissed with costs to the Petitioners.
59. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF SEPTEMBER, 2025.

HON. C. K. YANO

JUDGE

Ruling delivered in the presence of: -

Ms. Chelogoi for the Petitioners.

Mr. Kavere for 4th - 6th Respondents.

Ms. Odeyo for 1st – 2nd Respondents.

No appearance for 3rd Respondent.

Court Assistant – Laban

