



**Mbindyo v Land Registrar, Machakos & 4 others (Environment and Land Constitutional  
Petition E005 of 2024) [2025] KEELC 6239 (KLR) (23 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6239 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E005 OF 2024  
NA MATHEKA, J  
SEPTEMBER 23, 2025**

**BETWEEN**

**GREGORY MUENDO MBINDYO ..... PETITIONER**

**AND**

**THE LAND REGISTRAR, MACHAKOS ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY SURVEYOR, MACHAKOS ..... 2<sup>ND</sup> RESPONDENT**

**MAGDALENE MALISAU KITHOME ..... 3<sup>RD</sup> RESPONDENT**

**PAUL WAMBUA KITHOME ..... 4<sup>TH</sup> RESPONDENT**

**ALEXANDER MUTUNGA KITEMA ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner is the Administrator Ad litem over the Estate of his deceased father one Mbindyo Mutua Ndava and also a beneficiary of the deceased's Estate. The deceased is the registered owner of land known as Mwala/Myanyani/501 which is the subject to the boundary dispute. That the 3<sup>rd</sup> -5<sup>th</sup> Respondents are using Plot No. Mwala/Myanyani/483 which is registered in the name of Kithome Maliani now deceased. He is the late husband of the 3<sup>rd</sup> Respondent and father to the 4<sup>th</sup> Respondent. He was an uncle to the 5<sup>th</sup> Respondent. The Estate of the late Kithome Maliani is not administered and none of the 3<sup>rd</sup>-5<sup>th</sup> Respondents has taken Letters of Administration over this Estate.
2. The subject matter in dispute between the Petitioner and the 3<sup>rd</sup> -5<sup>th</sup> Respondents is due to creation of a road of passage between parcels numbers Mwala/Myanyani/501 which the Petitioner has interests and Mwala/Myanyani/483 occupied by the 3<sup>rd</sup> - 5<sup>th</sup> Respondents. The Petitioner is bringing this Petition on behalf of the Estate of the registered owner one Mbindyo Mutua Ndava. That there existed no road on the ground between the two parcels of land and this issue never came up when the two deceased



registered owners were alive. That the 2<sup>nd</sup> Respondent acts under the instructions and/or advise of the 1<sup>st</sup> Respondent and cannot solely go round establishing boundaries and creating/opening roads.

3. That for any boundary dispute, there has to be a complainant and this should be the registered owner of one of the parcels or someone with legally recognized authority such as one holding Letters of Administration. In this case it appears the complainant were the 3<sup>rd</sup>-5<sup>th</sup> Respondents who are neither the registered owner of parcel No. 483 or legal representatives of the Estate of the registered owner. The said Respondents therefore lacked capacity to invite the Surveyor and that the latter too should have declined to attend to the call. This is complicated further by the fact that even the Estate of the Petitioner's father was unadministered and no one was there to defend it if in any case the actions of the Respondents were adverse to it.
4. The Petitioner avers that the 2<sup>nd</sup> Respondent acted ultra-vires and unfair to him and therefore his rights were violated. The Respondents actions led to a chunk of his deceased father's Estate being chopped off unprocedurally which did not only amount to intermeddling but also infringed on the constitutional protection of right to own property and protection from having it arbitrarily taken away. After the 2<sup>nd</sup> Respondent decision that there existed a road, the 3<sup>rd</sup>-5<sup>th</sup> Respondents cut down all the indigenous s that laid there. There are trees that had been there for decades and which in any case the Petitioner would have been the one to use. That the 2<sup>nd</sup> Respondent did not even consider the acreage of each of the parcels of land to establish where the alleged road passed at all, but only implemented the wishes of the other parties. The said report did not even mention who had encroached into the alleged road and by what extent. Further, it doesn't indicate what sanctioned the road opening. The Petitioner had a right to know all this information. When the Petitioner raised several concerns, he was told to wait for the process to end and he can then go to Court, no answers were given. Clearly this did not at all confirm to the constitutional requirements of a fair administrative action in Article 47 and which the Petitioner can only have it redressed by this Court.

Prays for;

- a. A declaration that the proceedings, the decisions and/or findings of the Machakos County Surveyor dated 16<sup>th</sup> November, 2020 were in violation of the guaranteed fundamental rights of a fair administrative action, reasonable and legitimate expectations, and a fair hearing before an impartial tribunal or body within the meaning of Article 47(1) and 50(1) of the Constitution of Kenya 2010, and hencefore, null and void.
  - b. A declaration that the County Surveyor, Machakos did not have jurisdiction to create and/or alter a boundary nor solve a boundary dispute and/or create a road passage between Mwala/Myanyani/503 and 483 and hence the action was illegal, null, void and ultra-vires.
  - c. A declaration that the actions of the Respondents were irregular and unfair as they not were sanctioned by any legally recognized law or entity and that they exposed the Estate of the deceased to intermeddling.
  - d. An order directed revoking and quashing the decision/report of the 2<sup>nd</sup> Respondent dated 16<sup>th</sup> November, 2020.
  - e. That costs of these proceedings be paid by the Respondents.
5. The 3<sup>rd</sup>,4<sup>th</sup> and 5<sup>th</sup> Respondents submitted that the Petitioner was present during the survey process conducted on the 13<sup>th</sup> October 2020 in the presence of the area chief. The actual boundary of the parcels of land Mwala/Myanyani/501 and Mwala/Myanyani/483 were identified and it was determined that a public access road exists between the two parcels of land and that the Petitioner



had encroached on the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' parcel of land. Subsequently the Petitioner filed Machakos ELC No. 60 of 2021 and later Judicial Review Misc. Application No. 7 of 2023 which were both dismissed for lack of merit.

6. This court has considered the Petition and the submissions therein. For a constitutional petition to be considered on merit by the court, it has to meet the threshold set out in *Anarita Karimi Njeru vs The Republic* (1979) eKLR, where it was held,

“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.”

7. The Court of Appeal in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR, emphasized the principles set out in *Anarita Karimi* and held that,

“The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars. We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case.”

8. I have perused the petition and evidence in support and I do note that as much as the Petitioner have cited Articles 2(A); 19(1); 19(2); 19(3) (A) (B) and (C); 20(1); 20(2); 20(3); 20(4) (A) and (B); 22(1); 23(3); 25(A); 47(1); 50 (1); 159 (2) (A) (D) and 162 (2) (B) of *the Constitution*, no particulars of the alleged violations and the manner of the alleged infringements have however, been pleaded. It is well established that a Petitioner who seeks redress under *the Constitution* must state his claim with precision by reference to the provisions of *the Constitution* violated and the manner of the alleged violation.
9. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR the Supreme Court held as follows: -

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“(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.”

10. Similarly, in *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* (2013) eKLR, Lenaola, J. (as he then was) stated;

“I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in *Haco Industries* (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG vs S.K. Dutambala Cr. Appeal No.37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.

11. In *Peter O. Ngoge vs Francis ole Kaparo & 4 Others* (2007) eKLR, the Court of Appeal applied the case of *Harrickson vs Attorney General of Trinidad And Tobago* (1980) Ac 265, where Lord Diplock stated;

“The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of *the Constitution* is fallacious ... the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

12. This is a dispute relating to boundary dispute and/or ownership of land and is a civil matter. The Petitioner is engaging in a forum shopping exercise. The Petitioner in filing this petition has not fully complied and thus offend the doctrine of ripeness and constitutional avoidance.

13. In *John Harun Mwau vs Peter Gastrol & 3 others* (2014) eKLR, the court discussed the principle of constitutional avoidance as follows;

“courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it... It is an established practice that where a matter can be disposed of without recourse to *the constitution, the constitution* should not be invoked at all.”

14. Further, in *I Currie & J De Waal The Bill of Rights Handbook* (2013) 72 the author stated that the exceptions to the above doctrine are:

“The exceptions to the application of the doctrine of constitutional avoidance are:

- i. where the constitutional violation is so clear and of direct relevance to the matter,
- ii. in the absence of an apparent alternative form of ordinary relief and



iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.”

15. This suit has failed in all three exceptions as the Petitioner did not comply with the first step and secondly this is a claim which can be prosecuted as a civil suit. Consequently, I find that this petition is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2025.**

**N.A. MATHEKA**

**JUDGE**

