



Mututa & 12 others v Mbiuva; Office of the Director of Public Prosecution (ODPP) & 2 others (Interested Parties) (Environment and Land Petition E004 of 2024) [2025] KEELC 7211 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND PETITION E004 OF 2024
EO OBAGA, J
OCTOBER 23, 2025**

**IN THE MATTER OF ARTICLES 22, 23, 40, 47, 48 AND
162 (2) (B) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF SECTIONS 45, 82, 83 AND 94 OF THE
LAW OF SUCCESSION ACT (CAP. 160) OF THE LAWS OF KENYA**

**IN THE MATTER OF SECTION 3, 13 AND 19 OF THE
ENVIRONMENT AND LAND COURT ACT (NO. 19 OF 2011)**

**IN THE MATTER OF SECTIONS 1A, 1B, AND 63 (E) OF THE
CIVIL PROCEDURE ACT (CAP. 21) OF THE LAWS OF KENYA**

BETWEEN

**JAMES MUTISYA MUTUTA 1ST PETITIONER
DAVID WAEMA MUTUTA 2ND PETITIONER
KIOKO IKULUME 3RD PETITIONER
RUTH IKULUME 4TH PETITIONER
WILLIAM MWEU IKULUME 5TH PETITIONER
FREDERICK KYUMWA 6TH PETITIONER
SAMUEL WAMBUA 7TH PETITIONER
STEPHEN MUTUKU 8TH PETITIONER
MESHACK KIIO 9TH PETITIONER
DOMINIC MUSEMBI 10TH PETITIONER
SHEDRACK MUTUA 11TH PETITIONER**



VERONICA MUMBE 12TH PETITIONER

PRISCILLA WAYUA 13TH PETITIONER

AND

JINAANI NZIOKI MBIUVA RESPONDENT

AND

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION
(ODPP) INTERESTED PARTY**

OFFICE COMMANDING STATION (OCS) WOTE INTERESTED PARTY

LAND REGISTRAR MAKUENI INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioners filed this petition against the Respondent and named the three Interested Parties. In their petition, the Petitioners sought the following reliefs:
 - i. A declaration be and is hereby issued that land parcel Nzai/Nziu/251 forms part of the estate of the late Ikulume Kinyae alias Ikulunze Kinyae.
 - ii. A declaration that any purported sale of the suit property is null and void ab initio.
 - iii. A declaration that the Petitioners are the lawful Dependants of the estate of the late Ikulume Kinyae alias Ikulunze Kinyae.
 - iv. An order of certiorari do issue quashing the decision in Makueni MCCR 388 of 2018 and Makueni MCCC E008 of 2020 together with the orders issued against the 1st and 2nd Petitioners.
 - v. An order of Mandamus do issue directing the OCS Wote or the Inspector General of police to expunge any and all criminal records, files and fingerprints against the 1st and 2nd Petitioners arising from Makueni MCCR 388 OF 2018.
 - vi. An order of prohibition do issue against the Land Registrar, Makueni from effecting any transfer or in any way altering the Deed File over Nzai/Nziu/251 in favour of the Respondent.
 - vii. An order of vacant possession do issue against the Respondent to vacate the suit property forthwith.
 - viii. An order of permeant injunction restraining the Respondent from trespassing on or in any way dealing with the suit property.
 - ix. A declaration do issue that succession proceedings do commence to facilitate the proper distribution of the estate of the late Ikulume Kinyae including the suit property.
 - x. An order for mesne profits for the duration of the illegal occupation calculated at the rate of Kenya shillings Ten Thousand (Kshs.10,000/=) per months per acre, being the standard lease amount for properties in Nziu area, to be calculated from the date of illegal acquisition of the property to the date of final vacation by the Respondent together with interest.



- xi. An order for general damages for the violation of the human rights of the Petitioners.
 - xii. An order for general damages for mental anguish, turmoil and frustration against the Petitioners.
 - xiii. Costs of the Petition be borne by the Respondent.
 - xiv. Any other relief that this honourable court may deem just and expedient.
2. Neither the Respondent nor the Interested Parties entered appearance or filed replying affidavit or grounds of opposition. The court directed the Petitioners to file brief submissions on the petition.
 3. The Petitioners contend that they are beneficiaries of the Estate of Ikulume Kinyae who passed away on 24th August, 1994 (deceased). The deceased owned among other properties Nzai/Nzui/251 measuring 5.2 hectares (suit property). They stated that the Respondent entered the suit property and fenced it and claimed that he had purchased it from unknown parties.
 4. The Petitioners further state that their attempts to access the suit property have been frustrated by the Respondent and as a result they have been unable to carry out succession in respect of the deceased's estate. The 1st and 2nd Petitioners tried to assert their rights over the suit property by bringing down the fence of the Respondent but this resulted in the Respondent instituting both criminal and civil suits against them.
 5. The Petitioners continue to state that the actions of the Respondent who is intermeddling with the deceased's estate where grant of letters of administration have not been issued has violated their constitutional rights under Article 40, 47 and 48 of *the Constitution*. The Petitioners are in violation of Section 45 (1) 82(a) and 28 of the *Law of Succession Act* Cap 160 Laws of Kenya.
 6. The Petitioners filed their submissions dated 23rd May, 2025. They identified three issues for determination by this court. The first issue is whether the Petitioners are the rightful beneficiaries of the estate of the deceased and if their rights have been infringed by the Respondent. On this issue, they submitted that they are sons, daughters, wife and grandsons of the deceased and that they are in the process of undertaking succession proceedings in respect of the estate of the deceased. They submit that they are dependents of the deceased as defined under Section 29 of the *Law of Succession Act*.
 7. The second issue is whether this court should declare the orders given in Makueni MCCR 388 of 2018 and Makueni MCCC E008 of 2020 as erroneous which ought to be quashed and stop execution of the orders emanating therefrom. The Petitioners submitted that Makueni MCCC E008 of 2020 was against the 1st and 2nd Petitioners. That case found the two Petitioners guilty of trespass and ordered them to vacate the land and deliver vacant possession.
 8. The Petitioners submit that the orders arising out of Makueni MCCC E008 of 2020 were erroneous in the sense that no title had been obtained by the Respondent to warrant the claim to the suit property. The Petitioners relied on the case of Republic –vs- Chairman Rent Restriction Tribunal; Nzaro (Interested Party); Wambua (Exparte) (Judicial Review Application 1 (2023 May, 2023) where it was held as follows:

“This court has powers under Section 8 and 9 of the *Law Reform Act*, Cap. 26 of the Laws of Kenya to issue prerogative writ of certiorari, which brings into this court to quash a decision which is ultra vires. A writ of prohibition intended to forbid or prevent an action by a public officer from taking place in granted alongside certiorari, since it's a similar remedy but more prospective than retrospective. While certiorari looks at the past, prohibitions



looks at the future looks at the future. The provision of Section 8 of the Law Reform Act, also provides for a writ of prohibition which primarily prohibits a tribunals, judicial bodies or subordinate courts from doing or taking an action in excess of its jurisdiction. The prerogative writs of “certiorari” derives from the Latin word “certiorari” which means to be certified, informed, appraised or shown. Both in its embryonic days and today, the order, initially and prerogative writ was inferior courts and required the proceedings of that to be transferred to the High Court and examined for validity. It meant the decision would be quashed”.

9. The third issue is whether a permanent injunction ought to issue against the Respondent barring him from interfering with the suit property. The Petitioners submitted that the Respondent is intermeddling with the estate of the deceased as there are no grant of letters of administration given. They submit that what the Respondent is doing is contrary to Section 45 of the Law of Succession Act Cap. 160 Laws of Kenya. They argue that as they are beneficiaries entitled to the estate of the deceased, an injunction ought to issue restraining the Respondent from further interference with the suit property.

10. The Petitioners relied on the case of Kenya Power & Lighting Co. Ltd –vs- Sheriff Molana Habib (2018) eKLR where the court stated as follows:

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence is support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected”.

11. I have carefully considered the Petitioners’ petition as well as their submissions. It is clear from the petition that the Petitioners are seeking to quash Makueni Chief Magistrates Court Criminal Case No. 388 of 2018 (R –vs- James Mutisya Mututa & David Waema Mututa and Makueni Chief Magistrate Civil case No. E008 of 2020.

12. Other than a decree in Makueni Chief Magistrate’s Civil Case No. E008 of 2020, the Petitioners did not annex any documents to show the nature of the two cases for the court to appreciate what they dealt with and whether the manner in which they were handled contravened any constitutional rights of the Petitioners.

13. In a constitutional Petition, a Petitioner is supposed to state with specificity the Articles of the Constitution which he alleges to have been violated. This was the position in the case of Anarita Karimi Njeru –vs- Republic (1976 – 1980 KLR 1272 where it was held as follows:

“We would, however, again stress that if a person is seeking redress in the High Court on a matter involving 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 provision said to be infringed, and the manner in which they are alleged to be infringed”.

14. In this Petition, the issues which emerge for determination are firstly, whether the Petitioners’ petition has been properly brought before this court or simply put whether this court has jurisdiction to deal with the petition. Secondly, whether any constitutional rights of the Petitioners have been infringed.



15. To begin with, the jurisdiction of this court is set out under the *Environment and Land Court Act*. A look at the two cases before the Chief Magistrates Court shows that both fall under the jurisdiction of the High Court. A look at the decree from Makueni Chief Magistrate’s Court Civil Case No. E008 of 2020 shows that the court awarded special damages of Kshs.200,000/= being the value of chain link fence, Kshs.436,000/= being payment of legal fees and disbursements and costs. There were no issues of ownership of the suit property before Makueni Chief Magistrate’s Civil Case No. E008 of 2020. It is therefore clear that if the Petitioners wanted to have their Petition considered, they ought to have filed their Petition before the High Court.
16. The Petitioners have brought this petition contending that the Respondent has infringed their Constitutional rights under Article 40, 47 and 48 of *the Constitution*. They have not indicated in which manner the alleged infringement occurred. Article 40 of *the Constitution* deals with the right to own property in any part of country. In the context of this petition, the Petitioners contend that the Respondent entered the suit property in either 2013 or 2014 on allegations that he had purchased the same from unknown parties. There were no details given on that. Ideally this is a matter which should not have been brought as a Constitutional Petition.
17. If the Petitioners felt that they had a cause of action against the Respondent, they should have taken even a limited grant of letters of administration to protect the property in an ordinary suit before the Environment and Land Court where evidence as to how the Respondent entered the suit property would have been interrogated.
18. It is absurd for the Petitioners to argue in this petition that the Respondent has prevented them from carrying out succession in respect of the estate of the deceased. What is in contention herein are private claims over a property which should not have been fashioned as a constitutional petition.
19. In the case of Maya Duty Free Limited –vs- Attorney General and 3 others Petition No. 45 of 2017, Justice Muita held as follows:

“It is therefore inappropriate for parties to rush to institute Constitutional Petitions alleging violation of rights under Article 47 (1) or any other Constitutional rights or fundamental rights when their petitions raise no constitutional issues at all for the court’s determination. It is also the position in law that parties should pursue remedies available to them instead of instituting constitutional petitions”.
20. A look at the remedies sought shows that this court has no jurisdiction to grant any of those remedies. I therefore find that this petition did not qualify to be filed as a constitutional petition and this court has no jurisdiction to determine it. Consequently the petition is hereby dismissed with no order as to costs.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF OCTOBER, 2025.

In the Presence of:

Mr. Makau for Petitioners

Court assistant – Steve Musyoki

