

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. PETITION NO. 76 OF 2017**

**ONESMAS                      NTHANGA                      NGUMA                      &                      72**

**OTHERS:.....:PETITIONERS**

**VERSUS**

**KATELEMBO ATHIANI MUPUTI FARMING & RANCHING**

**CO-OPERATIVE SOCIETY:.....:1<sup>ST</sup> RESPONDENT**

**THE      LANDS                      REGISTRAR,                      MACHAKOS:.....:2<sup>ND</sup>  
RESPONDENT**

**THE      MINISTRY                      OF                      INTERIOR:.....:3<sup>RD</sup>  
RESPONDENT**

**NATIONAL POLICE SERVICE:.....:4<sup>TH</sup> RESPONDENT**

**THE      DIRECTOR                      OF                      PUBLIC                      PROSECUTIONS:.....:5<sup>TH</sup>  
RESPONDENT**

**THE ATTORNEY GENERAL:.....:6<sup>TH</sup> RESPONDENT**

**AND**

**NATIONAL                      LANDS                      COMMISSION:.....:INTERESTED  
PARTY**

**JUDGMENT**

The Petitioners state that they are residents of Katelembo and their residence there was established at birth. They boast of an ancestral connection to the land each one of them occupies having been handed down the same by their parents and those before them. That they have lived in Katelembo all their lives, acquired the land they live in without fraud or illegality and enjoyed peace and uninterrupted use of the said land for years on end. Like several parts of the country, Katelembo has been hard hit by systemic mismanagement of land distribution and adjudication. And that it is just to put it politely. In several instances the menaces of land grabbing and fraud have reared their heads in the Petitioners community with the 1<sup>st</sup> Respondent standing accused of being complicit and even resolute perpetrator of these ills.

When the colonialists were leaving Kenya around 1963, the 1<sup>st</sup> Respondent was created by some former employees of the said colonialists to engage in land trading. That the previously colonially occupied land passed to the 1<sup>st</sup> Respondent, by law with the reservation that those who were already settled there in from time immemorial (such as the Petitioners), had overriding interest in the land. The 1<sup>st</sup> Respondent has over the years completely misapprehended its legal rights over the Katelembo area lands, believing that it holds absolute title to every square inch of soil therein. The 1<sup>st</sup> Respondent instigates arrests of members of the Petitioners community and has them psychologically tortured at the behest of land grabbers who continue to buy land in this area despite the Petitioners conspicuous presence.

Some of these land grabbers have managed to financially manipulate and compromise a number of residents to back down from their convictions about their entitlement to live in Katelembo as owners and not squatters. The land grabbers, emboldened by their onslaught against the residents' cohesion have at times succeeded in maneuvering their way around the court process.

However, the Petitioners still live each day of their lives with a fear that any one of them could be victim of an arrest or harassment by the police or provincial administration personnel. The experiences of two other Petitioners herein, the 42<sup>nd</sup> and 48<sup>th</sup>, puts this feeling in perspective. Both these Petitioners were arrested between the years 2010 and 2015 and charged with the offences of forcible detainer, charges which emanated from their occupancy of lands in contention herein.

The charges were anomalous as the lands in question were not registered to either the names of the complainants or the accused, meaning that the disputes ought to have been submitted for civil resolution in the first instance. This position has been severally articulated by the High Court. The 42<sup>nd</sup> and 48<sup>th</sup> Petitioners were in fact acquitted of the charges. But the Petitioners maintain that the arrests should not have happened at all furthermore, there is a likelihood that they will unless this Honourable Court intervenes. One Michael Mwongela who had sworn an affidavit in the Petitioners favor narrates a more recent encounter with the office of the 5<sup>th</sup> Respondent and its reckless urge to turn Katelembo residents into state guests on

account of innocent acquisition and settlement on their ancestral land. Their Respondents herein have been and are anticipated to continue infringement of the Petitioners constitutional rights.

The Respondents bluntly ignored the general nation land policy laid out in Article 60 of the Constitution of Kenya by constantly threatening and purporting to render the Petitioners landless. The arrests and charging of the some of the Petitioners with the offence of forcible detainer over their occupation of ancestral land is superfluous and an attack to their right to dignity. The conduct and behavior of a section of state officers working for and within various departments of the 2<sup>nd</sup> to 6<sup>th</sup> Respondents is at odds with Articles 10 and 73 of the Constitution of Kenya in as far as they unashamedly and with partiality, execute the will of shadowy, well connected businessmen at the expense of the wellbeing of the Petitioners who remain vulnerable citizens of Kenya. Thus to put out a clear message that the rule of law has its firm grip over the plains of Katelembo location, this Honourable Court is beseeched to reaffirm the constitutional principles and dictates that may have lost all relevance to the Respondents.

The Petitioners pray for redress that:

- a) A declaration be issued that the Petitioners have an overriding interest as per Sections 30 and 28 of the Registered Land Act and the Land Registration Act respectively, in the land in which they have settled upon and that they

cannot be evicted from the same by any of the Respondents or any other person or institution.

- b) A declaration that the Petitioners live on ancestral land as contemplated in Article 63 (d) (ii) of the Constitution of Kenya.
- c) A permanent injunction issues restraining the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents from ever arresting, detaining, charging and prosecuting the Petitioners over any matter directly concerned with their occupation and use of the land they live on.
- d) Costs of the suit be awarded in favor of the Petitioners.

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.”*

The Court of Appeal in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR, emphasised 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.”*

I have perused the petition and evidence in support and I do note that as much as the Petitioner have cited Articles 60, 10 and 73 of the Constitution, no particulars

of the alleged violations and the manner of the alleged infringements have however, been established. 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.

The Petitioners' case is that they have been in occupation of the suit parcel for more than 40 years and have constructed permanent structures. That there was no interference until 2017 when the 1<sup>st</sup> Respondent attempted to evict them. PW1, Rodah Kavee Kioko testified that she has resided on the suit land since 1964 when she was born. PW2, Sarah Katumbi Wambua stated that she is a squatter on the suit land and was married in 1970 and stayed there. Her husband married and moved elsewhere but she remained.

The 1<sup>st</sup> Respondent called Wilson Masila Muema their Chairman to testified. He stated that the suit land was acquired in 1971 by the 1<sup>st</sup> Respondent for its members who were 3525. That the Petitioners are members or related to members who are pretending to be squatters on the land. That there was a decision by the Court of Appeal and the genuine squatters were compensated by the government with land at Nguu Scheme. They submitted that the claim was subject to proceedings in Court of Appeal Civil Appeal Nos. 151, 167 & 168 of 1989 Daniel Mutisya & another vs Katelembu Athiani Muputi Farming and Ranching Cooperative Society Limited.

In Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR the Supreme Court held as follows: -

*“(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.”*

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.*

In *Peter O. Ngoge vs Francis ole Kaparo & 4 Others* (2007) eKLR, the Court of Appeal applied the case of *Harriksson 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.”*

This is a dispute relating to adverse possession and/or ownership of land and is a civil matter. The Petitioners are engaging in a forum shopping exercise. The Petitioners in filing this petition have not fully complied and thus offend the doctrine of ripeness and constitutional avoidance.

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.”*

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.”*

This suit has failed in all three exceptions as the Petitioners did not comply with the first step and secondly this is a claim which can be instituted 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 25<sup>TH</sup> DAY OF  
NOVEMBER 2025.**

**N.A. MATHEKA**

**JUDGE**

ORIGINAL