



**Anjarwalla and another (As Executors of the Estate of Saifuddin Karimbhai Anjarwalla)
& 2 others v Attorney General & 3 others; Molu (Interested Party) (Environment and
Land Petition 34 of 2021) [2025] KEELC 8635 (KLR) (11 December 2025) (Judgment)**

Neutral citation: [2025] KEELC 8635 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND PETITION 34 OF 2021
JO OLOLA, J
DECEMBER 11, 2025
IN THE MATTER OF: ARTICLES 19, 20, 21(1) & (2), 22(1) &
(2), 23 (1) & (3), 40(1) & (3), 47(1) &
(2), 60 (1) (B), 165 (3) (B) & (D) 258
OF THE CONSTITUTION OF KENYA
2010
AND
IN THE MATTER OF: CONTRAVENTION OF ARTICLES 40,47
AND 50(1) OF THE CONSTITUTION OF
KENYA 2010
AND
IN THE MATTER OF: SECTION 111 OF THE LAND ACT,2012
AND
IN THE MATTER OF: LAND VALUE INDEX LAWS
(AMMENDMENT) ACT 2018
AND
IN THE MATTER OF: SECTIONS 24,25,26 & 101 OF THE
LAND REGISTRATION ACT (REPELAED)
AND
IN THE MATTER OF: VIOLATION OF THE PETITIONER’S
RIGHT TO PROPERTY BY ILLEGAL
ACQUISITIONAND ALIENATION OF THE



PETITIONERS' LAND PARCEL
JUDGEMENT PAGE 1 OF 20MBSA. ELC.PET. 34 OF 2021
MOMBASA/BLOCKXXI/469 SITUATE
WITHIN MOMBASA COUNTY BY THE
GOVERNMENT OF KENYA WITHOUT
COMPENSATION AS REQUIRED BY THE
CONSTITUTION OF KENYA 2010

BETWEEN

ATIQU SAIFUDDIN ANJARWALLA AND HAYATI SAIFUDDIN ANJARWALLA
(AS EXECUTORS OF THE ESTATE OF SAIFUDDIN KARIMBHAI
ANJARWALLA) 1ST PETITIONER

AJAYKUMAR ARVINDCHANDRA MEHTA (AS EXECUTOR OF THE ESTATE
OF HIMATLAL CHATRABHUJ MEHTA) 2ND PETITIONER

KHALIFA MBARAK ALI AL HINAI AND FIRDAUSE MBARAK ALI
AL HINAI (AS EXECUTORS OF THE ESTATE OF SIR MBARAK ALI
HINAWY) 3RD PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT 3RD
RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 4TH RESPONDENT

AND

SULTANALI PYARALI MOLU INTERESTED PARTY

JUDGMENT

Background

1. By this Petition dated 14th June 2021 as amend on 14th February 2023, Atiq Saifuddin Anjarwalla and Hayati Saifuddin Anjarwalla (as Executors of the Estate of Saifuddin Karimbhai Anjarwalla), Ajaykumar Arvindchandra Mehta (as Executor of the Estate of Himatlal Chatrabhuj Gopali Mehta) and Khalifa Mbarak Ali Al Hinai and Firdause Mbarak Ali Al Hinai (as Executors of the Estate of Sir Mbarak Ali Hinawy) (hereinafter “the Petitioners”) pray for reliefs as follows:
 - a. A declaration that by issuing a title deed to third parties over the property known as Mombasa/Block XXI/469, the Respondents have violated the Petitioners and/or the proprietors in common right to property guaranteed by Article 40 of the *constitution* of Kenya, 2010;



- b. A declaration that by issuing a title deed to third parties over the property known as Mombasa/Block XXI/469, the Respondents have violated the Petitioner's and/or proprietors in common right to property guaranteed under Article 60(1) of the constitution of Kenya, 2010;
 - c. A declaration that the Respondents have violated the Petitioners' and/or Proprietors in Common rights and legitimate expectation to fair, lawful and reasonable administrative action guaranteed under Article 47 of the constitution of Kenya 2010 and the Fair Administrative Action Act, 2015;
 - d. A declaration that the Respondents have violated the Petitioners and/or proprietors in common rights to a fair hearing by arbitrarily issuing a title deed over the property known as Mombasa/Block XXI/469 without affording the Petitioners and/or Proprietors in Common right to be heard, in contravention of Article 50 (1) of the constitution;
 - e. A declaration that by issuing a title deed to third parties over the property known as Mombasa/Block XXI/469, the Respondents have violated the Petitioners and/or the proprietors in common rights under Article 14 of the African Charter on Human and People's Rights relating to protection of the right to property;
 - f. A declaration that by issuing a title deed to third parties over the property known as Mombasa/Block XXI/469, the Respondents have violated the Petitioners and/or the proprietors in common's right under Article 17 of the Universal Declaration of Human Rights relating to protection of the right to property;
 - g. A declaration that the allocation and alienation by the Government of Kenya of the property known as Mombasa/Block XXI/469 other than by way of compulsory acquisition and upon prompt payment of compensation is unconstitutional, illegal, null and void;
 - h. An order of special damages against the Respondents to pay to the Petitioners the sum of Kshs 1,013,600,000/= being the market value of the Petitioners' collective half share in the property known as Mombasa/Block XXI/469;
 - i. An order for general damages to be issued against the Respondents for violating the Petitioner's right to their ownership, use and occupation of the property known as Mombasa/Block XXI/469 from the date of expiry of the lease on 27th February, 2005;
 - j. Interest on (h) and (i) above;
 - k. Costs of this Petition to be borne by the Respondents in any event; and
 - l. Such other orders that this Honourable Court shall deem fit.
2. It is the Petitioners case that Saifuddin Karimbhai Anjarwalla, Himatlal Chatrabhuj Gopali Mehta, Farid Bin Hinawy, Fawziya Binti Mbarak Hinway and Freyah Binti Mbarak Hinawy (all Deceased) together with Sultanali Pyarali Molu (the Interested Party herein) are registered as absolute proprietors and tenants in common of all that piece of land known as Mombasa/Block XXI/469 measuring approximately 7.24 acres (the suit property) it being a subdivision of Mombasa/Block XXI/261.
 3. The Petitioners aver that on 17th December 1925, the suit property was leased to the Government of Kenya for a period of ninety-nine (99) years from 28th February 1906. They aver that during the said period, the Government did subject the property to Serani Primary School and that when the lease expired on 27th February 2005, neither the Petitioners nor the Interested Party renewed the lease.



4. It is the Petitioners case that despite the expiry of the lease, the Government failed to hand over vacant possession and they were unable to obtain vacant possession as there were third parties in physical occupation the same being Serani Primary School, Serani Secondary School, Burhani Sports Club and Sunni Mbaraki Mosque who claimed ownership.
5. The Petitioners further aver that in the year 2017, they realized that the Government purported to issue a leasehold interest over the suit property to Sunni Muslim Community Registered Trustee for a period of 99 years from 1st October 2017. It is their case that the unconstitutional and illegal alienation of the suit property has deprived them of their constitutional rights as provided for under the [constitution](#).
6. The Attorney General, the Chief Land Registrar and the Ministry of Lands Housing and Urban Development (the 1st, 2nd and 3rd Respondents) are opposed to the application. In a Replying Affidavit sworn on their behalf on 10th October 2023 by the Land Registrar Mombasa Sheila Soita, the Respondents concede that the suit property had been leased to the Government for a term of 99 years from 28th February 1906 and that when the same expired on 28th February 2005, the same was not renewed.
7. The Respondents assert that the Government of Kenya is not in possession of the suit parcel ever since the lease expired. They aver that the Petitioners have not availed any proof of the registration and/or issuance of any leases and/or title to third parties as alleged.
8. The Respondents further aver that the suit herein is sub-judice as the Petitioners and the Interested Parties had filed two suits earlier and that while one was withdrawn, Mombasa ELC Case No. 180 of 2013 is yet to be heard and determined.
9. In addition to the Replying Affidavit the Respondents have filed a Notice of Preliminary Objection dated 15th January 2025 wherein they object to the Petition on the grounds:
 - a. That this Petition is sub judice and Res Judicata as provided for in Section 7 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya; and
 - b. That the Constitutional Avoidance principle is applicable against this Petition.
10. The County Government of Mombasa is equally opposed to the Petition. In their Response to the Petition dated 25th September 2023, the 4th Respondent asserts that the Petitioners have not tendered any evidence that the suit property has been sub-divided. The 4th Respondent equally states that the suit is both res Sub judice and res Judicata. In addition, the 4th Respondent states that it does not issue titles and that the mandate to do so is reserved for the 2nd Respondents.

Analysis and Determination

11. At the trial herein, the Petitioners called two witnesses who testified in support of the case. The Respondents on the hand relied on the sole testimony of the Land Registrar, Mombasa.
12. Given that the Objections to the suit were brought after the hearing had commenced, this court directed the parties herein to address the court thereon in their closing submissions.
13. I have carefully perused and considered the pleadings filed by the parties, the testimonies of their witnesses as well as the evidence adduced before the court. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Counsels representing the parties herein.
14. From the material placed before the court, the following issues arise for this court's determination:



- i. Whether the suit before the court is Sub Judice and/or Res Judicata;
- ii. Whether the Petition has met the threshold for a Constitutional Petition; and
- iii. Whether the Petitioners are entitled to reliefs sought in the Amended Petition.

I shall hence address myself to the issues in the sequence in which they are set out hereinabove.

i. Whether the Petition is Sub Judice and/or Res Judicata

15. In their opposition to the Petition, the Respondents aver that both the Petitioners and the Interested Party had previously instituted Mombasa ELC Case No. 180 of 2013; Sultanali Pyarali Molu –vs- The Registered Trustees/Officials of Burhani Sports Club & 4 Others. It is further their case that the 1st Petitioner had also instituted Mombasa ELC Case No. 26 of 2014; Atiq Saiffudin Anjarwalla and Hayati Anjarwalla –vs- Quresh ZakirHUssein Lukmanji & 6 Others. It was the Respondents’ case that while the Petitioners had withdrawn Mombasa ELC Case No. 26 of 2014, ELC Case No. 180 of 2013 wherein the Interested Party was seeking vacant possession remains pending for hearing and determination.
16. The doctrine of sub judice is captured under the Provisions of Section 6 of the *Civil Procedure Act*, Cap 21 as follows:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”
17. Dealing with the doctrine in Kenya National Commission of Human Rights –vs- The Attorney General & 17 Others (2020) eKLR, the Supreme Court stated as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary, 9th Edition as:

“Before the Court or Judge for determination.”

The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives....”
18. In the matter herein, the Respondents have submitted that the matter is sub-judice as the existence of the earlier suit filed in 2013 was admitted at the trial by Atiq Saifuddin Anjarwalla (PW2). While indeed PW2 confirmed the existence of the said suit, the Respondents did not avail any evidence of the pleadings in the said suit to enable this court to establish that this Petition offends the said doctrine of Sub judice. In particular, there was no evidence placed before the court to demonstrate that the parties



in this Petition were the same as the parties in the previous suit or were their representatives and/or that the previous dispute concerned the violation of constitutional rights as contended in this Petition.

19. As for Res Judicata, the Substantive law is captured at Section 7 of the [Civil Procedure Act](#) as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

20. On the doctrine of res judicata, the Supreme Court of Kenya in *Kenya Commercial Bank Limited – vs- Muiri Coffee Estate Limited & Another* (2016) eKLR, held as follows:

“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights...The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

21. In the matter before me, I was unable to find any basis upon which the doctrine had been invoked. No judgement or court order has been produced before this court pertaining to the earlier cases alluded to by the Respondents from which it could be inferred that the issues raised therein were similar to those in the instant Petition and that the same had been heard and finally determined. That limb of the Preliminary Objection therefore fails.

ii. Whether the matter has met the threshold of a Constitutional Petition

22. In their third limb of objection, the Respondents object to the Petition on the ground that the Constitutional avoidance principle is applicable to this Petition.

23. Blacks’ Law Dictionary, 10th Edition at Page 377 defines the doctrine of Constitutional avoidance as:

“The doctrine that a case should not be resolved by deciding a Constitutional question if it can be resolved in some other fashion.”

24. The doctrine of Constitutional avoidance therefore, deals with instances where a court will decline to deal with a matter because there exists another remedy provided in law which the party is yet to utilize. Expounding the doctrine in *Communication Commission of Kenya & 5 Others –vs- Royal Media Services Ltd & 5 Others* (2014) eKLR, the Supreme Court stated thus:

“(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 –vs- 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.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).

(258) From the foundation of the principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”

25. Dealing with a similar issue in the case of *Faraj & 3 Others –vs- Police & 2 Others* (Constitutional Petition 165 of 2020) KEHC 287 (KLR), Mativo J. (as he then was), observed as follows:

“The doctrine of avoidance is primarily viewed by courts from the position that although the court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved.”

26. In the matter before me, the Petitioners aver that together with the Interested Party they leased the suit property to the Government of Kenya on 17th December 1925 for a period of 99 years commencing 28th February 1906. It is their case that despite the expiry of the said lease on 27th February 2005 the Government had failed to hand over vacant possession and that they were unable to take vacant possession thereof due to the presence of third parties who were in physical occupation thereof. The Petitioners aver that the unconstitutional and illegal alienation of the suit property has deprived them of their constitutional rights and interests in the suit property as provided under Article 40 of the *constitution* and hence the necessity for this Petition.

27. It was however apparent to me from my perusal of the issues raised in the Petition as amended that the subject matter herein solely revolves around the proprietorship of the suit property. The main issue herein being a dispute over the ownership of the suit property and the alleged issuance of title deeds to third parties by the Respondents herein, this is a matter which in my view, qualifies as an ordinary civil claim that can as well be dealt with by this court in the exercise of its ordinary civil jurisdiction.

28. It was also apparent to me that the Petitioners were aware of the fact that this court can in the exercise of its ordinary civil jurisdiction deal with the dispute between the parties. That is supported by the fact that in the previously instituted suit said to be pending before this court, they filed an ordinary civil claim against the said third parties who are said to be occupying the suit property. There was no reason why this Petition should not take the same route.



29. As was aptly held by Lenaola J., (as he then was) in *Uhuru Muigai Kenyatta –vs- Nairobi Star Publications Limited* (2013) eKLR:

“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 *A G –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. The complaint in this case is not so serious as to attract Constitutional sanction.”

30. I stand guided by the above precedents which all point to the fact that not every infringement and/or violation of a right qualifies to be dealt with in a constitutional Petition. This court is already well clothed with jurisdiction under Article 162 (2) (b) of the *constitution* and Section 13 of the *Environment and Land Court Act* to hear and determine such disputes in the exercise of its ordinary civil jurisdiction.

31. In the premises, I do find merit in that limb of the Respondents’ Preliminary Objection dated 15th January 2025. Having so found, I did not find any basis to consider the merits of the Amended Petition herein dated 14th February 2023. The same is hereby accordingly struck out.

32. Each party shall bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 11TH DAY OF DECEMBER, 2025

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J.O. OLOLA

JUDGE

In the presence of:

a. Ms. Firdaus Court Assistant.

b. Mr. Nkonge holding brief for Ms. Onesmus Advocate for the Petitioners

c. Mr. Waga Advocate the 1st, 2nd, and 3rd Respondents

d. Ms. Katisya for the Interested Parties.

