



Nyamongo v Diocese of Kisii (St Charles Lwanga, Kisii Central Church) & 4 others (Environment and Land Petition E001 of 2024) [2025] KEELC 8658 (KLR) (11 December 2025) (Ruling)

Neutral citation: [2025] KEELC 8658 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND PETITION E001 OF 2024**

M SILA, J

DECEMBER 11, 2025

BETWEEN

CLEMENT NYAMBINYA NYAMONGO PETITIONER

AND

THE DIOCESE OF KISII (ST CHARLES LWANGA, KISII CENTRAL CHURCH) 1ST RESPONDENT

THE BOARD OF TRUSTEES, THE CHAIRMAN, SECRETARY AND TREASURER, ST CHARLES LWANGA KISII CENTRAL CHURCH 2ND RESPONDENT

LAND CONTROL BOARD CHAIR, KISII COUNTY 3RD RESPONDENT

LAND REGISTRAR, KISII COUNTY 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

(Suit commenced by way of a constitutional petition; petitioner claiming to be the rightful proprietor of the land in dispute; petitioner alleging that the 1st respondent fraudulently obtained title and took possession of the land; petitioner seeking orders inter alia for a declaration that he is the rightful proprietor of the suit land and for the cancellation of the title of the 1st respondent; cancellation of title being provided for in the Land Registration Act; no constitutional issue presented; claim of the petitioner capable of being presented as an ordinary civil suit; pursuant to the doctrine of constitutional avoidance, suit struck out)

RULING

1. This suit was commenced by way of a constitutional petition allegedly pursuant to Articles 22, 23, 25, 40, 64 and 165 of *the Constitution*. The petitioner contends to be entitled to ownership rights over the land parcel Nyaribari Chache/B/B/Boburia/4475. He pleads that this property was unlawfully



and unconstitutionally transferred to the 1st respondent. He pleads that documents of title were issued to him on 20 June 1989 which are still in his custody and possession and that he has never sold nor transferred the land to any person including the 1st respondent. He has pleaded that he enjoyed possession of the suit land until around 2015 when the 1st respondent took possession alleging to have purchased it from one Sam Nyamari Mose who in turn alleged to have bought the land from one Annah Kerubo Ocharo. He claims that these are total strangers to him. In the petition, he seeks the following prayers which I copy verbatim and any discernible errors are errors in drafting of the pleading :

- a. A declaratory that the petitioner is the legitimate and legal owner of the land parcel LR No. Nyaribari Chache/B/B/Boburia/4475 and entitled to possession, occupation, and all rights attendant to ownership.
 - b. A declaration that the 1st respondent's claim of ownership and occupation thereof land parcel LR No. Nyaribari Chache/B/B/Boburia/4475 is wrought with maldives, irregular, unconstitutional, illegal and incapable of good title warranting nullification of the title registered in the name of the 1st respondent with an order reverting the green card records of the subject of the subject property to the petitioner.
 - c. A declaration that the 1st respondent is a trespasser ab initio having been facilitated to illegally acquire title and possession of the same.
 - d. A declaration that the petitioner is the legal owner of all that parcels of land known as LR No. Nyaribari Chache/B/B/Boburia/4475 and is therefore entitled to exclusive right of ownership, possession, use and enjoyment.
 - e. An order compelling the 4th respondent to rectify the record of ownership of the property LR No. Nyaribari Chache/B/B/Boburia/4475 to reflect and underpin and insulate of ownership in the name of the petitioner.
 - f. That his Honourable Court be pleased to issue a permanent injunction against the 1st respondent, his agents and/or persons acting in his name and instructions from prohibiting further interference with the petitioner's quiet enjoyment, use and possession of the suit property; mesne profits; general damages.
 - g. An order recalling the impugned title issued in favour of the 1st respondents for nullification.
 - h. The Honourable Court be pleased to make orders and or issue remedies envisaged and or contemplated under Article 23 of *the Constitution* of Kenya 2010 with regard to the subject parcel of land.
 - i. Costs of this suit.
 - j. Interest on (f) and (g) above at court rate.
 - k. Any other and further relief this Honourable Court may deem just and expedient to grant in the circumstances.
2. I asked counsel to file submissions as to veracity of this claim as a constitutional petition and I have taken note of the submissions filed.
 3. My take of the suit is that this is nothing more than a suit for title to the suit land. It is of course claimed by the petitioner that the 1st respondent acquired title illegally for reason that he has never sold the suit land. You will see claims of trespass, mesne profits, general damages and most importantly the prayer



for nullification of title of the 1st respondent and registration of title in the name of the petitioner. There is no prayer in the petition that requires the court to make an analysis or declaration on any Article of *the constitution* save for the insertion of prayer (h) on remedies.

4. The issue of cancellation of title is a matter that is provided for in Section 80 of the *Land Registration Act*, 2012, which provides as follows :

80. Rectification by order of Court

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

5. The determination of who should own title to land between two private individual, and revocation of a title found to have been acquired fraudulently, is therefore a matter that is squarely in the domain of statutory law and does not require invocation of constitutional procedure.

6. In her submissions, counsel for the petitioner defended the filing of the suit as a petition inter alia claiming that there is violation of property rights under Article 40. Well, *the constitution* is actually the basis for all rights, but it cannot be said that all claims are therefore justiciable through constitutional petitions. Indeed, it is arguable that all cases touching on rights over land, or title to land, assert the right to own property under Article 40, but that does not mean that all land cases ought to be entertained as constitutional petitions. The doctrine of constitutional avoidance applies.

7. The Supreme Court articulated this principle in the case of Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment) where it pronounced itself as follows :

(254) The Appellate Court (Musinga J.A) agreed with Majanja J., that if indeed the appellants had violated the intellectual property rights of the broadcasters, a petition to enforce fundamental rights and freedoms was not the proper recourse, as there exists a definite legal regime for the resolution of such complaint (paragraph 136).

(255) Section 35(4) of the *Copyright Act* provides an avenue for redress, in the event of an infringement. It thus provides: Infringement of any right protected under this Act shall be actionable at the suit of the owner of the right and in any action for the infringement the following reliefs shall be available to the plaintiff? a. relief by way of damages, injunctions, accounts or otherwise that is available in any corresponding proceedings in respect of infringement of their proprietary rights; (b) delivery-up of any article in possession of the defendant which appears to the court to be an infringing copy; or any article used or intended to be used for making infringing copies..."

(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.”

- (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 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.
8. In this petition, I see nothing more than a claim for title to land which can be presented by way of an ordinary suit. Indeed, the issues herein are best determined through an ordinary suit where parties can present claims and/or counterclaims, and present witnesses in the normal manner for examination and cross-examination. I have seen nothing in the submissions of counsel for the petitioner which pronounces that the issues presented in this suit could not be presented through an ordinary suit.
9. Thus, on the basis of the doctrine of constitutional avoidance, this suit is hereby struck out with costs. In my discretion, I cap costs at Kshs. 100,000/= to the respondents
10. Orders accordingly.

DATED AND DELIVERED THIS 11 DAY OF DECEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Ms. Nyaboke h/b for Mr. Mose Nyambega for the petitioner

No Appearance on the part of the respondents

Court Assistant – David Ochieng’.

