



**Oucho & 2 others v Opiyo & 4 others (Environment and Land Petition E028 of 2024) [2025] KEELC 8613 (KLR) (10 December 2025) (Judgment)**

Neutral citation: [2025] KEELC 8613 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND PETITION E028 OF 2024  
SM KIBUNJA, J  
DECEMBER 10, 2025**

**BETWEEN**

**JOHN ABURA OUCHO ..... 1<sup>ST</sup> PETITIONER  
MRIMA YOUTH GROUP ..... 2<sup>ND</sup> PETITIONER  
COMMISSIONER FOR HUMAN RIGHTS AND JUSTICE ..... 3<sup>RD</sup> PETITIONER**

**AND**

**PATRICK OMONDI OPIYO ..... 1<sup>ST</sup> RESPONDENT  
COUNTY LAND REGISTRAR MOMBASA ..... 2<sup>ND</sup> RESPONDENT  
BERNAND GICHUKI MWANGI T/A SURE AUCTIONEERS .... 3<sup>RD</sup>  
RESPONDENT  
TOM ODHIAMBO ONYANGO ..... 4<sup>TH</sup> RESPONDENT  
MWARANDU & CO. ADVOCATES ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. Vide the petition dated 13<sup>th</sup> December 2024, the petitioners sought for the following prayers:
  - a. “A declaration is hereby issued that the 1<sup>st</sup> petitioners eviction from premises known as plot number 1960 Ex Waitiki Likoni Mombasa was unlawful, wrongful and unprocedural.
  - b. A declaration that the 1<sup>st</sup> petitioner’s right to own property has been violated and/or infringed.
  - c. An order of permanent injunction restraining the respondents by themselves, their servants, agents, employees, proxies and any other person acting on their behalf from selling, advertising for sale, disposing off, transferring, developing and/or carrying any developments thereat, charging, committing any other acts of waste and/or generally interfering with the 1<sup>st</sup>



petitioner's ownership, use, possession, occupation and/or quiet enjoyment of all that property comprising of plot No. 1960 Ex Waitiki Likoni-Mombasa.

- d. An order of mandatory injunction compelling the respondents to forthwith vacate and/or deliver to the 1<sup>st</sup> petitioner vacant possession of all that property comprising of plot No. 1960 Ex-Waitiki Likoni-Mombasa and in default the respondents be forcibly evicted from all that property comprising of plot No. 1960 Ex-Waitiki Likoni-Mombasa to be enforced by a court bailiff assisted by officer commanding Shelly Police Station.
- e. Damages for wrongful and unlawful eviction.
- f. An order requiring the respondents to pay mesne profit to the 1<sup>st</sup> respondent. (?)
- g. My [sic] other order [?] may deem fit to grant.
- h. Costs of this petition to be borne by respondents.”

The petitioners averred inter alia that the 1<sup>st</sup> petitioner acquired a 100 by 115 feet plot comprising of plot No. 1960 Ex Waitiki, Likoni, suit property, from the 2<sup>nd</sup> petitioner, and built a residential house where he has been residing in and renting a portion thereof to tenants; that on 29<sup>th</sup> November 2024 the respondents unlawfully, wrongfully, irregularly and unprocedurally evicted him and his tenants from the suit property, without notice; that the said eviction amounted to a violation of his constitutional right to own property; that respondents have since 2010 been determined to dispossess him of the said property by filing a suit against him and proceeding to obtain orders without serving him; and using an eviction order for plot No. 160 and to evict him from plot No. 1960 through fabrication and misrepresentation. The petitioners further averred inter alia that they relied on Article 3(1) of *the Constitution* that bestows obligations on every person to respect, uphold and defend *the Constitution*; that they have a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened as envisaged under Article 22(1) of *the Constitution*; that under Article 258(2) of *the Constitution*, the petitioners have a right to institute court proceedings in the public interest to thwart threats to *the Constitution*; and this court has the powers under Articles 23(1), 162(2) and 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.

2. The petition is opposed by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents through their replying affidavits sworn on the 10<sup>th</sup> January 2025, 16<sup>th</sup> January 2025, 16<sup>th</sup> January 2025, and 15<sup>th</sup> January 2025 respectively, inter alia deposing that the 1<sup>st</sup> respondent is the legal owner of the suit property; that the 1<sup>st</sup> respondent and 1<sup>st</sup> petitioner had a loan agreement secured by the suit property's title and cunningly the 1<sup>st</sup> petitioner filed ELC No. 2921 of 2009 claiming he had purchased the land from him; that the 1<sup>st</sup> petitioner withdrew the suit and the 1<sup>st</sup> respondent's counterclaim was heard and 1<sup>st</sup> petitioner was ordered to return the original title document and pay him Kshs.500,000 as undertaking for damages; that 1<sup>st</sup> petitioner filed ELCA No. 24 of 2021 and partially succeeded with the award of Kshs.500,000 being set aside, and in place the 1<sup>st</sup> respondent was directed to move the trial court for an inquiry of damages; that the 1<sup>st</sup> petitioner through proxies filed SCCCOMM No. E411 of 2023 seeking refund of the money relating to the sale of the suit property but it was dismissed on 26<sup>th</sup> July 2023; that the 1<sup>st</sup> respondent moved the trial court inquiry of damages vide application dated 22<sup>nd</sup> September 2023 and was awarded Kshs.4million, and 1<sup>st</sup> petitioner was directed to voluntarily vacate in 45 days or be forcefully evicted from the suit property; that he moved the court in ELCC No. E121 of 2022 for vesting order over the suit property, and that the 1<sup>st</sup> petitioner applied to be joined; that the vesting order was granted through the consent of 13<sup>th</sup> June 2023, and the 1<sup>st</sup> petitioner has filed an application dated 13<sup>th</sup> December 2023 to set aside the said consent that was coming for hearing on 16<sup>th</sup> January 2025; that the 1<sup>st</sup> petitioner



then filed this application and petition with the sole aim of attacking the Justice Munyao Sila's orders in ELCA No. 24 of 2021 and the ruling of 11<sup>th</sup> December 2024 by Justice Matheka in ELCC No. E121 of 2022; that the 1<sup>st</sup> respondent was represented by the 5<sup>th</sup> respondent's firm of advocates, and the petition should be dismissed with costs.

3. The 2<sup>nd</sup> respondent also opposed the petition through the replying affidavit of Segoo M. Mwanyarkiy, Mombasa County Land Registrar, sworn on the 27<sup>th</sup> February 2025, inter alia deposing that the dispute is over plot No. 1960, Mombasa-Likoni, Ex-Waitiki, that from the green card emanated from the County Government of Mombasa; that it was registered with 1<sup>st</sup> petitioner on 14<sup>th</sup> June 2017 as a lessee and on 21<sup>st</sup> September 2023, the County Land Adjudication and Settlement officer was directed to implement a court order on the suit property; that on 25<sup>th</sup> September 2023 the title documents relating to the suit property were surrendered to the National Titling Centre for amendment of the lease to reflect the 1<sup>st</sup> respondent; that on the 3<sup>rd</sup> October 2023 the Director, Land Adjudication and Settlement officer was directed to implement the court order and on 17<sup>th</sup> October 2023, the leasehold interest over the suit property was issued to the 1<sup>st</sup> respondent, in compliance with the vesting order issued by the Hon. Lady Justice Matheka on 13<sup>th</sup> June 2023 in ELCC No. 121 of 2022 (OS).
4. That pursuant to the directions issued on the 16<sup>th</sup> July 2025, the learned counsel for the 2<sup>nd</sup> respondent, 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, & 5<sup>th</sup> respondents and petitioners filed their submissions dated 8<sup>th</sup> July 2025, 11<sup>th</sup> August 2025 & 2<sup>nd</sup> October 2025 respectively, that the court has considered.
5. From the facts in the petition, affidavit evidence and submissions by the learned counsel, the following issues arises for the court's determinations:
  - a. Whether the petitioners' rights to property has been violated and or threatened to be infringed.
  - b. Whether the petitioners are entitled to any of the reliefs sought.
  - c. Who pays the costs?
6. The court has carefully considered the grounds on the petition, affidavit evidence by the various deponents, submissions by the learned counsel, the superior courts decisions cited and come to the following conclusions:
  - a. It is in order to start the analysis of the evidence and submissions filed in support and opposition of the petition by reiterating what the court stated at paragraph (c) of the ruling delivered on 16<sup>th</sup> July 2025 in respect of the petitioners' application dated 13<sup>th</sup> December 2024 for conservatory orders, that:

“It would however be amiss if I fail to acknowledge for posterity's sake, that it is obvious the 1<sup>st</sup> petitioner and the 1<sup>st</sup> respondent have had several litigations before this court and the lower court over the suit property, subject matter of this petition and application. The petitioners have through their affidavit evidence and submissions blamed the respondents for evicting the 1<sup>st</sup> petitioner from Parcel 1960 on the strength of an eviction order in respect of parcel 160, thereby occasioning the commencement of this petition. The question that is left unanswered is why the petitioners did not move to the court that had issued the impugned eviction order for appropriate orders instead of resorting to an entirely new proceeding. That would have avoided a multiplicity of suits over the same subject matter and between the same parties, which would easily run afoul to the subjudice and res judicata provisions of sections 6 and 7 respectively, of the *Civil Procedure Act* chapter 21 of



Laws of Kenya. Having applied the facts presented so far by both sides, the previous litigations between the parties and the superior courts decisions as summarized above, I find the petitioners have failed to establish the existence of a prima facie case with a likelihood of success. They have also failed to show that there is a likelihood of the substratum of the petition being rendered nugatory. This is because the impugned eviction was emanating from a court order obtained through a judicial process, and the petition and application filed herein are not an appeal from the trial court's orders. It is therefore in the public interest not to issue the conservatory and prohibition orders sought herein as there exists other litigations between the parties through which any aggrieved party may move the court for the desired orders."

After the court delivered the ruling referred to above, the parties filed their submissions for and against the petition. I therefore find it necessary to establish whether the petitioners claim meet the threshold of a constitutional petition in view of the finding through the above ruling that the question of ownership and occupation of the suit property has already been determined through judicial processes in which the 1<sup>st</sup> petitioner and 1<sup>st</sup> respondent participated.

- b. In the case of Mukhobi versus Mukhobi & Another [2025] KEELC 5276 (KLR) the court held as follows:

"The threshold for constitutional petitions was set in the case of Anarita karimi Njeru -vs The Republic (1979) eKLR where it was held that constitutional petitions should set out with a reasonable degree of precision the petitioner's complaint, the provisions of *the constitution* alleged to have been infringed and the manner in which those provisions of *the constitution* have been infringed."

In the above case the court also cited with approval the case of Mumo Matemu -versus- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR in which the Court of Appeal stated that:

"It is our finding that the petition before the High court was not pleaded with precision as required in Constitutional petitions. Having reviewed the petition and Supporting Affidavit we have concluded that they did not provide adequate particulars of the claims relating to the alleged violation of *the Constitution* of Kenya and the Ethics and Anti- Corruption Commission Act, 2011, accordingly the Petition did not meet the standard enunciated in the Anarita Karimi Njeru Case"

The question of ownership and possession of the suit property having been decided through the previous litigations as particularized in paragraph (2) above is incapable of satisfying the threshold required of a constitutional petition. A claim that has already been a subject matter of a civil litigation from the lower court to this court cannot form the subject matter of a constitutional petition to this court as if it is a fresh litigation. The party(ies) not satisfied by the decision of this court sitting as a civil court should consider moving to the Court of Appeal or seek for review but not coach the already decided claim as a constitutional petition as that is an abuse of court process, and such a claim is res judicata the previous decisions.

- c. The petition is therefore, without merit and is for dismissal. This petition was in pursuit of private property rights, as opposed to public interest litigation. The petitioners having failed in their petition will pay the respondents' costs.



7. In view of the foregoing conclusions, the court finds the petitioners have failed to establish their claim against any of the respondents to the standard required by the law. The court therefore orders as follows:

- a. That the petition dated 13<sup>th</sup> December 2024 is hereby dismissed.
- b. That the petitioners are to pay the respondents' costs in the petition.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10TH DAY OF DECEMBER 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Petitioners : Mr Kamwendwa

Respondents : Mr Kahindi For Mwarandu For 1<sup>st</sup> Respondent

Kalekye-court Assistant.

