Mutua & another v County Commissioner Machakos & 3 others (Environment and Land Petition 4 of 2024) [2026] KEELC 265 (KLR) (28 January 2026) (Judgment)

Neutral citation: [2026] KEELC 265 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND PETITION 4 OF 2024

NA MATHEKA, J

JANUARY 28, 2026

BETWEEN

FRANCIS MULWA MUTUA .... 1ST PETITIONER

BONIFACE KIMANTHI JOEL .... 2ND PETITIONER

AND

THE COUNTY COMMISSIONER MACHAKOS .... 1ST RESPONDENT

THE CABINET SECRETARY FOR LAND AND PHYSICAL PLANNING .... 2ND RESPONDENT

THE ATTORNEY OF GENERAL .... 3RD RESPONDENT

JOHN MUTHUSI NGUNANGA .... 4TH RESPONDENT

JUDGMENT

1. The Petitioners Francis Mulwa Mutua and Boniface Kimathi Joel the 1st and 2nd Petitioners herein state that there was a Minister's Appeal Case Number 91 of 2007 before the 1st Respondent in this Petition. The parties in the said appeal were the 4th Respondent herein who was the Appellant and the late Sakayo Mutua Mulwa who was the Respondent but deceased as at the time of the hearing of the said appeal. The said appeal was against the decision and or Ruling of the Land Adjudication Board given in respect of land parcel number Mitaboni/ Mitaboni/ 2612 on the 18th July 2008 by the said board which comprised of the Chairman and two members. According to the Land Adjudication Register the said land was at the hearing of the said appeal registered and it is still registered in the names of four people who were Ngunanga Kitele, Naftali Yusuf Kitele, Teresia Monthe and Esther Muui and the said record has not changed to date.

2. Despite the fact that the said four people are on record as owners of the said land the case before the adjudication board and also before the Minister's appointee who was the 1st Respondent herein was

conducted in the presence and involvement of representatives of only two people out of the four and a decision dispossessing the other two of the ownership of the said land made. The first Petitioner is the son of the Respondent in the said appeal namely Sakayo Mutua Mulwa. He is a legal administrator of the estate of Zakayo Mutua Mulvva alias Sakayo Mutua Mulwa per a Grant of Representation issued in September 2019 in Kangundo SPMC Succession Cause No. 168 of 2019. The second Petitioner is the grandson of Teresia Monthe one of the four parties on the land adjudication register. The 2nd Petitioner's father is known as Joel Kyungu Mulwa. He too has a Grant of Representation issued to him by the High Court Machakos in respect of the estate of his late father Kyungu Mulwa. Teresia Monthe was registered in the land adjudication record in the place of her husband who was then deceased. Her descendants who include the 2nd Petitioner occupy this land and their homes have at all material times been on this land. It was their legal expectation that the law would protect them and that they would not be exposed to dispossession without being heard. That Esther Muui the other party in the land adjudication register is the 1st Petitioner's grandmother. That in the year 2007 the 4th Respondent herein filed Land Case No. 91 of 2007 about parcel number 2612. The case was heard by the Land Adjudication board and a decision delivered on the 18th July 2008. That the Respondent herein being dissatisfied with the outcome of the said case he appealed to the Minister who delegated his powers to hear the appeal to the 1st Respondent. The appeal against the Land Board ruling dated 18th July 2008 should have been lodged with the land adjudication officer before being lodged with the Minister whose decision is final. Despite the demise of the 1st Petitioner's father the 1st Respondent issued summons dated 2nd December 2020 in the name of the deceased Respondent demanding that he appears before the Deputy County Commissioner's office (boardroom) on 8th December 2020 for hearing of appeal number 91 of 2007. The said summons dated 2nd December 2020 were served on the 1st Petitioner's wife three days before the 8th December 2020. The Minister's appeal was set for hearing by the 1st Respondent two times and in each instance no sufficient time was given for the parties' relatives to prepare for the hearing. The first time the appeal came for hearing the said summons were served three days before the hearing date while in the second instance the local chief informed the 1st Respondent of the 1st Respondent's visit to the land in question a day before the date of the visit which was on 14th January 2021. That there was no hearing notice served before the Respondent visited the parcel number 2612 on 14th January 2021.

3. The 2nd Petitioner lives on parcel 2612 as his grandmother's name is on the land adjudication records as one of the owners but the decision of the Minister has now extinguished his grandmother's interest without a hearing. The 2nd Respondent who is more than seventy years old was born and bred on this land. He has his siblings on this land too. Their children and their families live on this land. An administrative action taken that upsets this right to occupy land cannot possibly be said to be a fair one when the parties are not heard or given reason why not. In both cases when the appeal was being heard and all through from the land board case the 2nd Petitioner's family was not heard yet the name of his grandmother (that is the mother of his late father) appears on the land adjudication register as a co-owner of land parcel 2612. There are so many relatives of the people on the land adjudication register for parcel number 2612 (currently) occupying the said land who were not given a hearing in the proceedings from the Land Adjudication Board to the Minister's appeal stage which is a denial of a right to a fair hearing before a decision prejudicial to one's fate is made. Naftali Yusuf whose family members are alive have never been given an opportunity to be heard before the land adjudication register is altered to remove the name of Naftali Yusuf from the said register.

4. The Petitioners have applied to the Land Adjudication Officer Machakos County to be served with records of adjudication which appear in what is called the Black Book for parcel number 2612 but the same is yet to be supplied. The Minister lacked jurisdiction to hear the appeal in respect of parcel

2612 since no Objection Proceedings existed to attract an appeal. In respect of parcel Mitaboni/Mitaboni/3530 the Minister lacked jurisdiction since the land was already registered when the appeal was heard.

5. The Petitioners relied on the grounds that the 1st Respondent's failure to comply with the land adjudication dispute resolution procedure laid out in Sections 6, 7, 8 and 29 of the *Land Adjudication Act* was in contravention of the Petitioners' rights given under Article 47(1) of the *Constitution* of Kenya 2010 which provides that every person has a right to administrative action which is lawful, reasonable and procedurally fair.

6. That the 1st Respondent acted in contravention of the Petitioners' fundamental right to a fair hearing given in Articles 25(c) and 50(1) of the *Constitution* of Kenya 2010. The Petitioners were not given a fair hearing by the 1st Respondent as they were not accorded adequate time to prepare for their defence. The 1st Petitioner was not given sufficient time to prepare and put a defence against the appeal as notice to attend the Minister for hearing was issued on 2nd December 2020 and the suit was set down for hearing on 8th December 2020. Further the said hearing Notice was addressed to the 1st Petitioner's deceased father and not the Petitioner. That the 1st Respondent acted in total disregard of the Petitioners' right to a clear protection of the law when he proceeded and made orderswithout jurisdiction as far as Mitaboni/Mitaboni/3530 was concerned. The said land had already been registered and a title deed. The said 1st Respondent's decision was reached without due observation of the provisions of the *Land Adjudication Act* to wit that the Land Registrar would only register land after a land adjudication register was finalized or closed and for that matter the Respondent had no jurisdiction to subject the adjudication process afresh to Mitaboni/Mitaboni/3530. The Respondent's decision is illegal in as far as Mitaboni/Mitaboni/3530 is concerned as it was made without jurisdiction. The 1st Respondent failed to appreciate that the Minister's appeal was about land parcel 2612 and not land parcel 3530 and deal with the said land parcel which was still at the adjudication level as opposed to parcel number 3530 which had already moved from the adjudication level to registration by the Land Registrar. The 1st Respondent was functus officio after completing the Land Adjudication Register under Section 24 and 25 of the *Land Adjudication Act* and submitting the same to the land registrar to make title document for Mitaboni/Mitaboni/3550 and could not revisit it and make fresh orders for its subdivision as that infringed on the Petitioners' right to the clear protection of the law that legal decisions will not be pronounced and retracted randomly.

7. The Petitioners sought the following reliefs;

    1. A declaration that the decision of the 1st Respondent made on 25th May 2022 in Minister's Appeal Number 91 of 2007 was made without jurisdiction in as far as land Mitaboni/Mitaboni/2612 is concerned and its therefore null and void and hereby set aside.

    2. A declaration that the decision of the 1st Respondent made on 25th May 2022 was made without jurisdiction in as far as land Mitaboni/Mitaboni/ 3530 is concerned and its therefore null and void and hereby set aside.

    3. An order permanently restricting alteration of the Land Adjudication records for Mitaboni/Mitaboni/2612 be and is hereby made against the Respondents save with orders of a competent court or body of competent jurisdiction.

    4. An order permanently restricting alteration and or change of the current registration of Mitaboni/Mitaboni/3530 be and is hereby made against the Respondents save with express orders of a competent court or body of competent jurisdiction.

    5. Any other relief that this court may deem just and fit to grant.

6. Cost of this Petition be awarded to the Petitioners.

8. 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."

9. The Court of Appeal in Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR, emphasized 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."

10. I have perused the petition and evidence in support and I do note that as much as the Petitioners have cited Articles 47(1), Articles 25(c) and 50(1) of the *Constitution* of Kenya 2010, 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.

11. The Petitioners' case is that there was a Minister's Appeal Case Number 91 of 2007 before the 1st Respondent in this Petition. The parties in the said appeal were the 4th Respondent herein who was the Appellant and the late Sakayo Mutua Mulwa who was the Respondent but deceased as at the time of the hearing of the said appeal. The said appeal was against the decision and or Ruling of the Land Adjudication Board given in respect of land parcel number Mitaboni/ Mitaboni/ 2612 on the 18th July 2008 by the said board. According to the Land Adjudication Register the said land was at the hearing of the said appeal registered and it is still registered in the names of four people who were Ngunanga Kitele, Naftali Yusuf Kitele, Teresia Monthe and Esther Muui and the said record has not changed to date. That it was conducted in the presence and involvement of representatives of only two people out of the four and a decision dispossessing the other two of the ownership of the said land was made.

12. The Respondents submitted that the Petition does not meet the threshold of a constitutional petition as set out in Anarita Karimi Njeru vs The Republic (1979) eKLR. That the court lacks jurisdiction to

determine this matter in view of the express provisions of Section 26 and 29 of the *Land adjudication Act* and therefore the current petition falls afoul the doctrine of exhaustion of remedies.

13. Section 26 of the *Land Adjudication Act*, Chapter 284 Laws of Kenya (the Act) provides as follows:

> (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete".

14. Section 29 of the Act provides as follows:

> (1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—(a)delivering to the Minister an appeal in writing specifying the grounds of appeal; and(b)sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final."

15. From the above provisions, it is evident that the said statute provides for avenues of dispute resolution. Secondly, the said processes are so governed as to militate against the intervention of a court. In other words, the said provision embodies the import of Article 159 (2) (c) of the *Constitution* towards resolution of disputes not necessarily through the Court process. This court has an imposed duty to similarly uphold the same. This position was taken in the Court of Appeal in Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another (2015) eKLR, where the court held as follows:

> We entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to involve the inherent jurisdiction of the High Court. The basis for that view is first that Article 159 (2) (c) of the *Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article 159 (2) (c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the high court would not be promoting but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165 (3) (a) of the *Constitution* in a way that will accommodate the alternative dispute resolution mechanisms".

16. From the above, parties are required to strictly adhere to the law especially in matters of resolution of disputes. It is also noted that under Section 29, the findings of the Minister are final. So that any challenge as to the legality of the process would only and limpidly invite judicial review proceedings. This position was restated by the court in Lepore Ole Maito vs Letwat Kortom & 2 Others (2016) eKLR as follows:

> The Act provides an appropriate mechanism for resolution of any disputes. The Minister is the apex in that dispute resolution mechanism and once an appeal is made to the Minister

and determined under the provisions of Section 29 of the Act, such determination is deemed final and is not subject to any appeal. A party therefore aggrieved by the Minister's decision can only challenge such determination by way of judicial review and not otherwise if he considers the Minister acted wrongly or exceeded his jurisdiction."

17. The substance of the Petition is that the appeal proceedings, emanating from the decision dated 18th July 2008, as conducted by the 1st Respondent. That it was unlawful for the 1st Respondent to admit for appeal the decision of a land board knowing that Section 29 of the *Land Adjudication Act* provided for only a decision of a land adjudication officer to be admitted as an appeal. The first action was therefore ultra vires and illegal as it lacked the legal backing the same being in violation of the clear provisions of the *Land Adjudication Act* which required that after a decision of a Land Adjudication Board the appeal should go to the Land Adjudication officer and lastly to the Minister. In this case the appeal from the Land Board went straight to the Minister. That in view of the fact that proceedings under the *Land Adjudication Act* are deemed to be judicial proceeding per Section 12 of the Act it was unlawful and unprocedural for the 1st Respondent to proceed to hear a matter in the absence of the actual parties. In the instant case the Appellant was absent while the Respondent was deceased. The other two co-owners were absent. The Petitioners' legitimate expectation that the rules of civil procedure would be followed as far as appearance of the parties and adducing of evidence was concerned. That this is what is envisaged in Section 12 of the *Land Adjudication Act*.

18. I find that the substratum of the allegations preferred by the Petitioners are in the nature of an appeal. The Petitioners are merely dissatisfied with the the case before the adjudication board and also before the Minister's appointee

19. In my view, going by the allegations above, there is no presence of constitutional violations. The grievances did not warrant the filing of a Constitutional Petition in the manner dictated by the Petitioner. Moreover, if the Petitioners were aggrieved with the procedural steps or unreasonableness of the impugned decision they ought to have filed judicial review proceedings and not the present dispute as soon as was practical. Thus, I see no constitutional violations as contemplated by the Petitioner.

20. In Communications Commission of Kenya & 5 others vs 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."

21. Similarly, in Uhuru Muigai Kenyatta vs 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.

22. 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."

23. 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."

24. 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."

25. This petition 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 judicial review proceedings. 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 28TH DAY OF JANUARY 2026.

N.A. MATHEKA

JUDGE