



REPUBLIC OF KENYA



KENYA LAW
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**Total Energies Marketing Kenya Plc & another v National
Land Commission & 6 others (Environment and Land Petition
E088 of 2024) [2026] KEELC 228 (KLR) (20 January 2026) (Ruling)**

Neutral citation: [2026] KEELC 228 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND PETITION E088 OF 2024

JG KEMEL, J

JANUARY 20, 2026

IN THE MATTER OF ARTICLE 10, 19, 20, 21(1) & 22(10 23(1) &3

AND 165(3) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 40 AS READ
TOGETHER WITH ARTICLES 60 (1) (B), 62(1) (C) 64 & 260 AND 47 (1)
OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 23 & 24 OF THE REGISTRATION
OF TITLES ACT (CHAPTER 281 OF THE LAWS OF KENYA) NOW
REPEALED AND TRANSITIONED AS SECTIONS 24, 25 AND 26 OF THE
LAND REGISTRATION ACT (NO. 3 OF 2012) AND IN THE MATTER
OF LAND REFERENCE**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT (NO. 3 OF 2012)

AND

**IN THE MATTER OF THE UNCONSTITUTIONAL AND ILLEGAL
ALLOTMENT OF TITLE NUMBER LR 209/19703 (IR 123186)**

IN THE NAME OF SAMUEL KAZUNGU KAMBI

**IN THE MATTER OF THE UNCONSTITUTIONAL AND ILLEGAL
CONVERSION OF TITLE NUMBER 209/19703 (IR 123186)**



**THE NAME OF SAMUEL KAZUNGU KAMBI TO TITLE
NUMBER NAIROBI BLOCK 58/067 IN THE NAME OF SAMWEL
KAZUNGU KAMBI**

BETWEEN

**TOTAL ENERGIES MARKETING KENYA PLC 1ST PETITIONER
GAPCO KENYA LIMITED 2ND PETITIONER**

AND

**THE NATIONAL LAND COMMISSION 1ST RESPONDENT
THE CHIEF LAND REGISTRAR 2ND RESPONDENT
THE DIRECTOR OF SURVEY 3RD RESPONDENT
THE HON ATTORNEY GENERAL 4TH RESPONDENT
HON SAMUEL KAZUNGU KAMBI 5TH RESPONDENT
RIVA OILS LIMITED 6TH RESPONDENT
DEVELOPMENT BANK OF KENYA LTD 7TH RESPONDENT**

RULING

[with respect to the Preliminary objection dated 9/10/25]

1. Before the court is the Preliminary Objection dated 9/10/25 filed by the 5th and 6th Respondents [the objectors] in respect to the Petition and Application dated 30/10/24 on the following grounds;
 - a. That the Application and the Petition are misconceived, incurably defective, incompetent, frivolous and vexatious, and therefore an abuse of the process of the court.
 - b. That this honourable court lacks the requisite jurisdiction to determine the application and the Petition, and/or issue the orders sought therein, pursuant to the provisions of Articles 162 and 165 of *the Constitution* of Kenya 2010 and Section 13 of the *Environment and Land Court Act*, 2011
 - c. That the Application and the Petition are premature and the same is a breach of the doctrine of constitutional avoidance.
2. On 13 /10/25, the parties elected to canvass the preliminary objection through written submissions. The 5th and 6th Respondents filed their submissions dated 5/11/25, while the Respondents' submissions are dated 27/11/25. The 7th Respondent's written submissions are dated the 2/1/2026.

The written submissions

3. The 5th and 6th Respondents submitted that the jurisdiction of a court is so fundamental that it can be raised at any stage of the proceedings, even including on appeal. However, it is always prudent to raise it at the earliest opportunity. The case of Mulemi vs. Angweye & Another (2021) KECA 214 (KLR) was



- cited in support. It was further submitted that, to the extent that the objection centres on the court's jurisdiction to determine the dispute before it, the objection is a pure point of law.
4. Reliance on Articles 162 and 165 of *the Constitution*, read together with Section 13 of the *Environment and Land Court Act* [ELC], led Counsel for the objectors to submit that the court lacks the requisite jurisdiction. It was submitted that a litigant has two options to approach the court; either by way of a constitutional petition invoking the provisions of Article 165(5) (b) [which divests the High Court of jurisdiction over matters reserved for a court of equal status] or by way of an ordinary suit invoking its specialised jurisdiction under Article 162(2) (b) read together with Section 13 of the ELC Act.
 5. It was argued that a litigant seeking determination of a land ownership, occupation, or title dispute should initiate an ordinary civil case and present evidence and establish rights through trial, rather than filing a constitutional petition as is the case here. Counsel referred to the decision in *Miheso vs. Kibetu & 9 Others* [2022] EKLK, where the court noted that if rights have not been determined, it would be premature to ask the court to decide on the violations of rights on the suit land. In the instant case, the court stated that its jurisdiction was wrongly invoked because the dispute was not constitutional in nature but an ordinary land ownership matter, and that the Petitioner, therefore, ought to have filed a Plaint before the ELC Court for determination.
 6. Accordingly, it was submitted that, to the extent the dispute between the Petitioners and the 5th Respondent concerns the ownership of the suit land, with both parties laying claim to it, the petition and the accompanying application are premature before the court and in breach of the doctrine of constitutional avoidance, which bars a court from determining a constitutional issue when other forums provided by law exist to do so. See the case of *Communications Commission of Kenya & 5 Others Vs Royal Media Services & 5 Others* (2014) EKLK.
 7. In summary, the 5th and 6th Respondents submitted that the dispute has nothing to do with a constitutional violation at all, but is a land ownership matter that ought to be determined under the provisions of Section 13 of the ELC Act, which empowers the court to hear and determine all disputes concerning the environment and land, including title, tenure, boundaries, and any other interest in land. Additionally, it was submitted that the instant petition is an abuse of the court's constitutional process and is legally untenable.
 8. The 7th Respondent associates itself fully with the 5th and 6th Respondents' Notice of Preliminary Objection and their submissions. It has submitted that the basis of the Petition, as set out in the replying affidavits of the 1st, 5th, 6th and 7th Respondents, concerns a dispute over the ownership of the suit land, and, as it is, the Petition offends the doctrine of constitutional avoidance and the requirement to exhaust statutory remedies.
 9. In opposing the Preliminary Objection, the Petitioner submitted that the primary source of the ELC Court's jurisdiction is *the Constitution* under Articles 162(2) and 165(5) of *the Constitution*, read together with Section 13 of the ELC Act.
 10. It was submitted that the Petitioners seek judicial intervention to address ongoing interference with their proprietary rights in LR No 209/13767 (IR 80524), based on a rival title held by the 5th Respondent, whose acquisition is deemed unlawful and irregular. Consequently, it was submitted that the court will be called upon to determine the questions of acquisition and ownership of the property between the Petitioners and the Respondents. The court was urged to find that the suit is properly before it and that the court is seized of jurisdiction to hear the Petition.
 11. On the question of whether the Petition is in breach of the doctrine of constitutional avoidance, the Petitioner submitted and extensively quoted from the Supreme Court case of *Communications*



Commission of Kenya & 5 others Vs Royal Media Services Limited & 5 others [2014] EKLK, which applied the principles in Anarita Karimi Njeru Vs The Republic [1976-1980] KLR 1272. In that case, the court held that, in a constitutional dispute, a party must show the rights allegedly infringed and the basis of its grievance. The necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of the contravention was found to play a positive role in the foundation of the conviction and in good faith in engaging the constitutional process of dispute settlement.

12. The Petitioners submit that their rights under Articles 40, 60(1)(b), 62(1)(c), 64, 260 and 47(1) of *the Constitution* have been violated by the 5th, 6th and 7th Respondents. In addition, it was submitted that the 1st, 2nd, 3rd, and 4th Respondents abdicated their constitutional mandate and acted ultra vires as custodians of land records, including the subject suit land. The court was urged to hold that Article 20(3) of *the Constitution* clothes virtually all legal issues, including the interpretation and application of legislation and common and customary law, with a constitutional imperative. It was also submitted that the doctrine of constitutional avoidance is not absolute. The exceptions to the doctrine, as submitted by the Petitioners, include, inter alia, where the constitutional violation is so clear and of direct relevance to the matter, as in the instant Petition.
13. Furthermore, the Petitioners submitted that the Petition raises issues relating to private rights and public interest in respect of the integrity of land administration, public trust in state institutions, the accountability of public officers, and anti-corruption measures. It was further submitted that the Petition seeks the court's intervention to address the abuse of office by the 1st, 2nd, 3rd, and 4th Respondents, as official custodians of land records in Kenya, and the alleged gross violations of the Petitioners' right to property under Articles 40 and 47 of *the Constitution* by the 5th and 6th Respondents.
14. The court was urged to find that it has the requisite jurisdiction to determine the petition.

Analysis and determination

15. Having considered the Preliminary objection, the rival submissions and all the material placed before the court, the only key issue for determination is whether the constitutional jurisdiction of the court has been improperly invoked.
16. Before I address the primary issue for consideration, it is essential to establish whether the objection pertains solely to a point of law. The principles applicable in the validity or otherwise of a Preliminary Objection were articulated by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd [1969] EA 696. At page 700, Law JA stated:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
17. For a preliminary objection to be successful, first, it must address a pure point of law; second, it must be argued under the assumption that all facts alleged by the opposing party are correct; and finally, it cannot be invoked if any fact requires ascertainment or if the matter involves the exercise of judicial discretion. A valid preliminary objection, if upheld, should result in the dismissal of the suit.



18. The instant preliminary objection seeks to challenge the constitutional jurisdiction of this Court to hear and determine the Petition before the court. For that reason, therefore, I find that the objection raises a pure point of law.
19. The next issue is whether the objection is merited, or, put differently, whether the court's constitutional jurisdiction has been improperly invoked.
20. There is a long thread of decisions by courts on why a court's jurisdiction is important in litigation. In any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The Supreme Court stated in the Matter of Interim Independent Electoral Commission [2011] eKLR as follows:
- (29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”
- 30 The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.
21. In the case of Samuel Macharia Kamau Vs KCB & Others (2012) EKLR the court held that;
- “a court's jurisdiction flows from either *the Constitution* or legislation or both. Thus a court can only exercise jurisdiction as conferred by *the constitution* or other written laws. it cannot arrogate to itself jurisdiction exceeding that which is confirmed upon it by law. The court must operate within the constitutional limits. it cannot expand jurisdiction through judicial craft or innovation.”
22. The ELC Court traces its jurisdictional roots to Article 162 of *the Constitution* which states;
162. System of courts
- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.



23. The ELC Court, which is a court of equal status to the High Court, has been clothed with authority by *the Constitution* under Article 165(3)(b) read together with Article 165(5) (b) to resolve questions concerning whether a right or a fundamental freedom in the Bill of Rights has been violated.
24. The mandate of the court, as set out in *the Constitution*, has been operationalised under Section 13 of the ELC Act, which elaborately provides for the jurisdiction of the Court that;
13. Jurisdiction of the Court
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.;
25. From the foregoing, it is not in dispute that the ELC Court enjoys both original and appellate jurisdiction to hear matters of environmental and land law, including those of a constitutional nature involving the violation or threat to infringement of constitutional rights.
26. Is this a matter that raises the question of whether the court's constitutional jurisdiction has been improperly invoked? The principle of constitutional avoidance, when applied, means the court will avoid constitutional adjudication of a matter, if an adequate alternative remedy is provided by law, such as a civil suit to determine ownership. It is our law that where a clear procedure for the redress of a particular grievance is prescribed by *the constitution* and/or an Act of Parliament, that procedure should be strictly followed. See the case of *The Speaker of the National Assembly vs Karume* (1992) KLR 22.
27. In the case of *Benson Ambuti Atega & two others vs. Kibos Distillers Limited & five others* [2020] eKLR, the Supreme Court clearly articulated its position regarding the doctrine of judicial abstention under such circumstances. The court held that the core issue in the Petition before the trial court concerned whether the three appellants were polluting the environment and whether their Environmental Impact Assessment (EIA) licences had been fully processed. Moreover, the court determined that the appropriate authority with original jurisdiction to hear and determine the dispute was either the tribunal or the National Environment and Environment Committee (NEEC), rather than the Environment and Land Court (ELC).



28. On Judicial abstention, as with judicial restraint, the court stated that

“it is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such a determination, if there are other appropriate legislatively mandated institutions and mechanisms.

(52) The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) also noted that a State Court determination would indeed bind the federal court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal court. If such a reservation is made, the parties can return to the federal court, even if the State Court makes a ruling on the issue.”

29. The issue of constitutional avoidance has been the subject of judicial inquiry over time, and I shall refer to a few such cases. In the case of *Communications Commission of Kenya & 5 others Vs Royal Media Services Limited & 5 others* (2014) EKLK, the apex court stated that the principle of avoidance, also known as constitutional avoidance, entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis.

30. Similarly, in the case of *Dhow House Limited v Kenya Power and Lighting Company* (Constitutional Petition E058 of 2021) [2022] KEHC 11840 (KLR) JM Mativo held that;

“in summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant’s cause. The exceptions to the application of the doctrine of constitutional avoidance are: - (a) where the constitutional violation is so clear and of direct relevance to the matter; (b) in the absence of an apparent alternative form of ordinary relief, and, (c) where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.

Closely tied to the doctrine of constitutional avoidance and ripeness is the question whether this Petition raises a constitutional question as submitted by the Petitioner. I have severally in my decisions stated that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to



consider Constitutional rights or values. The dispute presented in this case arising from a contested electricity bill can be resolved without resorting to *the Constitution*. In fact, the definition of a constitutional question provided in the South African case of *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others* cited by the Petitioner does not support the Petitioner's argument that before this is constitutional Petition. Courts abhor the practice of converting every question into a constitutional question which amounts to trivializing *the Constitution*".

31. To answer the question in issue, the court has keenly considered the Petitioners' case, including the reliefs sought. In summary, the reliefs include: a declaration that the suit property was not available for any allotment by the Commissioner of Lands on 24/3/2010 to the 5th Respondent or any other person having been registered in the name of the 2nd Petitioner as Lessee; a declaration that the allotment of the suit property by the Commissioner of Lands to the 5th Respondent was unlawful, irregular, and illegal; a declaration that the application by the 2nd Respondent for conversion and migration of the suit property to Nairobi Block 58/067 was unlawful, irregular and illegal; a permanent injunction restraining the Respondents from trespassing or interfering with the 2nd Petitioner's proprietorship and the 1st Respondent's right of possession and use of the suit property; a declaration that the charge of the suit property by the 5th Respondent to the 7th Respondent was unlawful, irregular and illegal. In the alternative, the Petitioners seek: a declaration that the dealings of the 1st to 5th Respondents amounted to compulsory expropriation of private land hence the 2nd Petitioner is entitled to due compensation at the market current value of the land and the developments thereon; an order for compensatory damages for violation of their proprietary rights over the suit property as well interest at court rates from the date of filing this petition until payment in full.
32. According to the affidavit evidence on record, the Petitioner's case is that it is the registered owner of LR No. 209/13767 [IR 80524], having acquired it from the Kenya Railways Corporation in 1999, and has been in occupation for the past 25 years. It further avers that its peaceful possession and occupation was disrupted when it received a letter dated 4/9/24 from the 5th Respondent's counsel demanding vacant possession of the land, alleging ownership of Nairobi/Block 58/067 (formerly LR No. 209/19073 [IR 123186]). Consequently, the Petitioner asserts that its rights under Article 40 of *the Constitution* have been infringed. It contends that the suit land was unlawfully and irregularly created and allocated to the 5th Respondent in 2010, despite its continued registration in the name of the 2nd Petitioner. It further contends that the conduct of the 2nd and 3rd Respondents in purporting to alienate private property and convert it into the new land registration regime without due process constituted a clear and direct violation of its rights to property.
33. On the other hand, the 5th and 6th Respondents allege that they are the owners of Nairobi/Block 58/067 (formerly LR No. 209/19073 [IR 123186]), which they acquired through allocation from the Commissioner of Lands in 2010. They challenged the Petitioner's title, inter alia, by contending that the previous vendor of the land had indicated that it had never sold the land to the Petitioner and that it had relinquished its interest to the Commissioner of Lands, who subsequently allocated the land to the 5th Respondent.
34. The 1st Respondent stated in the affidavit sworn by Zacharia Ndege on 26/2/26 that the suit land belongs to the 5th Respondent. Paragraph 12 of the aforementioned affidavit raises a challenge to the Petitioners' title, based on a letter from the Director of Survey [NLC-2]. The deponent states that it is impossible to ascertain the Petitioners' interests from the records currently held by both the Lands Office and the Directorate of Survey and Mapping, and therefore urged the 2nd Petitioner to substantiate its claim.



35. Based on the foregoing, it is evident that the matter before the court pertains to a contested land ownership issue. The rights to ownership of the parties are protected by statute - the [Land Registration Act](#), specifically sections 25 and 26, which set out the manner for challenging titles on the grounds of fraud, misrepresentation, and/or illegality. To establish the competing interests concerning the suit land, the parties are required to present evidence, which shall subsequently be examined during cross-examination within the framework of an ordinary civil proceeding.
36. It is, therefore, my view that the Environment and Land Court has jurisdiction to hear Constitutional Petitions concerning land rights pursuant to Articles 162(2)(b) and 40 of [the Constitution](#). Nevertheless, in cases where ownership or title is disputed, as in this instance, the court has held that the appropriate forum for resolving such disputes is civil suits or statutory adjudication rather than Constitutional Petitions. Ultimately, the court finds that the preliminary objection is merited. Consequently, the Petition and the Application are hereby struck out with costs in favour of the Respondents, except for the 2nd -4th Respondents. The dispute herein being land ownership, the parties shall adduce evidence that will be tested at trial in support of their respective claims. Consequently, in observance of the principle of constitutional avoidance, the court declines to entertain the instant Petition as it ought to have been brought as an ordinary civil suit not a constitutional petition.
37. Ultimately, the court finds that the preliminary objection is merited. Consequently, the Petition and the Application are hereby struck out with costs in favour of the Respondents, except for the 2nd -4th Respondents.
38. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY, 2026 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

Mr Brian Okoth HB for Mr Ochieng Oduol

NA for the 1st – 4th Respondents

Mr Osiemo HB for Mr Nyachoti for the 5th & 6th Respondents

Mr Kipkorir for the 7th Respondent

CA – Ms. Yvette

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