



**Musyoka v Kung'u & 2 others (Constitutional Petition
E011 of 2025) [2026] KEHC 1169 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION E011 OF 2025
RC RUTTO, J
FEBRUARY 5, 2026**

BETWEEN

RICHARD MULWA MUSYOKA PETITIONER

AND

FAITH MELI KUNG'U 1ST RESPONDENT

OFFICER COMMANDING, MATUU POLICE STATION 2ND RESPONDENT

ATTORNEY GENERAL OF KENYA 3RD RESPONDENT

RULING

1. The Petitioner filed the present petition together with an application dated 24th April 2025 seeking the following orders;
 - a. The court be pleased to issue an interim stay of execution of the illegal night eviction of unknown and or secret dates against the petitioner pending the hearing and determination of the application.
 - b. The court be pleased to issue conservatory order restraining the respondents, their agents, employees, servants or any person acting on their behalf from evicting the petition from Machakos/Matuu/1105, 12835 and 12836.
 - c. The court be pleased to issue an order directing the 2nd Respondent, OCS Matuu Police Station to cease further participation in enforcing the illegal night eviction.
 - d. The Honourable court be pleased to declare that the eviction of the petitioner is unlawful, unconstitutional and a violation of Articles 27, 28, 47 and 50 of the *Constitution*.



- e. This Honourable court be pleased to direct that any future eviction, if necessary, must strictly comply with due process including proper notice and compliance with eviction and resettlement laws, proper service of notices and due process.
 - f. This Honourable court be pleased to award general, punitive and special damages to the petitioner for the violation of the fundamental rights.
 - g. This Honourable court be pleased to issue any further reliefs it deserves just as expedient in the circumstance.
 - h. The costs of the application be borne by the Respondents.
2. In response to the application, the 2nd and 3rd Respondent herein filed Grounds of Opposition dated 24th April 2025 together with a Notice of Preliminary Objection of even date.
 3. It is the Notice of Preliminary Objection dated 24th April 2025 that is before this court for determination. The objection challenges the hearing of the Petitioner's Notice of Motion Application dated 26th March 2025 on grounds that;
 - a. The court lacks jurisdiction to entertain the notice of motion application and the petition.
 - b. The suit herein is fatally defective and a waste of court's judicious time.
 - c. The suit is incompetent and ought to be struck out with costs.
 - d. The suit is frivolous and does not disclose any cause of action against the 2nd and 3rd Respondents.
 - e. The suit is an abuse to the due process of the court.
 4. Pursuant to the directions of the court, the Preliminary Objection was canvassed by way of written submissions. Only the 2nd & 3rd Respondent's submissions dated 5th May 2025 and the 1st Respondent's submissions dated 19th May 2025 that are on record.

2nd & 3rd Respondent's submissions

5. In support of the preliminary objection, the 2nd & 3rd respondent through counsel Lydia Lung'u filed framed three issues for determination namely; first, whether the High Court has jurisdiction to hear and determine the issues raised in the application and petition; second whether the suit herein amounts to an abuse of the court process and third, whether the petition meets the threshold for grant of orders sought.
6. On the first issue, counsel relied on the decisions in *Jeremiah Memba Ocharo v Evangeline Njoka & 3 others* [2022] eKLR and *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR to submit that this Court lacks jurisdiction to entertain the present matter. Counsel argued that the Petitioner seeks, among other reliefs, a stay of execution of an eviction order and conservatory orders restraining the Respondents from evicting him from the suit property. According to the Petitioner's own annexures, on 29th October 2024, the Magistrates' Court in Machakos MCCC No. 1142 of 2013, ordered that the Petitioner be evicted without further notice.
7. Counsel further submitted that although the Petitioner states that he filed an appeal before the Environment and Land Court at Machakos, he has not explained why he has now shifted to the High Court to seek reliefs relating to land matters. Counsel maintained that questions of land ownership and eviction, as raised in the petition, concern the use, occupation and title to land issues which fall



squarely within the jurisdiction of the Environment and Land Court. Accordingly, counsel urged that this Court lacks jurisdiction to hear and determine the matters presented in the application and the petition.

8. On the second issue, whether the suit amounts to an abuse of the court process, counsel submitted that, from the annexures filed by both the Petitioner and the 1st Respondent, it is evident that the 1st Respondent sued the Petitioner in Machakos MCCC No. 1142 of 2013 whereby, it sought orders of specific performance and/or eviction of the Petitioner from the suit property. Those orders were granted by the trial court. Counsel further noted that, during the pendency of the said suit, the Petitioner filed Machakos ELC JR No. E003 of 2023, which was subsequently dismissed.
9. Aggrieved by the magistrates' court judgment, the Petitioner filed Appeal No. E063 of 2024 before the Machakos Environment and Land Court, together with an application dated 18th November 2024 seeking a stay of execution. That application is already scheduled for mention before the ELC. Counsel contends that, despite invoking the appellate jurisdiction of the ELC, the Petitioner has now filed the present petition and application before this Court seeking the very same orders. In counsel's view, this amounts to forum shopping and an abuse of the court process, warranting that the petition be struck out with costs.
10. On whether the petition meets the threshold for grant of orders sought, counsel referred to the case of Anarita Karimi Njeru v Republic and submitted that the petition fails to meet the required threshold for a constitutional petition. Counsel argued that the petitioner has not pleaded a clear, precise and concise manner which of his constitutional rights have been violated. Further that the petitioner has failed to establish specific acts or omissions attributable to the 2nd and 3rd Respondents that would amount to a breach of their statutory or constitutional obligations. Counsel therefore contended that the petition is incompetent, lacks merit and should be dismissed with costs.

1st Respondent's submissions

11. In further support of the preliminary objection, the 1st Respondent through the firm of Mulu & Company Advocates filed submissions dated 19th May 2025. Counsel identified three issues for determination; first, whether the High Court is clothed with jurisdiction to hear and determine the application and the petition; second whether the suit herein is an abuse of the court process and third whether the petition meets the threshold for grant of orders sought.
12. Counsel, while referring to Joseph Njuguna Mwaura & 2 Others v Republic, Section 101 of the [Land Registration Act](#) and Section 150 of the [Land Act](#), submitted that the Petitioner principally seeks stay of execution of eviction orders and conservatory orders restraining the Respondents from evicting him from the suit property. Counsel noted that the Petitioner had been directed to clear the balance of Kshs. 700,000/= within 30 days, failing which he would be evicted without further notice. It was counsel's argument that although the Petitioner alleges to have filed an appeal before the Environment and Land Court, he has now approached this Court seeking reliefs relating to land ownership, eviction, occupation and title. Counsel maintained that such matters fall within the jurisdiction of the Environment and Land Court and not the High Court. Accordingly, counsel urged that this Court lacks jurisdiction to entertain the land matters raised in both the application and the petition.
13. On the second issue, whether the petition amounts to an abuse of the court process, counsel submitted that the Petitioner was sued by the 1st Respondent in Machakos MCCC No. 1142 of 2013, Faith Meli Kung'u v Richard Mulwa Musyoka, wherein the Respondent sought specific performance and/or eviction. During the pendency of that matter, the Petitioner filed Machakos ELC JR No. E003 of 2023,



which was dismissed. Counsel added that after judgment was delivered in Machakos MCCC No. 1142 of 2013, the Petitioner filed an appeal at the Machakos Environment and Land Court being Appeal No. E063 of 2024, together with an application dated 18th November 2024 seeking stay of execution, which is scheduled for mention on 30th June 2025 before ELC Court No. 1. Counsel submitted that, in light of these multiple and parallel filings, the Petitioner is a frivolous litigant with a penchant for forum shopping.

14. On the third issue, whether the petition meets the threshold for grant of orders sought, counsel referred to the case of Anarita Karimi versus Republic, the case of Mumo Matemu versus Trusted Society of Human Rights Alliance [2013] eKLR, the case of John Harun versus Peter Gastrow & 3 others [2014] eKLR and the case of Karatina Municipal Council & Another versus Kanyi Karoki [2015] eKLR. Counsel submitted that no constitutional issues are discernible in the petition to warrant admission and adjudication by the court. Consequently, the petition fails to meet the threshold of a constitutional petition and ought to be struck out with costs.

Analysis and Determination

15. It is my considered view that the issues that arise for determination are;
- a. Whether the Notice of Preliminary Objection dated 24th April 2025 meets the legal threshold of a preliminary objection.
 - b. Whether the preliminary objection is merited
16. The locus classicus case in which the threshold for preliminary objection was laid out is the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696. The principles were reaffirmed by the Supreme Court in the Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (2014) eKLR as follows:

“(31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd v West End Distributors (1969) EA 696:

“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....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

17. Similarly, in Dismas Wambola v Cabinet Secretary, Treasury & 5 others (2017) eKLR, the Court held thus:

“A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.



It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence....”

18. A preliminary objection is therefore confined to pure questions of law. It is argued on the basis that the facts pleaded by the Petitioner are assumed or taken to be correct at that juncture. Where there is any contest on facts, a preliminary objection cannot be sustained.
19. The Notice of Preliminary Objection filed on 24th April 2025 raises three core legal points: (a) lack of jurisdiction to entertain the application and petition, (b) abuse of court process through forum shopping, and (c) failure by the petition to meet the constitutional petition threshold. Each of these grounds, are pure points of law which, on the facts as pleaded, is capable of disposing of the petition. Accordingly, I find that the Notice of Preliminary Objection, meets the requirement of a preliminary objection as a point of law and is properly before the court. The question of whether it succeeds is considered under the second issue below.

Whether the preliminary objection is merited

20. On jurisdiction, the respondents contend that the petition principally raises issues of land, title, occupation and eviction which fall within the exclusive jurisdiction of the Environment and Land Court under the Constitution and the Environment and Land Court Act. Article 162(2)(b) of the Constitution together with the Environment and Land Court Act vest the ELC with original and appellate jurisdiction to hear and determine disputes relating to the land and the environment. Matters concerning ownership, occupation, title and eviction are therefore ordinarily for the ELC domain. Article 162(2)(b) of the Constitution provides as follows:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- a.; and
- b. the environment and the use and occupation of, and title to, land.”

21. Section 13 of the Environment and Land Court Act No.19 of 2011 provides as follows:

“In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

- i. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- ii. relating to compulsory acquisition of land;
- iii. relating to land administration and management;
- iv. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- v. Any other dispute relating to environment and land.

22. Despite the Respondents assertions that the petition falls squarely within the jurisdiction of the Environment and Land Court, the petitioner has not opposed this assertion.



23. In the present petition, the primary relief sought is a stay of execution of an eviction order and conservatory orders restraining eviction from specified land. By its nature, this relief concerns occupation and possession of land, as well as enforcement of a subordinate court judgment. The Petitioner's own annexures confirms that an appeal and a pending stay application are already before the Environment and Land Court. On the pleadings, therefore, the dispute is essentially a land and eviction matter properly within the ELC's jurisdiction, not a distinct constitutional claim requiring the High Court's intervention. While the *Constitution* permits access to constitutional remedies in the superior courts, such access cannot be used to circumvent or displace specialized jurisdiction conferred by statute. On the facts pleaded, the jurisdictional objection is well-founded.
24. Accordingly, I hold that the High Court, on these pleadings, is not the appropriate forum to grant the principal relief sought in the petition and the associated notice of motion. Those remedies should properly be pursued in the Environment and Land Court. The jurisdictional limb of the preliminary objection succeeds.
25. Regarding abuse of the court process, the respondents allege that the Petitioner is guilty of forum shopping because substantially the same relief is already pending before the Environment and Land Court, Appeal No E063 of 2024 and in an application dated 18th November 2024 for stay of execution. It is settled law that litigants must not file duplicative proceedings in different courts in a manner that constitutes forum shopping and this undermines the orderly administration of justice. Where the same cause of action and relief is before a court of competent jurisdiction, filing a parallel petition in another forum to obtain the same orders is an abuse of process. Moreover, where the petitioner has an adequate alternative remedy in a specialized court and has already invoked it, the High Court may properly decline to exercise jurisdiction. On the admitted facts, that there is a pending appeal and stay application in the ELC concerning the same eviction, the court finds that the Petitioner's conduct amounts to forum shopping and is an abuse of the court process. This limb of the preliminary objection succeeds.
26. On the threshold of a constitutional petition, it is trite that a petition must plead with precision by citing the provisions of the *Constitution* that are alleged to have been violated and a descriptive account of the said violation. A Petitioner must identify the provisions that are alleged to be violated and show how the said provisions were violated from the facts and evidence of the case. This can be ascertained by examining the Petition alone without delving into the evidence hence is an issue for which a Preliminary Objection can be raised.
27. In the petition before this court the Petitioner alleges breach of Articles 27, 28, 47 and 50 of the *Constitution*. However, the pleading falls short of the required specificity. The petition does not particularize how each of the named Articles was violated by specific acts or omissions attributable to the 2nd and 3rd Respondents. Nor does it explain why the alleged constitutional infringement requires the High Court's intervention rather than remedies available in the ELC. The allegations are general and fail to raise independent, standalone constitutional questions of sufficient nature and degree to justify the High Court's exercise of original constitutional jurisdiction. For these reasons, the petition does not, meet the established threshold for a constitutional petition. This limb of the preliminary objection therefore succeeds.
28. In conclusion, for the reasons set out above, the preliminary objection dated 24th April 2025 is upheld. The petition is dismissed. Each party to bear its own costs.
Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 5TH DAY OF FEBRUARY, 2026



RHODA RUTTO

JUDGE

In the presence of;

..... Petitioner

..... Respondent

Selina Court Assistant

