



Awino v County Government of Homabay & 5 others (Environment and Land Petition E001 of 2025) [2026] KEELC 1927 (KLR) (16 March 2026) (Ruling)

Neutral citation: [2026] KEELC 1927 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND PETITION E001 OF 2025

FO NYAGAKA, J

MARCH 16, 2026

IN THE MATTER OF: ARTICLES 3(1), 2(4), 10, 19, 20, 22, 23, 24, 27, 28, 31, 35, 40, 47, 50 & 258 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: CONTRAVENTION OF ARTICLES 10, 27, 28, 31, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION OF ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE KENYA ROADS ACT, CHAPTER 408 LAWS OF KENYA

AND

IN THE MATTER OF: CONTRAVENTION AND VIOLATION OF SECTION THE KENYA ROADS ACT, CHAPTER 408 LAWS OF KENYA

AND

IN THE MATTER OF: ARBITRARY AND UNLAWFUL DEPRIVATION OF THE RIGHTS TO PROPERTY AND

IN THE MATTER OF: MALICIOUS, DISCRIMINATING AND TARGATED INFRINGEMENT ON THE RIGHTS TO AND INTERESTS INTHE PETITIONER’S RIGHT TO PROPERTY

BETWEEN

PHILIP OUMA AWINO APPLICANT

AND

THE COUNTY GOVERNMENT OF HOMABAY 1ST RESPONDENT



**EDITH OPAR - NYAWITA SUB-LOCATION ASSISTANT
CHIE 2ND RESPONDENT**
HOMABAY COUNTY SURVEY DEPARTMENT 3RD RESPONDENT
**MOSES ODERO - RANGWE SUB-COUNTY ADMINISTRATOR 4TH
RESPONDENT**
DAVID ANDUGO - KAGAN WARD ADMINISTRATOR 5TH RESPONDENT
**PROJECT MANAGEMENT COMMITTEE CHAIRPERSON JANE HILDAH
KONDITI 6TH RESPONDENT**

RULING

Introduction

1. The Petitioner filed a Petition dated 13th January 2025. In his petition, he sought the court's intervention against the actions of the Respondents whom he averred were violating his constitutional rights. In particular, the Petitioner alleged that the Respondents had encroached and destroyed his property which is situate on land parcel number North Nyokal/ Gongo/520.
2. The Petitioner alleged that, on 2nd January 2025, the Respondents arbitrarily and unlawfully entered his property with heavy machinery and in the guise of repairing and /or expanding the Bondo Mariwa Road. The outcome of the said encroachment and destruction of the portioner's property is said to have left a trail of destruction. He alleged that the actions left his home exposed yet his property did not encroach on the road the Respondents were repairing and/or expanding.
3. The Petitioner claimed that as a result of the alleged encroachment and destruction, several of his constitutional rights, including the right to property, dignity, privacy and fair administrative action had been violated by the Respondents.
4. The Petitioner prayed for a declaration that the Respondents be held jointly and severally liable for violating the Petitioner's constitutionally guaranteed rights, including the rights protected under articles 40, 27, 28, 31, 47 and 50 of *the constitution*. The Petitioner also prayed for a permanent injunction to the Respondents to restore the Petitioner's property that is capable of being restored and compensation for the damage occasioned to the Petitioner, being Kshs. 1, 290,160/=

The Preliminary Objections

5. The 1st, 3rd, 4th and 5th Respondents filed a Preliminary Objection dated 30th June 2025. Their Objection was founded on four grounds bur which they clustered into two, namely, lack of locus standi as the sum of the first two, and doctrine of constitutional avoidance as the sum of the last two. The four full grounds were that:
 1. The Petition herein is ill conceived, defective incurable, bad in law and in competent as the registered owner of the suit property is Onyango Oloo, therefore the Petitioner has no Locus Standi or capacity to institute this suit.
 2. As per the County surveyor's report dated 7th January 2025 the registered owner of the suit property Land parcel no North Nyokal Gongo/520 is Onyango Oloo therefore Philip Ouma Awino has no capacity to institute this suit.



3. That the Petition is claim for land encroachment alleging trespass but it is framed as a Constitutional petition without raising any genuine Constitutional Questions contrary to the Principles of constitutional avoidance.
 4. Therefore, the petition is inherently flawed and constitutes an abuse of the legal process, warranting its dismissal with cost at the outset.
6. On their part, the 2nd and 6th Respondents filed their Preliminary Objection dated 10th March 2025. It was based on three grounds, being:
1. That the petition violates the principle of constitutional avoidance, which stipulates that courts should only interpret *the Constitution* when absolutely necessary, as articulated in the Judgement in High Court Petition No. 455 of 2018 – Consumer Federation of Kenya v Toyota Motors Corporation & 4 Others.
 2. That the petition is a simplistic claim for land encroachment alleging the illegality of demolition of structures and trespass, yet it is camouflaged as a constitutional petition.

It should not have been submitted as a constitutional petition, but rather as an ordinary plaint, thereby circumventing the Last Resort Rule that dictates that judges/courts should ideally adjudicate cases based on non-constitutional grounds first before resorting to constitutional grounds.
 3. The petition at hand lacks the essential articulation of the genuine, earnest, and crucial dispute between the involved parties necessary for its resolution. Consequently, the dispute could be more suitably addressed through alternative legal avenues, such as a traditional civil lawsuit. Therefore, the petition is inherently flawed and constitutes an abuse of the legal process, warranting its dismissal with costs at the outset.
7. In summary the grounds of the two sets of Preliminary Objections are that,
- a. The petition is inherently flawed and constitutes an abuse of the legal process, warranting its dismissal with cost at the outset
 - b. The petition at hand lacks the essential articulation of the genuine, earnest, and crucial dispute between the involved parties necessary for its resolution.
 - c. The Petitioner lacks locus standi to institute the Petition.
 - d. The Petition offends or is contrary to the doctrine of constitutional avoidance

Submissions of the Parties

8. The preliminary objection was canvassed by way of written submissions. The Petitioner filed his written submissions dated 22nd September 2025. The Petitioner cited the Mukisa Biscuits Manufacturing Company Limited v West End Distributors (1969) EA 696 to submit that a preliminary objection must emerge from the pleadings and be grounded in facts that are mutually acknowledged by both parties. The Petitioner also cited the case of Oraro v Mbaja [2005] to buttress the argument that a preliminary objection should not deal with disputed facts that require probing by evidence.
9. The Petitioner submitted that the Respondents' argument that the petition offends the doctrine of constitutional avoidance invites the court to an examination of the pleadings, the nature of the constitutional violations and a determination of whether constitutional questions are properly raised.



10. On the issue of locus standi that had been raised by the Respondents, the Petitioner submitted that the same is also a matter of fact. On the question of constitutional avoidance, the Petitioner submitted that the court would be called upon to interrogate the pleadings in order to determine whether constitutional questions had been disclosed besides determining whether the petition had been properly framed. He submitted that such an evaluation can only be done at the hearing the petition and not at substantive stage.
11. The Petitioner concluded that the objections do not meet the thresholds established in the Mukhisa Biscuits case (supra) and prayed that the same be dismissed with costs.
12. The 2nd and 6th Respondents filed their submissions dated 5th November 2025. The gist of their submissions is that the issues raised by the Petitioner could be ventilated through civil litigation as opposed to a constitutional petition.
13. The 2nd and 6th Respondents submitted that this court should restrain itself from hearing and determining the instant petition owing to the doctrine of constitutional avoidance. They referred the court to several decisions to substantiate this position. Some of the authorities cited by the 2nd and 6th Respondents are the supreme court decision in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR the Supreme Court; Uhuru Muigai Kenyatta vs Nairobi Star Publications Limited (2013) eKLR as well as the South African Constitutional court decision in S v. Mhlungu, 1995 (3) SA 867.
14. The 2nd and 6th defendants concluded that, the matter before the court being a straightforward assertion of encroachment and trespass, albeit camouflaged as a constitutional petition, the same should be addressed as an ordinary civil suit. They invited the court to strike out the petition with costs to the Respondents.
15. On their part the 1st, 3rd, 4th, and 5th Respondents did not file written submissions.

Issues, Analysis and Determination

16. Having considered preliminary objections as summarized in the previous paragraph and having looked the pleadings under the law I am of the view that the following issues arise for determination:
 - a. Whether all the grounds raised by the respective Respondents are points of law as can be defined as preliminary objections.
 - b. whether this court's jurisdiction was properly invoked by the Petitioner;
 - c. whether the Petitioner has the legal capacity/standing to file the petition; and
 - d. who should bear the costs of the preliminary objection.
17. The court has carefully considered the pleadings filed by the Petitioner, the preliminary objections filed by the Respondents as well as the submissions of the parties. At the outset, and as was correctly pointed out by the parties herein, the principles that should guide courts in determining preliminary objections were set out in the locus classicus decision of Mukisa Biscuits Manufacturing Company Limited v West End Distributors (1969) EA 696. In this decision, the court determined that a preliminary objection should address pure points of law and not facts that are disputed by the parties. Accordingly, the court determined that:

“ 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. example is 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 that used to be called 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.”

18. Similarly, in the case of Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, the court held that: -

“ A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

19. The Court of Appeal restated the nature of a preliminary objection, in Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya [2017] eKLR, that:

“We agree with counsel for the appellant that grounds of preliminary objection were vague and did not specify the point of law that was in issue We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned.” What their Lordships are stating in their decision is that one must state with precision the point of law he or she is raising against another so that both the court and that other party are aware of the match before him or her.

20. Also, in Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR, the same Court stated as follows:

“We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

21. Further, in SUSAN WAIRIMU NDIANGUI V PAULINE W. THUO & ANOTHER [2005] eKLR, Musinga J (as he then was) held that

“ a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

22. As defined in the authorities above, a preliminary objection must be hinged on and determined only by a comparison of the law to only the pleadings filed by the parties. It arises by necessary implication from the pleadings of the parties and no more. Any point that calls for an examination of the evidence in order to understand or clarify it will be vague and not qualifying to be a preliminary point of law or



objection hence it should be rejected. The basis for such a refusal is that evidence needs to be adduced and its veracity tested as per the rules of evidence in order for it to pass that critical test for it to found the decision of its merits and that of the matter generally.

a. Whether the Petition was an abuse of the court process

23. This now turns the analysis and determination herein to the issue which is, whether all the grounds raised by the respective Respondents are points of law as can be defined as preliminary objections. The simple and straight answer to this question is, no. To demonstrate that the court now looks at the first issue which is, whether the Petition is inherently flawed and constitutes an abuse of the legal process, warranting its dismissal with cost, at the outset. For any pleading, or claim or defense to be found to be or declared an abuse of the process of the court, the party pleading it must have brought previous pleadings before the same court or another court of competent jurisdiction and previous determinations made on the same on one way or other; or the party is litigating over the same issue in two or more different courts or causes before the same court. That means that this court has to be furnished with the evidence of the multiplicity or repetitive processes being urged. That would call for analysis of evidence hence not amounting to a preliminary objection. Therefore, the first point identified above is not a preliminary objection properly so called and the court needs not analyse it.

b. Whether the Petitioner pleaded his claim with specificity

24. The second issue which the parties argued was whether the petition lacked the essential articulation of the genuine, earnest, and crucial dispute between the parties. The legal requirement for specificity in constitutional petitions cannot be gainsaid. Sufficient particulars have to be given by the Petitioner so that the Court can discern right from the beginning by reading through the Petition whether indeed the same is a constitutional petition or a cause of action veiled as a constitutional petition. This, even when a party specifies the actions complained of as constitutional violations, he must show how those actions have violated the specific constitutional provision he/she relies on or claims to have been infringed, violated or threatened. It is not enough, as I usually see parties do, to just list various constitutional provisions and state what they are and end it there. The actions complained of must be linked with the rights or fundamental freedoms at stake or breached. Thus, in *Anarita Karimi Njeru vs Republic* (1979) eKLR the court set out the legal threshold for a Constitutional Petition thus;

“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.”

25. Also, the Court of Appeal restated this principle in the case of *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR as follows:

“(44) 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. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior Court below to lament that the petition before it



was not the “epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent.

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 violations 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.”

26. In the instant Petition, the Respondents averred that the actions of the Respondents were in violation of Articles 27, 28 and 40 of the Constitution. He added that on 2nd January 2025 the Respondents unlawfully and arbitrarily entered his property with heavy machinery and began demolishing it, and they destroyed a perimeter wall and mortgage electricity lines and uprooted huge grown trees. These were among the many issues he complained about.
27. In my view the acts complained about were precisely stated in line with the Anarita Karimi decision (supra) requirements.

c. Whether the court’s jurisdiction was properly invoked by the Petitioner

28. Turning to the third ground, the Respondents contended that the Petitioner contravened the doctrine of constitutional avoidance by opting to file a constitutional petition in a matter of alleged encroachment and/or trespass, which issues they maintained should be ventilated via ordinary civil litigation as opposed to filing a constructional petition. By arguing that the Petitioner ought to have instituted his suit via ordinary civil litigation, the Respondents suggested that the Petitioner did not properly involve this court’s jurisdiction.
29. This Court has carefully considered the pleadings. From the contents of Part C of the Petition, specifically paragraphs 37 to 48, and the paragraph 8 of the Affidavit in support of the Petition, the issues or claims by the Petitioner are clear. Starting with paragraph 8 of the Affidavit which is a minor content intended to highlight the main content of the Petition, the Petitioner depones that “the encroachments by the Respondents were more than nine (9) metres into the property...” then at paragraph 10 he depones that his property was neither encroaching on the said road nor compulsorily acquired. This means that the Petitioner clear that the issue that led to the alleged destruction of any property if any was due to encroachment or an issue of fixing a boundary. That is not a constitutional violation, particularly when the Petitioner has not pleaded or shown that indeed the boundaries of the alleged property or land on which the property destroyed lay had been fixed or determined, under Section 18 of the Land Registration Act, 2012.
30. Additionally, paragraph 42 of the Petition is clear that the Respondents’ act alleged between paragraphs 37 and 41 of the Petition were as a result of an alleged encroachment by the Respondents. The paragraph reads that, “The encroachments made by the Respondents into the property are more than a distance of over nine (9) meters...” At paragraph 44 the Petitioner pleads further that his property is neither encroaching the road alleged by the Respondents nor was it compulsorily acquired...” Further, that there is no justification for the “...respondents’ unlawful actions of encroachment and invasion into the Petitioner’s property.” Moreover, at paragraph 47 the Petitioner repeats the claim of the encroachment and states that due process was not followed.”
31. As noted above, the issue at hand, and as submitted by the Respondents revolves squarely on encroachment and /or trespass onto land, as a result of which allegations of destruction of property



- are brought up. The Petitioner contended the Respondents jointly and severally encroached into his land, destroyed property and in the end left his home exposed. The Petitioner further averred that these actions violated several of his constitutional rights, including the right to property, the right to privacy, the right to human dignity and the right to fair administration action, all of which are guaranteed and protected under *the constitution*.
32. The issue of encroachment and trespass are issues often resolved through claims instituted by way of plaints. The fact that a party has taken a long time as to be time barred does not transform a claim from an ordinary one to a constitutional claim, because that is a subtle way of a party seeking to go around the provisions or requirements of the *Limitation of Actions Act*. For instance, where a party ought to have claimed damages for trespass, as in the instant Petition, within the stipulated time but slept on his rights, the inaction does not now resurrect the claim as a constitutional one. Courts should be vigilant to weed out such claims cleverly brought through such means.
33. In *Omollo (Suing as the Administrator Ad Litem of the Estate of John Omollo Anditi - Deceased) v Asembo (Sued as the Administrator of the Estate of Lazaro Odera Jura) & 6 others (Environment and Land Petition E007 of 2024) [2025] KEELC 5087 (KLR) (11 June 2025) (Ruling)* this Court held,
- “But where a party fails whether by inadvertence, inaction or ignorance to take advantage of the legal and constitutional means available to him or her at the time to move the appropriate forum and loses that opportunity whether by effluxion of time or other means it does not trigger a constitutional violation. Courts must be vigilant to distil the clothing of parties’ mistakes as constitutional violations simply because the parties are closed from opening legal doors hence seeking refuge in allegations or pleadings of constitutional violations, infringements or threats because they span limitation of actions.”
34. Parties must approach courts through constitutionally and statutorily prescribed means as those are not mere technicalities that may be glossed over or even cured by Article 159(2)(d) of *the Constitution of Kenya 2010*. Courts have time and again held that where a matter can be resolved using other avenues, parties should refrain from seeking the resolution of the said matters by way of filing constitutional petitions. This approach embodies the doctrine of constitutional avoidance. In *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR*, the Supreme court held that:
- “The principle of constitutional avoidance entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis. It is a sound judicial practice for courts to decide cases on non-constitutional grounds if that course is available.”
35. In *Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited (2013) eKLR* Lenaola J (as he then was) stated that
- “...Where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of decision of *Haco Industries* where the converse may have been expressed as the position. My mind is clear however that not every ill in the society should attract a constitutional sanction as stated in *AG V Dutambala Criminal Appeal No. 37 of 1991 (Tanzania Court of Appeal)* such sanctions should be reserved for appropriate and really serious occasions...”
36. *Indimuli v Salasya (Constitutional Petition E006 of 2024) [2025] KEHC 16251 (KLR) (12 November 2025) (Ruling)*, the court determined that:



6. The Respondent has argued that the petition herein offends the principle of constitutional avoidance, and as such, the issues the Petitioner raises can be determined in a civil claim, having not met the threshold to institute a constitutional petition. The doctrine of constitutional avoidance is a judicial principle that discourages courts from deciding constitutional issues when a matter can be resolved through statutory or ordinary legal mechanisms.
 7. In *Bernard Murage v Fine Serve Africa Ltd & 3 others* [2015] eKLR, Muriithi J held that:

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, that route must be pursued first.”
 8. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] eKLR succinctly held:

“The principle of constitutional avoidance entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis. It is a sound judicial practice for courts to decide cases on non-constitutional grounds if that course is available.
 9. Likewise, in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, the Court of Appeal stated that where a clear procedure is prescribed by law for redress of a grievance, that procedure must be strictly followed before resorting to constitutional remedies...
 11. I find that the Petitioner’s attempt to file constitutional petition in what is essentially a tortious claim offends the doctrine of constitutional avoidance. The alleged act does not require constitutional interpretation. The High Court’s constitutional jurisdiction is invoked where there is a genuine constitutional controversy, not where ordinary civil remedies are available and adequate to resolve the tortious wrong.”
37. Similarly, the court in *Motiga v Lugalia & 4 others* (Petition E328 of 2023) [2025] KEHC 275 (KLR) (Constitutional and Human Rights) (22 January 2025) (Ruling), found that it was improper for litigant suing for defamation and access to information from the Respondent to institute his suit through a constitutional petition. The court reasoned that these issues could be fully and effectively litigated as a tortious claim either under the *defamation Act* or as a common law claim in an ordinary civil suit. Hence, the court determined that:
71. It is manifest from the reading of this Petition the essential complaint is the alleged publication of the defamatory material against the Petitioner. In any case, even if the matter involves the need for supply of information under Article 35 of *the Constitution*, there is an elaborate procedure that is provided for under *Access to Information Act* prescribing how this is to be done and consequences of failure to facilitate the access to information when the conditions set out for supply of information have been met. In short, this Court will not necessarily have to turn to *the Constitution* to resolve the two main issues raised by the Petitioner in this Petition. That will require *the Constitution* to resolve. In other words, the resolution of the issues presented through this Petition will only require interpretation of the relevant statutes or principles of common law rather than *the Constitution* as the claim is founded on the tort of defamation and the issue of access to information is also adequately covered in the *Access to Information Act*. I can thus comfortably conclude that this Petition does not raise any Constitutional question that would compel the Court to resort to *the Constitution* to resolve.



72. This leads me into making the finding that the dispute that this Petition presents is not a Constitutional controversy since it can be determined without application of *the Constitution*. Its resolution squarely lies in the application of the tort law and the *Access to Information Act*.
73. It is impermissible for a litigant to found a cause of action on *the Constitution* when the same can be founded on legislation or other established legal principles”.
38. I must distinguish the facts of and the claim in the instant Petition from those in *Jovet (Kenya) Limited v Bavaria NV* (Petition E039 of 2024) [2025] KESC 27 (KLR) (Constitutional and Judicial Review) (16 May 2025) (Judgment). At paragraph 58 to 59 of the *Jovet* decision the Supreme Court held that the Superior Court and the Court of Appeal fell error by not indicating any reservations they may have had to the primary approach to constitutional adjudication rather than maintaining silence and defaulting to constitutional avoidance.
39. Here are my reservations. In the instant petition, the alleges that the Respondents encroached into his land and destroyed his property and by so doing, violated his constitutional rights. The Petitioner seeks to rely on constitutional violations in order to found his claims for compensation herein. I have stated above that while there may have been damage to properties that called for compensation, the remedy was sufficiently and appropriately provided for in the resolution of the same through ordinary civil claims or by plaint. There was no right to property violated when the actions allegedly committed were on a parcel of land whose boundary was not determined yet as to firm the claim of government (respondents) taking of the Petitioner’s land without due process, which would have translated to a violation under Article 40(1) of *the Constitution*. For parties to turn every other breach or violation of any right into a constitutional violation or breach would trivialize *the constitution* and clog the courts with unnecessary and uncalled for pronouncements on constitutional interpretation where there is basically none.
40. The complaint was on encroachment onto land and/ or trespass which are matters that can be determined through ordinary civil litigation. Again, this Court has found that the Petition was an indirect way of reviving a stale claim. For this reason, I find and hold that the court’s jurisdiction in in this matter was not properly invoked and that the petition offends the doctrine of constitutional avoidance.
41. Lastly, the court has reservation on proceeding to decide on the primary approach to constitutional adjudication in respect of a matter instituted by an individual who did not have locus standi as discussed below.

d. Whether the Petitioner has the legal capacity/standing to file the petition

42. Having so found, I now turn to the issue of the Petitioner’s locus standi. Locus standi is a cornerstone of litigation in our jurisdiction, for without it, a party loses his or her right to be heard by the court. In *Rugiri v Kinuthia & 3 others* [2024] KECA 1601 (KLR) the Court of Appeal stated that:

“The Black’s Law Dictionary, 9th Edition (page 1026) defines locus standi as “the right to bring an action or to be heard in a given forum”. This Court in *Alfred Njau and Others vs. City Council of Nairobi* [1982] KAR 229 held that: “The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

Locus standi is cardinal in civil proceedings because without it, a party lacks the right to institute and/ or maintain the suit even where a valid cause of action subsists. It can be equated to a court acting without jurisdiction. In *Amlers Precedents of Pleadings*, Lexis Nexis LTC Harms et al 2018 on page



248 the following is said: “The question of locus standi is in a sense procedural, but it is also a matter of substance. It concerns the sufficiency and directness of a person’s interest in the litigation to be accepted as a litigating party. It is also related to the capacity of a person to conclude a jural act. Sufficiency of interest depends on the facts of each case and there are no fixed rules.”

Locus standi concerns the sufficiency and directness of a litigant’s interest in proceedings which warrants his or her title to prosecute the claim asserted, and should be one of the first things to establish in a litigation.

43. The Respondents argued that the Petitioner lacks locus standi to institute the instant Petitioner for the reason that he is not the registered owner of the suit property. The court notes that the rights that the Petitioner claims to have been violated by the Respondents emanate from the encroachment and /or trespass to the suit property. Locus standi, in relation to the instant Petition is basically, on the pleading as to who the Petitioner is in relation to the property allegedly destroyed and on which he claims rights have been violated.
44. In claiming the violations of rights to property, the Petitioner pleaded, at paragraph 5 of the Petition, that he was a resident of Homabay County, where he has built his home in Rangwe Sub-county, Kagan Ward. He then proceeds to claim, at paragraph 38 that he has been quietly enjoying the property, being North Nyokal/Gongo/520 for over 20 years. Beyond that he does not at all state whether he is the owner of the property or in which capacity he brings the Petition, if at all he is not the owner.
45. It is only in his submissions that the Petitioner acknowledged that the suit property was registered, even as was raised by the Respondents when they claimed that he lacked locus standi, in the name of a deceased person, and that that he had brought the petition in his capacity as a beneficiary. First, it is worth noting that submissions are not pleadings. They are nothing more than arguments made by parties in a language they view their case and which they use to convince the court to view the dispute in that prism. Thus, courts do not necessarily rely on them.
46. In *Moi v Muriithi & another* (Civil Appeal 240 of 2011) [2014] KECA 642 (KLR) (9 May 2014) (Judgment) the Court of Appeal held that,

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
47. For the instant Petition, this court cannot use the Petitioner’s submissions to lay the basis and make a finding that he is a beneficiary of a deceased’s estate hence entitled to claim therein. In any event, even beneficiaries of deceased person’s estates must approach courts with capacity. In such instances they must be executors of wills or have letters of administration as provided for under Section 82(a) of the *Law of Succession Act*, Chapter 160 Laws of Kenya. The Petitioner has not pleaded that he has any of those capacities. What the Court is stating herein is that it is trite that a party who wished to institute a suit on behalf of the estate of a deceased person must obtain the relevant grant of representation before instituting such a suit.
48. Accordingly, I find that the Petitioner does not have locus standi to institute the Petition, having failed state the capacity in which he instituted the Petition since there was no nexus whatsoever in his pleadings between him and the property to establish his legal capacity to sue on behalf of the estate of a deceased person.



e. Who should bear the costs of the preliminary objection and the Petition

49. The two sets of Preliminary Objections have succeeded in the limbs that have been singled out above. Therefore, the entire petition is dismissed on that account. In terms of Section 27 of *Civil Procedure Act*, costs follow the event. Since the parties who raised the objections are the ones whose objections have succeeded, they are the only ones entitled to costs herein, and those costs are to be borne by the Petitioner.

50. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM
THIS 16TH DAY OF MARCH 2026.**

HON. Dr. IUR FRED NYAGAKA

JUDGE

In the presence of:

Court Assistant: Mr. Terence/ Ms. Fiona

Mr. H. Mulongo Advocate for the Petitioner.

Mr. Odhiambo holding brief for Mboya for the 1st, 3rd, 4th and 5th Respondents.

