



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KABARNET

ELC PETITION NO. E004 OF 2024

**IN THE MATTER OF ARTICLES 2, 10, 27, 28, 40, 47 OF THE
CONSTITUTION OF KENYA, 2010**

= BETWEEN =

**CHRISTOPHER ROTICH KIPSIGEI 1ST
PETITIONER**

**JOSEPH MUZEE ROTICH 2ND
PETITIONER**

***(suing as legal representative of the
Estate of Kiptutuny Arap Kirui, deceased)***

= AND =

**BOARD OF MANAGEMENT
KAPCHEROP SECONDARY SCHOOL 1ST
RESPONDENT**

**COUNTY GOVERNMENT
OF ELGEYO MARAKWET 2ND
RESPONDENT**

**COUNTY LAND REGISTRAR,
MARAKWET COUNTY 3RD
RESPONDENT**

**ATTORNEY GENERAL 4TH
RESPONDENT**

JUDGMENT

1. The petitioner herein, instituted this suit/petition seeking the following orders: -
 - a) A declaratory order that the 2 acres which form part of title number Cherangani/Kapcherop/18 was unlawfully annexed by the 2nd respondent in favour of the 1st respondent;
 - b) An order directing the 3rd respondent in conjunction with the County Surveyor to resurvey title number Cherangani/Kapcherop/18 and hive off the 2 acres which comprise the petitioners' land and home and have the same registered in the petitioners' name;
 - c) A permanent injunction to restrain the 1st respondent, its agents or servants from trespassing into, ploughing or doing anything to interfere with the petitioners' right to property ownership;
 - d) An order for damages for trespass;
 - e) Costs of the petition;
 - f) Interest.

2. As can be discerned from the averments in the petition, the petition/suit is premised on the grounds that the petitioners are the rightful owners of 2 acres of land comprised in the parcel of land known as Cherangani/Kapcherop/18 measuring approximately 10.8 acres; that the petitioners acquired their interest in the suit property by way of purchase of the two acres from Chepkok Arap Taritei (deceased) and that the petitioners have been in use and occupation of the portion of the suit property that they occupy since 1968.

3. It is the petitioners' further pleaded case that their use and occupation of the portion of the suit property that they occupy, had been peaceful and uninterrupted until sometime in 2024 when the 1st respondent, through its Secretary, one Amos K. Cherono, wrote a letter dated 17th September, 2024 to them requiring them to immediately vacate the portion of the suit property that they occupy, which property is the only place they know as their home.

4. The petitioners also complain that the 1st respondent fenced off the portion of the suit property they claim, thereby blocking their entry and exit from the suit property, hired people who began cultivating the portion of the suit property they claim and unlawfully harvested their trees.
5. Terming the actions of the respondents complained of a violation of their constitutional rights, the petitioners filed the instant suit/petition seeking the reliefs listed herein above.
6. In reply and opposition to the petition, the 1st respondent filed the affidavit (replying) of Amos Kibet Cherono, sworn on 15th February, 2025. Through the affidavit, the 1st respondent avers/ contends as follows: -
 - i) That the petition is incurably defective, incompetent, frivolous, scandalous and devoid of substance in law;

- ii) That the affidavit sworn in support of the petition is full of falsehoods and misrepresentations tailored to win the sympathy of the court;
- iii) That the petition does not meet the threshold of a constitutional petition/reference;
- iv) That the petition does not raise a constitutional issue, is incompetent and it is time or statutorily barred having been brought more than 50 years after the land in dispute had been set aside for public utility;
- v) That the suit property, measuring 4.4 ha, is registered in the name of the 2nd respondent who holds it in trust for the 1st respondent;
- vi) That registration of the suit property in the name of the 2nd respondent to hold in trust for the 1st respondent was as a result of land adjudication process over Elgeyo-Marakwet District adjudication section in the period between 1968 and 1972;
- vii) That the suit property was surrendered to the 1st respondent by Taritei Arap Chepkok who was

adequately compensated with a 10 acre farm in Chebai area, Cherangany.

- viii) That the area in which the suit property is situated was declared an adjudication area in the period between 1968 and 1972 and issues of ascertainment and recording of land rights carried out in accordance with the provisions of the Land Adjudication Act.
- ix) That the land adjudication register for the area in which the suit property is situated, Kacherop, was completed and made available for inspection in accordance with the applicable law and procedures;
- x) That the petitioners have not demonstrated that they raised objections to the manner in which the adjudication process was carried out;
- xi) That the invocation of the jurisdiction of this court to question the procedural propriety or substantive merit of the adjudication process, when the petitioners did not challenge the decision using the

given statutory mechanism of challenging it, is improper;

- xii) That the issue of ownership and legality of the title of the suit property that is at the centre of the petition is a matter that ought to have been canvassed through a civil claim and not through a constitutional petition as per the doctrine of constitutional avoidance;
- xiii) That the 1st respondent has on several occasions called upon the petitioners to vacate the School land but the petitioners remained adamant to move out of the suit property;
- xiv) That there were previous court proceedings, to wit Eldoret HCC No.27 of 1991, between the petitioners and the respondents over the suit property;
- xv) That the suit referred to in (xiv) above was dismissed for want of prosecution.
- xvi) That in a meeting presided over by the National Land Commission between the petitioners and the 1st respondent, held on 23rd April 2024, the

petitioners voluntarily agreed to move out of the suit property.

xvii) That after the period the petitioners had requested to be given (90 days), to voluntarily move out of the suit property lapsed, the petitioners requested the 1st respondent to extend the time within which they ought to have voluntarily vacated the suit property, which request was denied by the 1st respondent.

7. Terming the instant petition/suit an affront to justice and an abuse of the process of the court, the 1st respondent maintains that the petition offends the doctrine of constitutional avoidance.
8. Asserting that no evidence has been led to suggest that the respondents violated any of the cited constitutional provisions and terming the claim that the registration process was conducted unfairly, unlawfully and irregularly a mere fallacy meant to advance the personal interests of the petitioner, the 1st respondent urges this court to dismiss the petition with costs.

9. The petition is also opposed by the 2nd respondent, on grounds which are similar to those relied on by the 1st respondent.

10. Pursuant to directions given on 13th March, 2025, the petition was disposed of by way of viva voce evidence.

11. When the petition came up for hearing, the petitioners through the evidence of Joseph Muzee Rotich (PW1), Kipserem Murei (PW2) and Peter Kibiwot Kimitei (PW3), led evidence to the effect that they have been living in the portion of the suit property they claim since 1968 when the portion of the suit property was bought by their predecessor in entitlement to the portion; that the school did not raise any objection to their use and possession of the suit property and that they have buried their relatives in the portion of the suit property without any objection from the school or the respondents.

12. The petitioners acknowledge that they were summoned by the National Land Commission (NLC) sometime in 2024 over their occupation of the portion of the suit property in question and informed that they were residing in land belonging to the school.

13. According to a document from the Office of the County Coordinator, Elgeyo Marakwet County dated 23rd April 2024, concerning the alleged encroachment on public land by the petitioners, the petitioners accepted to surrender the land and requested in writing for a specific time period to vacate. The document shows that the office of the coordinator acceded to the request by the petitioners to be given time to vacate the suit property and gave them 90 days to do so.

14. Joseph Mzee Rotich PW1, acknowledges that following the summons by the NLC, they participated in the proceedings/public hearing referenced in the document produced in evidence by the respondents. He also acknowledged that after the lapse of the 90 days given to

them to voluntarily vacate the suit property, they wrote a letter dated 13th May, 2024 seeking to extend their stay but the school through a letter dated 17th September, 2024 declined their request.

15. Whereas the PW1 claims that they were compelled to surrender their interest in the suit property, he did not provide any evidence capable of proving that they were indeed compelled to either participate in the public hearing conducted by NLC or to write the letters they wrote following the public hearing. In their letter to the Board of Management, Kapcherop Boys Secondary School dated 13th May 2014, seeking extension of their stay on the suit property for a further 5 months, the petitioners have not indicated or even suggested that they were compelled or forced to surrender their interest in the suit property. In that regard see the letter whose contents are as follows: -

“We write to respectfully request that you extend and strengthen your 90 days from 23rd April 2024 residential eviction executive delay

orders to prevent eviction for additional 5 months to December 2024. This will enable the family look for alternative place to relocate and through your valuation your office can assist where possible. This will enable the family to settle in the said place of relocation”.

16. In cross examination, the petitioners’ witnesses admitted or acknowledged that they are aware that the suit property was reserved for the school in 1972 and a title deed issued in favour of the school in 2014. The petitioner’s witnesses, particularly PW1, also acknowledged or admitted that Mzee Kiptutuny who allegedly bought the portion of the suit property claimed by the petitioners, was alive during land adjudication but did not complain to the Land Adjudication Officer (LAO) concerning adjudication of the portion of the suit property they claim as part of land reserved for the school. PW1 admitted and/or acknowledged that even after the death of Mzee Kiptutuny, they did not visit the Lands office to claim the two acres allegedly comprised in the land

reserved for the school. PW4 explained the delay in filing a suit as lack of funds. PW.1 further informed the court that their father had filed a case against the County Council of Keiyo over the suit property but could not tell the fate of the suit.

17. On whether his father was aware of a public notice by the LAO in 1970 inviting objections to the adjudication register, PW1 stated that his father may have been aware of the notice. PW1 admitted that his father did not object to the register. He stated that his father went to court ten years later, in 1991. PW1 informed the court that his father's case was dismissed for want of prosecution because his father was unwell.

18. In re-examination, PW1 stated that the sale agreement (Pexbt 3) states that the land is in Kapcherop; that he has not been shown any document where Chepkok has acknowledged receipt of 10 acres in exchange of the land he gave the school or any document where the school

informed them as persons in occupation that they were processing a title deed for the portion they occupy.

19. PW2 Kipserem Murei, confirmed that during land adjudication, residents of Kapcherop were informed by the LAO about the adjudication register and that they were required to raise objection. He could not tell whether Kiptutuny raised any objection.

20. PW3 Peter Kibiwot, told the court that he is aware that the family of Kiptutuny is claiming part of the land registered under the school. According to him, the family of Kiptutuny is entitled to the two acres it claims from the school because they have always lived there. PW3 admitted/acknowledged that once land is reserved as a public utility it is not available for allocation.

21. In cross examination, PW3 admitted that his evidence is based on hearsay; information given to him by other people.

22. The respondents through the evidence of Amos Kibet Cherono (DW1), Patrick Joseph Yano (DW2) and William Kipserem Kibiwot (DW3), demonstrated that the suit property was set aside for Kapcherop Secondary School during land adjudication.

23. At close of hearing, parties filed submissions which I have read and considered.

24. From the petition, the response thereto and the submissions by the parties, I find the issues for the court's determination are as follows: -

- i) Whether the instant petition/suit offends the doctrine of constitutional avoidance;
- ii) Whether the Petitioners have made up a case for being granted the orders sought;
- iii) What orders should the court make?

25. On whether the instant petition/suit offends the doctrine of constitutional avoidance the petitioners submit as follows:

“...The petitioners’ grievance is not a mere land ownership dispute but a challenge to the constitutionality and legality of the process by which their property was unlawfully alienated and transferred to a public institution without due process or compensation. This is precisely the type of matter contemplated under Articles 22 and 23 of the Constitution...The petitioners’ rights under Article 40, 43, 47, 27 and 50 are directly affected by the 1st and 2nd Respondent’s unlawful actions, making constitutional adjudication appropriate.

The petitioners’ rights to property, human dignity, fair administrative action and access to justice have been violated. The 1st and the 2nd Respondents’ acts, including the threats of eviction, restriction of movement, fencing the homestead, harvesting of trees and failure to follow due process constitute arbitrary deprivation of property prohibited under Article

40 of the Constitution 2010. The petitioners' elderly mother faces inhuman treatment, violating Articles 28 and 27 of the Constitution. The 1st and the 2nd Respondents' failure to provide notice or an opportunity to be heard violates Article 47...

In this case, the 1st and 2nd Respondents proceeded with a forceful and unlawful eviction of the petitioners without any lawful eviction order and without adherence to the laid down statutory procedures...

The manner in which the 1st and the 2nd Respondents conducted the eviction was cruel, degrading and inhumane. The 1st Respondent unlawfully erected a barbed-wire fence around the petitioners' homestead, effectively blocking their access and restricting their movement to and from their residence. Furthermore, the 1st Respondent ...commenced farming activities within the petitioners' homestead and unlawfully

harvested their trees, thereby causing the petitioners and their family immense distress, psychological anguish and substantial loss.

Such conduct is in clear violation of both the Land Act and the Constitutional safeguards to a fair administrative action, human dignity and protection of property rights....”

26. Based on the decisions in the cases of **Musembi & 13 others v. Moi Educational Centre Co. Ltd & 3 others (2021) KESC 50 (KLR)**, the petitioners submit that the respondents’ actions were illegal, high-handed and contrary to both domestic and international law.

27. According to the petitioners, the cumulative actions of the 1st and the 2nd respondents complained off, amount to compulsory acquisition of private property without due process.

28. On their part, the respondents have submitted as follows: -

“The doctrine of constitutional avoidance is relevant in this case as it guides the court in interpreting the Constitution to avoid constitutional issues when the same can be ventilated in an ordinary civil suit. The thread that runs through the entire petition is the legality of the process of acquisition and title held by the 1st and 2nd respondents and the enforcement of the contractual obligations between the deceased petitioner and one Chepkok Arap Taritei. ...It is our submission that even though the agreement alluded to by the petitioners does not disclose or indicate the parcel sold to the petitioners, parcel Cherangany/Kapcherop/18 was not available for sale in 1968 since the interests thereto had since passed to the government. The petitioners claim therefore should lie with the estate of the vendor for specific performance and or refund and not against the 1st respondent in a

constitutional petition. There was no privity of contract between the deceased petitioner and the respondents. The agreement for sale of the 2 acres governed the conduct between the deceased petitioner and the vendor Chepkok Arap Taritei.

A claim for specific performance is governed by the Law of Contract Act. Further since the interest passing were based on unregistered land, the deceased petitioner was under a duty to comply with the requirement of the Land Adjudication Act during the registration and ascertainment of interests over an adjudication area. The Land Adjudication Act lays an elaborate procedure which has to be followed. The process of ascertaining rights begins with a declaration of an adjudication section. This is followed by a public meeting where landowners are notified and asked to present their claims and boundaries. The process then moves to

demarcation and recording, where ground officers work with landowners and a local committee to physically mark boundaries and record ownership details, with disputes being handled by the committee or an arbitration board. Finally, the collected information is compiled into an adjudication register for public inspection and official registration. Any objection with regard to the register can be appealed to the Minister.

The petitioners claimed that they did not receive any notices inviting any objections to the published register. None of the respondents sued in this petition was under a duty to inform the petitioners and or publish the impugned notice. Even though the respondent averred that the notice was published and posted at Kapcherop market by the Land Adjudication and settlement office, the lapses thereto if any

cannot be attributed to the respondents herein. If at all the Land Adjudication office is being blamed for failure to publish the notice they ought to have been made parties to this petition as the duty bearers. The respondent did not owe the petitioners any duty to publish the notice. Be that as it may, the petitioners ought to have moved the minister and or court pursuant to the Provisions of the Land Adjudication Act. In Isaac Kipleting Kibitok vs Secretary Board of Governors Cherangany Primary School & Others [2020] eKLR, the court observed that the petitioner should only have approached the court for remedies of violation of his constitutional right once his interest in the land occupied by the school was clearly defined and had crystallized. The court said the claim could have been ventilated in a civil suit... A reading of the issues presented in this Petition leave no doubt that the Petitioner's grievance if any can

effectively be addressed in a normal civil suit. The court handling the civil case will be better suited to determine whether the petitioner is the owner of the suit parcel. The court will weigh the veracity or otherwise of the party's positions. We pray that this court invokes the doctrine of constitutional avoidance and decline to entertain the matter...."

29. On whether the petitioners are entitled to the reliefs sought, the respondents submit as follows: -

"...The petitioners claim that the 2 acres' subject of this petition was sold to their father in 1968 by Chepkok Arap Taritei. In support of this claim they produced a land sale agreement (PExhibit 3). The agreement was drawn on 28/5/1968 and executed by both the vendor and the purchaser together with some witnesses. However, it does not contain a description of the property being sold save to

mention that the property being sold is 2 acres at a consideration of Kshs.400/=. DW2 testified that the 2 acres in question was part of parcel Cherangani/Kapcherop/18 measuring about 10 acres. That sometimes in 1963, Taritei Arap Chepkok surrendered the above parcel to the community for purposes of starting a school and was compensated with a 10-acre parcel at Chebai area. Upon the surrender he vacated the land and went to Chebai area where he unfortunately sold the donated land to one Willy Kilimo, came back to Kapcherop and stayed at his brother's parcel. He never took back possession of the land donated for purposes of starting a secondary school. Neither did he have any issues with the school's occupation of the parcel... it is apparent that at the time the alleged sale was being made the entire 10 acres had already been surrendered to the community for

purpose of constructing a secondary school. This implies that the vendor, Chepkok Arap Taritei, did not possess the capacity to transfer ownership of any part of the land in question post-surrender. The surrender, which occurred in 1963, effectively transferred ownership and control of the entire property to the community/school, rendering subsequent purported transactions with third parties a potentially nonexistent or invalid. Further from the time of execution of the agreement the petitioners have never taken any step to enforce the agreement by having their interests in the land registered. DW1, 2, and 3, confirmed that sometimes in 1968 Kapcherop area was declared an adjudication section. The issue of ascertainment and recording of rights commenced where members of the area were required to declare their interests and to have them recorded. That on 24th June 1970 the

register of Kapcherop adjudication section was declared complete and members of the public could inspect it at Kapcherop market within a period of 60 days from the date of the notice. The notice called for objections as to the correctness or otherwise of the register to be lodged with the adjudication officer within 60 days in compliance with the law. Section 13 (1) of the Land Adjudication Act provides.... It is apparent that during the Land Adjudication process, the petitioners father failed to take any steps to verify or assert his claim over the property claimed. Further Section 29(1) of the Land Adjudication Act provides a mechanism for objecting to adjudication register. The petitioner and or their deceased father did not raise any objection as required and thus acquiesced to the registration of the land in the school's name. It is a settled principle that

failure to protest the register within the period prescribed amounts to waiver...

The petitioners have not alleged any fraud on the part of the respondents in procuring the title for the suit parcel. Their complaint is only pegged on the long standing occupation and an unperfected contract for sale. It is trite that failure to obtain Land Control Board consent to transfer an agricultural land voids the contract rendering it unenforceable... Further Your ladyship as mentioned in the above paragraphs the petitioners claim is based on a contract to purchase land executed in 1968. This petition therefore seeks to protect the rights accruing to the petitioners (if any) pursuant to the terms of the said contract. This being the case, Section 7 of the Limitation of Actions Act is applicable to the suit unless ousted by the Constitutional principles. The petitioners

therefore ought to have enforced their rights over the said parcel within a period of 12 years from 1963. The claim herein became statute barred in 1975. However, they claim that they only became aware of the registration of the 2nd respondent as the owner of the parcel in 1992. Assuming this is factually correct then they ought to have filed a claim by 2004. After 2004 the claim became statute barred...

It is not disputed that the petitioners together with their family members attended a meeting chaired by the National Land Commission on 23/4/2024 together with representatives of the 1st respondent with a view of having an amicable solution to the issue at hand. It is on record that after the meeting the petitioners together with their family members voluntarily agreed to vacate the suit land. Vide a letter dated 23/4/2024 the petitioners requested to

be allowed 90 days to allow the family find an alternative place and to allow them harvest their farm produce. The request was allowed and the petitioners wrote another letter dated 13/5/2024 requesting for an extension of the 90 days period to 5 months. The request for extension was declined prompting the institution of this petition.

The question that calls for answers at this point is whether there was any violation of the petitioners rights by the respondents.

It has not been disputed that the petitioners were summoned by NLC vide a letter dated 16/4/2024 to attend the meeting scheduled for 23/4/2024 at Iten board room. The petitioners voluntarily attended the meeting and after deliberations as captured in NLC's report dated 23/4/2024, the petitioners voluntarily agreed to

move out of the school land. The petitioners have not pleaded any undue influence and or coercion from the respondents. There was no evidence tendered to suggest that the above letter was executed under duress. After leaving the meeting on 23/4/2024 the petitioners again wrote another letter to the 2nd respondent requesting for extension of time with which to vacate the school land. There was no indication at all that the letters were being authored under duress. Neither has the petitioners disowned them. In fact, during cross examination PW1 confirmed that he wrote the two letters.

The petitioners in their submissions claim that NLC did not have the mandate summon and or convene the meeting with the petitioners and or resolve ownership disputes.

For a start the NLC did not make any resolution of the dispute. The report dated 23/4/2024 clearly indicates that NLC merely facilitated the meeting where each parties position was noted. What follows is the letter dated 23/4/2024 from the petitioners referring to “a resolution and agreement on the contested land.” This letter clearly shows that there was some agreement from both sides as opposed to a verdict delivered by NLC as alluded to by the Petitioners...”

30. The doctrine of constitutional avoidance, was discussed in **Brookside Dairy Limited v. Mohamed & another (Constitutional Petition E339 of 2022) (2022) KEHC 13627 (KLR) (Commercial and Tax) (13 October 2022) (Ruling)** thus: -

“31. The doctrine of constitutional avoidance does not divest this court of the jurisdiction to hear and determine this matter. What the

doctrine means is that while this court can indeed hear and determine this matter, it restrains itself to hear the same because there is another appropriate forum that can hear and determine the matter effectively.

32. The question as to what constitutes a constitutional question was determined in the case CNM V WMG [2018] eKLR where J Mativo stated:'20.In my view, this Petition does not raise constitutional questions at all. 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 issues raised here will only require the Court to examine defamation law. 21.The question of what constitutes a constitutional question was ably illuminated

in the South African case of Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others in which Justice O'Regan recalling the Constitutional Court's observations in S vs Boesak notes that:-

'The Constitution provides no definition of 'constitutional matter.' What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State, the interpretation, application and upholding of the Constitution are also constitutional matters. So too, is the question whether the interpretation of any legislation or the development of the common law promotes

the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.'

33. He further states, 'Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. At the heart of the cases within each type or classification is an analysis of the same thing - the constitutionally entrenched fundamental

rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.'

34. It is evident that for one to determine whether the argument raises a constitutional issue, the court should consider whether the argument forces the court to consider constitutional rights or values. The petitioner has brought this suit against the respondents for utterances that were made in a public rally by the 1st respondent. As to whether it raises a constitutional question, it would be necessary to examine the provisions alleged to be contravened and how they have been contravened and whether the petitioner has

suffered any damage / loss as a result of the said contravention or violation.

35. It is also important to consider the nature of the orders sought in the petition, as to whether they fall under the ambit of those provided for under Article 23 (3) of the Constitution. If both aspects are in the negative, then the petition does not raise a constitutional question.

36. The doctrine of constitutional avoidance has been addressed in quite a number of decisions by our courts. It was expounded by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR. Where 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.'(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper

question falling to the jurisdiction of the Appellate Court.'

37. In Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others [2021] eKLR, the court stated;'³⁰**.So as to ensure that constitutional jurisdiction of the court is not misused, the doctrine of constitutional avoidance comes in handy. It frowns upon the practice of bringing ordinary disputes to the constitutional court. In that regard, the Supreme Court observed as follows in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.'Also see Council of County Governors v Attorney General & 12 others [2018] eKLR.**

38. Justice J M Mutungi in Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR observed that: -'Parties are

increasingly filing matters that are essentially civil matters and christening the same as constitutional petitions which is not proper where there is an alternative remedy of filing a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the Constitution court.'

39. In the case of Bernard Murage -vs- Fine Serve Africa Ltd & others (2015) eKLR the Court stated:- 'Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.'

40. In the case of Godfrey Paul Okutoyi & others -vs- Habil Olaka & Another (2018) eKLR Chacha , J on the issue of there being an alternative remedy in lieu of constitutional remedies at paragraph 65

stated:-'It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.'

41. In the case of KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling) Mativo J set out the exceptions to the doctrine of constitutional avoidance as hereunder: - 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

42. The petitioner herein has raised issues on breach of Article 20, 27(1), and 33(2) (d) of the Constitution. The petitioner is aggrieved as a result of the utterances made during a public rally by the 1st respondent and has ascribed meaning to those utterances. This court will have to look into issues like whether the utterances meant that the

petitioner exploits the dairy farmers who sell and supply milk to the petitioner as raw material for its business, whether it also means that the petitioner subjects the said farmers of suppliers to unfair treatment, whether the utterances are false, etc. In my humble view this petition does not raise a constitutional question.

- 43. This question will be better and effectively determined in a civil court on what the alleged utterances meant and whether they were false or not. In as much as the petitioner makes reference to Article 33(2) (d) and 27 of the Constitution, this court will have to determine the issues aforesaid before it can eventually determine the issue of breach of the said Articles. The key grievance here is whether the utterances were in the first instance made and whether they mean what the petitioner is alleging.**

The court will also have to determine whether the utterances are false and consequently whether the petitioner should be compensated or not. If that other court agrees with the petitioner then it will grant the effective remedies. It is therefore not the only course that will give the petitioner the remedy it seeks. I am guided by the case of KKB v SCM & 5 others (supra) wherein it was stated,³⁶.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....”

31. I have gauged the issues raised in the instant suit/petition against the principles espoused in the above cited cases.

32. Whereas the petitioners contend that the petition raises serious issues which can only be heard and determined by a constitutional court, I find the issues raised in the petition to be issues touching on alleged unlawful adjudication and/or inclusion of land said to belong to the petitioners' family into land belonging to the 1st respondent and alleged failure to comply with the applicable law and procedures in evicting the petitioners from the suit property by the 1st and 2nd respondents, which issues ought to be addressed in a civil suit as opposed to a constitutional petition.

33. There is nothing constitutional in the claim that the petitioners land was unlawfully or un procedurally adjudicated as forming part of the land currently registered in the name of the 2nd respondent to hold in trust for the 1st respondent. Equally, there is nothing constitutional in the claim that the respondents did not adhere to the applicable law and procedures in evicting or attempting to evict the petitioners from the suit property.

34. As pointed out by the petitioners in their own submissions, the procedure of eviction of a person said to be in unlawful possession of public or private land is provided for in the Land Act and not the Constitution. In that regard **section 152B** provides as follows: -

“An unlawful occupant of private, community or private land shall be evicted in accordance with this Act”.

35. Regarding eviction from public land, **Section 152C** Provides as follows: -

“The National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before eviction.”

36. **Section 152F**, on the other hand, provides for the rights of a person served with an eviction notice, which right includes making an application to court against the notice.
37. Whereas in the circumstances of this case, no notice was issued on the petitioners in compliance with the provisions of **section 152C** of the Act, the evidence adduced in this case shows that the National Land Commission was involved in alternative dispute resolution process that culminated in the petitioners promising to voluntarily vacate from the suit property after 90 days.

38. It is the view of this court that in the circumstances, the NLC was not under any obligation to issue the petitioners with the notice contemplated under **section 152C** of the Land Act as the rationale of the notice is to notify the person or persons said to be in unlawful occupation of public land of the impending eviction. In the circumstances of this case, the petitioners had voluntarily committed to vacate the suit property within 90 days.
39. If for whatever reason, the petitioners decided not to vacate the suit property within the time they voluntarily committed to vacate, the onus was on them to move the court for the relief contemplated in **section 152F** of the Land Act.
40. **Section 152G**, on the other hand, provides for mandatory procedures that must be complied with in carrying out evictions.
41. In view of the foregoing, I find and hold that the petition taken up by the petitioners as well as the reliefs sought, do

not amount to constitutional issues. They are simply civil disputes that ought to have been brought through an ordinary civil suit and not as constitutional issues. Be that as it may, having heard the suit presented by the parties on its merits, I will consider the case presented by the petitioners on its merits, with a view of determining whether the petitioners have made up a case for being granted the orders sought, or any of them.

42. On whether the petitioners have made up a case for being granted the orders sought or any of them, the evidence adduced in this case shows that the suit property was reserved for Kapcherop Secondary School during land adjudication.

43. Reservation of the suit property for use by Kapcherop Secondary School made the land public land. Such land is unavailable for allocation to any private individual.

44. Whereas there is evidence that the petitioners have been in use and possession of the suit property for a long period of time, there being evidence that the suit property was reserved for Kapcherop Secondary School during land adjudication and that the process that culminated in adjudication of the suit property was not challenged by the petitioners and/or their predecessors in claim to entitlement to the portion of the suit property in question, I find the petitioners' claim against the respondents to be unmaintainable on the grounds that the suit property having been set apart for use for public purpose is public land hence not available for alienation in favour of private individuals; the long period of use and possession of the suit property by the petitioners without interruption by the respondents does not entitle the petitioners to lay a claim to the suit property as by dint of the provisions of **section 41** of the Limitation of Actions Act, Cap 22 Laws of Kenya, a claim for adverse possession does not lie in respect of public land.

45. In that regard see the said section of law which provides as follows: -

“41. This Act does not-

a. enable a person acquire any title to, or any easement over-

Government land or land otherwise enjoyed by the Government;... land vested in the county council...lack vested Trustees of National Parks of Kenya...”

46. The upshot of the foregoing is that the petitioners have not made up a case for being granted the orders sought or any of them. Consequently, I dismiss their claim against the respondents but with no orders to costs.

47. I direct the petitioners to voluntarily vacate the suit property, within 90 days from the date of delivery of this suit failing which they will forcefully be removed therefrom.

48. Orders accordingly.

**Judgement dated, signed and delivered virtually at Busia
this 31st day of March, 2026.**

L. N. WAITHAKA

JUDGE

In the presence of;

Ms Nafula h/b for Mr. Samba for the Petitioners

Ms Olando h/b for Ms Cheruiyot for the 1st Respondent

Mr Kwame for the 2nd and 3rd Respondents

Court Assistant: Tracy