

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CORAM: R. MWONGO, J.
CONSTITUTIONAL PETITION NO. E024 OF 2024

IN THE MATTER OF CONSTITUTION OF KENYA ARTICLE 73(1)(a)(i-iv)
AND ARTICLE 75(1)(a,b,e) AND 2 (a) AND (b) OF THE
CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONSTITUTION OF KENYA AS READ TOGETHER WITH
ARTICLE 50(1) OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF ARTICLE 49 CLAUSE (1)(a)(i) OF THE CONSTITUTION OF
KENYA AS READ TOGETHER WITH ARTICLE 50(1) OF THE
CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ARTICLE 22(1)(2)(a) OF THE CONSTITUTION OF
KENYA WHICH APPROVES THAT PERSON CAN ACT ON BEHALF OF ANOTHER
PERSON WHO CAN NOT ACT IN THEIR OWN NAME.

BETWEEN

ISAIAH NYAGA KATHIORI.....1ST PETITIONER/CLAIMANT
JEREMIA NJERU NYAGA.....2ND PETITIONER/CLAIMANT
ANDREW IRERI NJERU AS THE PROFESSIONAL
MEDIATOR.....3RD PETITIONER/CLAIMANT

-VERSUS-

THE OCS ISHIARA POLICE STATION.....1ST
RESPONDENT
THE CORPORAL KANYUAMBORA POLICE POST.....2ND RESPONDENT
THE ASSISTANT CHIEF RUIRIA SUB-LOCATION.....3RD RESPONDENT
THE CHIEF NGUTHI LOCATION.....4TH RESPONDENT
THE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

Petition

1. Through a petition dated 09th October 2024, the petitioners seek the following orders:

- 1) This honourable court be pleased to grant an injunction order to restrain 1st, 2nd, 3rd and 4th respondents from interfering with the 1st and 2nd respondents until the Succession Cause No.124 of 2011 will be heard and determined:-

- 2) A declaration of right as an order to set the 1st and 2nd free and fit well when they were at their home.
 - 3) An order to sack 1st, 2nd, 3rd and 4th respondents according to Article 75(1) (a)(b) (c) and (2)(a) and (b) of the constitution of Kenya and this honourable court direct the said order to:-
 - (1) (IG) Inspector General of Police.
 - (2) CS Interior and Coordination of National Government.
2. The petition is founded on grounds specified therein, which are that the 1st to 4th respondents acted in a manner that would interfere with succession proceedings in which they are parties. This interference came to them by way of frustration through threats.

The Application

3. The petitioners also filed a notice of motion dated 22nd October 2024 seeking orders that:
- 1) This honourable court be pleased to grant an injunction order to save the life of parties.
 - 2) This honourable court be pleased to grant order to restrain respondent not to enter the land parcel No. Evurore/Nguthi/1266 until the case will be heard and determined.
 - 3) Order for cost.
4. The application is founded on grounds that the petitioners are occupying the suit land and there is a likelihood of bloodshed if no determination is made as to who will utilize it. That the orders are necessary to avert any potential bloodshed between the petitioners and the respondents.

Preliminary Objection

5. The respondents filed a notice of preliminary objection dated 28th October 2024 on the following grounds:
- 1) That the Petition does not meet the threshold of a Constitutional Petition in that it has not been pleaded with reasonable precision and clarity enumerating the constitutional rights that have been violated or likely to be infringed.
 - 2) That this Honorable Court lacks jurisdiction to hear, entertain and determine the Petition.

Parties' Submissions

6. The parties herein filed their written submissions.
7. The 3rd petitioner filed written submissions stating that the 3rd and 4th respondents sent the 1st and 2nd respondents to arrest the 1st and 2nd petitioners over the dispute regarding parcel number Evurore/Nguthi/1266 where they live. That the 4th respondent was bribed to work with the 1st and 2nd respondents to arrest the 1st and 2nd petitioners. He stated that the fact that the 1st and 2nd respondents were transferred to other stations is not a resolution for the matter and that they ought to be held accountable for the discriminatory acts they perpetrated.
8. On their part, the respondents relied on the case of **Anarita Karimi Njeru v Republic (Miscellaneous Criminal Application 4 of 1979) [1979] KEHC 30 (KLR)** and argued that the petitioners had failed to precisely plead the constitutional violations alleged. That the National Police Service Act and Regulations lay down procedures for removal of police officers from service and there are several disciplinary measures that can be explored before then. That none of these procedures have been invoked, thus, this constitutional court bears no duty to order removal of these officers from service in the manner prayed. They argued that the petition is frivolous and vexatious and that it ought to be struck out on grounds that the petitioners have not exhausted all other means of resolving the dispute before bringing it to court.

Issue for determination

9. The issue for determination is whether the preliminary objection has merit

Analysis and Determination

10. It is trite that a preliminary objection is raised based purely on issues of law. Additionally, the determination of those legal issues should have the overall effect of determining the primary suit if the preliminary objection succeeds. This was the position taken by the court in the case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696** where the Court of Appeal held thus:

“...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit....A preliminary objection is in the nature of 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.”

11. The petitioner’s case is founded on a claim that the 1st and 2nd respondents were arrested by the 1st to 4th respondent who were co-operating with each other to cause the arrest. According to them, the respondents ensured the arrest in a bid to frustrate succession proceedings in which the suit land is where the petitioners are settled. They want these local policing authorities to be removed from service and an injunction be issued against them.
12. The respondents have objected to the petition on grounds that the petitioners have failed to concisely state the constitutional alleged to have been violated. They also challenged the jurisdiction of the court to hear the petition on the same basis. These are, indeed, pure issues of law which must be addressed first.
13. It is trite that a constitutional petition must clearly state the constitutional rights alleged to have been infringed and specify how they have been infringed. It must be clear to the constitutional court what the petitioner is claiming as a violation and how it was committed. The clarity and precision of a constitutional petition as to describing constitutional violations was stated in the case of **Anarita Karimi Njeru v Republic (supra)** 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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.” [Emphasis added]

14. Following the promulgation of the 2010 Constitution, the **Anarita Karimi case** was cited with approval in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)** where it was held:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional

provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.
[Emphasis added]

15. Besides the fact that the alleged constitutional violations in this case are unclear, the petitioners have also sought an injunction and an order for dismissal from service against the 1st to 4th respondents. A party may bring a matter before the court in the form of a constitutional petition. However, if it soon becomes evident that the orders sought can be granted through other litigation or dispute resolution channels besides a constitutional petition, then those channels must first be exhausted. That is the basis of the doctrine of exhaustion.

16. Whenever this happens, the constitutional court should exercise constitutional avoidance and avoid the matter whose redress may be found outside of or by means other than a constitutional petition. In the case of **Sports and Recreation Commission v. Sagittarius Wrestling Club and Anor, 2001 (2) ZLR 501 (S)**, the South African Court held thus:

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.” [Emphasis added]

17. In this case, an injunctive order could have been sought by the petitioners through another litigation channel against the respondents, besides the petition herein. As for the orders for dismissal from service, the petitioners ought to follow the procedure laid down in the various laws upon which the respondents' public offices were established to obtain the relevant remedies. This would also include raising complaints with the office of the ombudsman.

Conclusions and Disposition

18. From the foregoing, it is clear that the petition offends the doctrine of exhaustion of statutorily available dispute resolution mechanisms. There were other channels available to the petitioners instead of or before the petition was filed, but the petitioners did not pursue any of them.

19. For the above reasons, the constitutional petition fails on the basis of the doctrine of constitutional avoidance. The jurisdiction of the court is also ousted under the doctrine of exhaustion.

20. Accordingly, the preliminary objection succeeds and the constitutional petition dated 09th October 2024 and the notice of motion dated 22nd October 2024 are hereby dismissed.

21. Orders accordingly.

Delivered, dated and signed at Embu High Court this 29th day of April, 2026.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. No Representation for 1st Petitioner
2. No Representation for 2nd Petitioner
3. Andrew Ileri Njeru – 3rd Petitioner
4. No Representation for Kiongo for Attorney General
5. Francis Munyao - Court Assistant