



**Oloo v Land Registrar Homabay County & another; Okello (Legal Representative of the Estate of Okello Ogilo) (Interested Party) (Constitutional Petition E006 of 2024) [2025] KEELC 5918 (KLR) (15 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5918 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
CONSTITUTIONAL PETITION E006 OF 2024**

**FO NYAGAKA, J  
JULY 15, 2025**

**BETWEEN**

**PAUL ODOYO OLOO ..... PETITIONER**

**AND**

**THE LAND REGISTRAR HOMABAY COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JENNIFFER ANYANGO OKELLO (LEGAL REPRESENTATIVE OF THE ESTATE OF OKELLO OGILO) ..... INTERESTED PARTY**

**RULING**

**Brief Facts**

1. This ruling is in respect of the Respondents' Preliminary Objection dated 2<sup>nd</sup> December, 2024 on the following grounds:
  1. That the instant Petition is Res Judicata pursuant to section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya.
  2. That the Honourable Court lacks jurisdiction to hear this Petition.
  3. That the instant Petition is fatally defective for expressly offending the provisions of Part III of the *Fair Administrative Action Act* No 4 of 2015.
  4. That the instant Petition is fatally defective for expressly offending the provisions of Order 53 of the Civil Procedure Rules.



5. That the instant Petition expressly offends the provisions of Section 9(3) of the *Law Reform Act*, Cap 26 of the Laws of Kenya.
6. That the instant Petition is fatally defective for expressly offending the provisions of Order 53 of the Civil Procedure Rules.
7. In any event, the instant Petition offends the doctrine of exhaustion, hence premature.
8. That the Petition is vexatious and an abuse of the court process.

## Response

2. There was no response to the preliminary objection because it was alleged to be a point of law.

## Submissions

3. Learned counsel for the Petitioner filed his submissions dated 11<sup>th</sup> April, 2025 whereby he gave a background of the case and relied on the case of Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd (1969) E.A. 696 and Oraro V Mbaja (2005) 1KLR 141.
4. It was his submission that the first ground as raised ought to be ascertained by the court through facts hence not a point of law. He further submits that the Petitioner did not come to court under Order 53 of the Civil Procedure Rules or Part III of the *Fair Administrative Action Act*.
5. He added that the Petition offended the provisions of Section 9(3) of the *Law Reform Act*.
6. Counsel went on to submit that the ground of res judicata since the lower court suit had been struck out for lack of jurisdiction. He relied on the case of John Florence Maritime Services Ltd & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others (2021) KESC 39 (KLR).
7. He relied on Article 40 of *the constitution* and submits that there was potential for injustice to him if the court did not hear the Petition on merit. He also submits that the Petition was premature since it offends the doctrine of exhaustion. He cited the case of Jenniffer Anyango Okello V Paul Odongo Oloo and 3 Others ELCA No. 12 of 2021.
8. Learned counsel relied on the case of Abidha Nicholus V Attorney General & 7 Others (2023) KESC 113 (KLR) and submits that the 1<sup>st</sup> Respondent ought to first establish the boundaries of the properties for the Petitioner's right to appeal to arise.
9. He also cited the case in Republic V Karisa Chengo & 2 Others (2017) eKLR and Article 162 (2) (b) of *the constitution* and submits that the Respondent's preliminary objection ought to be dismissed with costs.
10. Learned counsel for the Respondents filed their submissions dated 9<sup>th</sup> April, 2025 by which he argued that the grounds as raised met the test of what amounts to a preliminary objection.
11. He submitted that the Petitioner's prayer in paragraph (a) of the Petition is a declaration to have the Land Registrar's ruling dated 14<sup>th</sup> August, 2018 in the boundary dispute be declared unconstitutional.
12. It was his submission that the said prayers sought to quash the registrar's ruling under the *Land Registration Act*, 2012 which ought to be set aside vide a judicial review. He added that the Petition offended Section 9(3) of the *Law Reform Act*, Cap 26.
13. He relied on Section 18(2) of the *Land Registration Act* and submits that the action complained against was yet to be concluded under the law to give rise to a legal claim.



14. Counsel cited the case of Owners of the Motor Vessel Lillian S V Caltex Oil (Kenya) Ltd [1989] KLR and submits that this court ought to down its tools for lack of jurisdiction.

### **Analysis and Determination**

15. This Court has considered the preliminary objection and the sole issue for determination is whether the Objection is merited. Attendant to it is the issue on who to bear the costs of the Preliminary Objection and Petition just in case the Preliminary Objection succeeds or not.

16. The nature and basis of a preliminary objection was well laid down in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd. V West End Distributors Ltd. [1969] EA 696, where the court held 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.”

17. In the judgment of Sir Charles Newbold in the same case stated as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion (emphasis added)”

18. This court has considered the grounds in the preliminary objection and it is a fact that the same raise points of law aside from grounds 1 and 8 which are factual. Thus, the Court needs not consider the two as that would require the merits of some of the facts being considered. Also, I have considered the other grounds of the Objection. Grounds 4 and 6 are a repetition of the other hence I will consider them as one.

19. In the Supreme Court in Communications Commission of Kenya & 5 others V Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment) discussed the principle of Constitutional avoidance as follows;

“105]. We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black’s Law Dictionary, 10th Edition at page 377 defines it as:

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”

[106]. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:

[256]. 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 Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others



[2014] eKLR (29<sup>th</sup> September 2014) (Judgment) the Supreme Court of Kenya in thus:

“(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.”

(257) Similarly, the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).”

20. In *K K B v S C M & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Hon. Mativo, J. (as he then was) also had this to say on the doctrine:

“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...”

21. The doctrine of constitutional avoidance fundamentally provides that where legal recourse, means or forum are available through which a legal dispute can be resolved, a court sitting as a constitutional court ought not to deal with the matter: it would lack jurisdiction to hear and determine the said legal dispute. Not all disputes which lie between people or parties find themselves as constitutional matters. The disputants have to exhaust those means available, and where they fail to do so, without the hinderance of the Respondents, defendants or adverse parties which hinderance itself cannot be remedied, rectified or removed by way of constitutional process, that does not of itself give rise to a Constitutional violation or infringement. Additionally, where a party squanders the opportunity to challenge a decision or act by statutory or available means or processes and forums he/she is prevented to now resort to the constitutional Court to use its forum and process. That itself would be an abuse of the process of the Court. Such a party who does not use the means available resolve a dispute cannot blame anyone for failure to do so. He is not welcome to take advantage of constitutional means to challenge it, later.



22. The Court has carefully noted the one of the grounds the Respondents allege is that the Petition offends the mandatory provisions of Section 9(3), (2) of the Law Reform Act, Chapter 26 Laws of Kenya and Order 53 Rule 2 of the Civil Procedure Rules, 2010.
23. Order 53 Rule 2 provides that:
- “Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding. For the purpose of its being quashed, unless the application for leave is made not later than 6 months after the date of the proceeding or such shorter period as may be prescribed by any act;”
24. The above rule is basically derived from Section 9(3) of the Law Reform Act and has the same force in terms of the period within which an order of Certiorari must be made. Section 9(3) provides as follows: -
- “In the case of an application for an order of Certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application is made not later than six months after the date of that judgment, order, decree, conviction.”
25. The provisions are clear that it the application has to be made within six months of the decision impugned. The Applicant failed to challenge the decision of the Land Registrar within six (6) months. He ought to have done so. He cannot now transform the decision to a constitutional violation merely because his avenues of challenging the decision have been closed by limitation of time.
26. Moreover, upon the decision given on 14<sup>th</sup> August 2018 being delivered, the Petitioner acted on tit by filing Homabay Homa bay Chief Magistrate Court Land Case No. 10 of 2020, against the two Respondents, the County Surveyor and Interested Party herein which was decided and he filed an appeal in Homabay ELC No. 12 of 2021 which was determined in April 2023. As will be discussed below, the Petitioner has already utilized his chances meritoriously in the said matter and appeal. It is an abuse of the process of this Court to invoke its jurisdiction as a constitutional Court through the instant Petition.
27. I have keenly perused the Petition. It is not in dispute that it is based on the 1<sup>st</sup> Respondent’s ruling dated 14<sup>th</sup> August, 2018. The Petitioner terms it as unconstitutional. From the record of the said Ruling annexed to the Supporting as Exhibit A8 it is clear that it followed the visit by the Land Registrar (1st Respondent) to the disputed parcels of land the same date and the carrying out of an elaborate interview of witnesses besides the Petitioner and the Interested Party herein. The document is clear on the face of it that the Ruling was delivered on the same date. In it the Land Registrar concluded that (1) the Existing Boundary remains the boundary of the parties (2) any error on the Map be amended to reflect the ground as the ground is the authority to boundaries (3) Any aggrieved parties to seek redress within 60 days in the ELC.
28. It is clear to me that the Ruling was delivered on the same date of the visit, which means it was on the presence of the parties. What it means is that the Land Registrar did not postpone the Ruling to another date or other place. Otherwise it could have indicated so. What supports this finding of the Court is that the Petitioner claims, at 10 and 11 of the Petition and actually repeated by way of a deposition in paragraph 9 of the Supporting Affidavit that he received a letter from the Surveyor that he was going to fix the boundary as per the decision of the Land Registrar’s decision. He did not annex to the Petition such a letter. He also does not dispute that the Land Registrar made the decision on the



same date of visit. He only refers the Land Registrar's visit as casual. Actually, the Petitioner depones at paragraphs 11 and 12 of the Petition and 10 of the Supporting Affidavit that up to the time of receiving that letter the land registrar had not supplied him with the decision or resolutions of the meeting but rather that whenever he approached him for the same the 1<sup>st</sup> Respondent became evasive, elusive and noncommittal.

29. There is no evidence whatsoever by the Petitioner that he ever visited the Land Registrar's office to be supplied with the decision and minutes and was denied the same. There is not even one simple written request for the same attached to the affidavit of the Petitioner to demonstrate to the Court and convince or satisfy it that indeed the alleged acts of the Land Registrar being evasive or noncommittal were ever done. This is but a mere conjecture and figment of imagination to make this Court out of whipped emotions to agree with his allegations.
30. Moreover, and more telling is that the Petitioner did not challenge the Constitutionality of that decision any time soon from the 27<sup>th</sup> February 2020 as he claims to have received it to the filing of the instant Petition. Instead, and evidence from his own pleading, at paragraph 14 of the Petition, that the Petitioner acted on the decision by filing Homabay Chief Magistrate Court Land Case No. 10 of 2020, against the two Respondents, the County Surveyor and Interested Party herein. A decision from the suit led the Petitioner to file an appeal in Homabay ELC No. 12 of 2021 which was determined in April 2023 when this Court held that the trial court did not have jurisdiction.
31. At paragraph 16 of the Petition the Petitioner avers that he once more moved the 1<sup>st</sup> Respondent to hear the boundary dispute afresh using the survey and adjudication maps and records. But the 1<sup>st</sup> Respondent has failed, declined and refused to do so hence depriving the Petitioner of his various constitutional rights.
32. He added in the following paragraph that the 1<sup>st</sup> Respondent and Interested parties have infringed, breached and contravened his constitutional rights and fundamental constitutional principles.
33. The above is the background of the instant Petition as brought out from the pleadings herein. It is this court's humble view that the Petitioner ought to have challenged the decision dated 14<sup>th</sup> August 2018 by way of Judicial Review but he failed to do so in time. He cannot now turn to clothe the complaint as a constitutional violation. He failed to exercise the doctrine of exhaustion of remedies hence this Court does not have jurisdiction. In sum, the remedy for such a claim can only be obtained through a Judicial Review process and not a constitutional Petition.
34. Secondly, the Petitioner acquiesced to the decision by filing Homabay Chief Magistrate Court Land Case No. 10 of 2020, against the two Respondents, the County Surveyor and Interested Party herein from whose decision an appeal lay in Homabay ELC No. 12 of 2021 and which was determined in April 2023. The Petitioner cannot now turn to ask the Court to relook at the same decision from a constitutional angle by alleging that it infringed his rights and was a breach of constitutional principles. Furthermore, the Petitioner has pleaded that he has subsequent to the decision of the Court urged the Land Registrar and Surveyor to make another determination of the dispute but he has failed and or refused to do so. If I hear the Petitioner well, he is determined to return to the same decisions of the land registrar and this Court many times over on the issue. The failure by the 1<sup>st</sup> Respondent to act upon subsequent requests by the Petitioner does not translate the earlier sealed decision to fall under a constitutional infringement or contravention
23. I thus find that the instant Petition is rather disguised as a Judicial Review claim and the proper forum for its resolution would be in a Judicial Review court.



24. Consequently, this court sitting as a Constitutional court does not have the jurisdiction to hear and determine the Petition.
25. The upshot of the foregoing is that the Respondents' preliminary objection dated 9<sup>th</sup> February, 2024 is merited: this Court does not have jurisdiction, and also the Petitioner filed this Petition in contravention of Order 53 Rule 3 of the Civil Procedure Rules and Section 9(3) of the [Law Reform Act](#). Therefore, the Petition dated 11<sup>th</sup> November, 2024 is hereby dismissed.
26. Costs of the Petition be to the Respondents and the Interested Parties.
27. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 15<sup>TH</sup> DAY OF JULY 2025**

**HON. DR. IUR NYAGAKA,**

**JUDGE**

In the presence of,

Mr. Kajo State Counsel for the Respondents

Odera Advocate holding brief for Kabahati for the Petitioner

Ms Agade Advocate also holding brief for Kabahati for the Petitioner

