



**Tim v Rono (Sued as the next of kin of Jackson Kipyegon Ronoh - Deceased) & 2 others;
Torongo Farmers Cooperative Society & another (Interested Parties) (Environment
& Land Petition 8 of 2021) [2024] KEELC 399 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 399 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND PETITION 8 OF 2021
JM ONYANGO, J
JANUARY 24, 2024**

BETWEEN

DR SAM KA TIM PETITIONER

AND

**MARIAM RONO (SUED AS THE NEXT OF KIN OF JACKSON KIPYEGON
RONOH - DECEASED) 1ST RESPONDENT**

THE LAND REGISTRAR KOIBATEK SUB-COUNTY 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

TORONGO FARMERS COOPERATIVE SOCIETY INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

1. The Petitioner instituted this suit by way of an undated Petition filed in court on August 2, 2021 and amended on May 24, 2022 seeking the following reliefs:
 - a. A declaration that the acquisition of land parcel no. Lembus/Torongo/301 by the 1st Respondent was irregular, illegal and thus null and void.
 - b. An order of cancellation of the title against land parcel no. Lembus/Torongo/301 against the 1st Respondent.
 - c. An order to return the land to Government and it be utilized for the purpose in which it was earmarked for)sic)



- d. An order be issued that apart from the suit land being reverted to the public, the items left behind by the public during the said unlawful eviction by the Respondent be calculated item by item in current value of each item as stated in this petition paragraph 10 (a-f) stated above and the court direct the Respondent to compensate the petitioners (sic).
 - e. Costs of incidental to this petition be awarded to the petitioner (sic)
 - f. That we pray that as a matter of justice, orders sought be allowed (sic).
2. The 1st respondent filed a notice of preliminary objection dated July 27, 2022 and a replying affidavit in response to the petition.
 3. In the Notice of Preliminary objection, she raised the following grounds:
 - i. That the petitioner’s petition dated May 24, 2022 is extra-jurisdictional by both pleadings and reliefs sought.
 - ii. That the petitioner herein lacks the requisite locus standi to commence and prosecute this cause.
 - iii. That the Petition is fatally defective and is for striking out for failing to meet the Constitutional test and threshold set in Anarita Karimi Njeru and Re Mumo Matemu v Trusted Society of Human Rights Alliance.
 - iv. That abuse of office is personal and is not as subject of succession and/or inheritance, hence no cause of action by abatement , thus a nullity.
 - v. That the suit herein fails the doctrine of exhaustion of forum and forum convenience in utter breach of settled precedents.
 - vi. That the matter herein is sub-judice.
 - vii. The petition herein is an illegality hence be struck out (sic).
 4. In the 1st Respondent’s Replying Affidavit sworn on April 20, 2023 she deposes that she is the widow of the late Jackson Kipyego Ronoh who died on August 23, 2021 leaving behind an estate comprising of *inter alia* the suit property which forms part of her matrimonial home. That before his demise, the deceased was summoned by the Cooperative Societies Officer, Eldama Ravine in an attempt to reclaim the suit property from him but the said attempt failed. It is upon the failure to repossess the said title that the Petitioner instituted the instant petition on behalf of Torongo Cooperative Society and the Respondents are threatening to evict the Petitioner from her home which she has been occupying since 1977.
 5. She deposes that the Petitioner lacks the locus standi to institute the suit and additionally that the Petition does not meet the Constitutional threshold in the case of Anarita Karimi Njeru and the Mumo Matemu case.
 6. It is her deposition that the allegations of abuse of office are personal and cannot be sustained after the demise of the deceased as the same are not transferrable. Further that the provisions of chapter six of the Constitution did not exist in 1976, 77,78 and 79 when the deceased is alleged to have processed his title.
 7. The 1st Respondent deposes that the suit ought to be dismissed for failure to comply with the exhaustion doctrine as the dispute involves members of a cooperative society.



8. It is her deposition that the suit property is the subject of a succession cause which is still pending in court and therefor this court lacks the jurisdiction to entertain this suit.
9. The 2nd Interested Party filed a Replying Affidavit sworn by Brian Ikol, the Director Legal and Regulatory Services of the National Land Commission. He deposes that the Petitioner has locus standi to institute the Petition and that the 2nd Interested party supports the prayers sought in the Petition save for the prayer for compensation. He denies that the 1st Respondent acquired proprietary interest in the suit property and states that if any allocation was made to the 1st Respondent then it is a nullity as the same was fraudulent.
10. It is his deposition that the suit property is public land reserved for Torongo Agricultural Demonstration Farm hence it was not available for allocation to a private individual and hence the title issued to the 1st Respondent cannot be protected under article 40 of the *Constitution* of Kenya, 2010.
11. He added that the 2nd Interested Party had received a complaint from Lembus Advocacy and Welfare Council of Elders who claimed that the suit property was public land and was illegally transferred to the 1st Respondent. They therefore wanted the suit property to revert to the 2nd Respondent. He averred that the 1st Respondent had not presented any offer letter to show how the suit property was alienated to them. He avers that if the prayers sought are not granted, the 1st Interested Party shall suffer irreparable loss.
12. The court directed that the Preliminary Objection be canvassed by way of written submissions and as at the time of writing this ruling only the 1st Interested Party had filed their submissions. The 2nd and 3rd Respondents indicated that they do not intend to file any submissions.

1st Interested Party's Submissions

13. In his submissions dated October 2, 2023 learned counsel for the 1st interested Party submitted that the Petition is properly before this court in accordance with the court's jurisdiction set out in article 162(2) (b) of the *Constitution* and section 13 of the *Environment and Land Court Act*.
14. As regards locus standi, counsel submitted that the Petitioner has the locus standi to institute this Petition. He relied on the *Mumo Matemu* decision, where the court observed as follows:

“It still remains to reiterate that the landscape of *locus standi* has been fundamentally transformed by the enactment of the *Constitution* in 2010 by the people themselves. In our view the hitherto stringent locus standi requirements of consent by the Attorney General or demonstration of some specific interest by or private citizen seeking to enforce a public right have been buried in annals of history. Today by dint of article 22 and 258 of the *Constitution*, any person can institute proceedings under the Bill of rights on behalf of another person who cannot act in their name or as a member of, or in the interest of a group or class of persons or in public interest. Pursuant to article 22(3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of June 28, 2013 (the *Mutungwa Rules*) to inter alia facilitate the application of the right to standing. The rules reiterate any person other than a person whose right or fundamental freedom under the *Constitution* is allegedly denied, violated, infringed or threatened has a right of standing and can institute proceedings as envisaged under article 22 (2) of the *Constitution*.”
15. On whether the Petition is fatally defective, he submitted that the Petition complies with the principle in the Anarita Karimi Njeru case that requires precision in framing constitutional Petitions. He submitted that the Petition has referred to articles 40, 47 and 64 of the *Constitution* and it has



enumerated how the actions of the 1st Respondent have infringed Article 40 of the Constitution which guarantees protection of property rights. He submitted that the 1st Respondent transferred the land in his name yet he had only been allowed to graze his cattle thereon. He thus submitted that since the Petition had set out the particulars of the alleged complaints, it had met the threshold of a Constitutional Petition.

16. It was counsel's submission that having been substituted as the 1st Respondent in place of Jackson Kipyegon Ronoh-deceased in accordance with the provisions of order 24 rule 4 (4) of the Civil Procedure Rules, the widow of the deceased was competent to continue with the suit. He added that the allegations of abuse of office were not personal as they pertained to the conduct of the deceased which affected the interests of the Petitioner.
17. Regarding the doctrine of the exhaustion of remedies, he submitted that the same was not applicable to this case as this court has jurisdiction to hear and determine this case as it is a public interest case.
18. He submitted that the pending succession matter relating to the suit property did not bar the court from determining this case as the suit property cannot be the subject of a succession matter before the disputes relating to it are settled.

Analysis and Determination

19. Having carefully considered the preliminary objection, the submissions, the applicable law and authorities cited to me, the following issues arise for determination;
 1. Whether the court has jurisdiction to hear and determine this matter.
 2. Whether the Petitioner has *locus standi* to institute this suit.
 3. Whether the Petition meets the threshold of a Constitutional Petition.
 4. Whether a claim of abuse of office can be sustained against a surviving spouse or legal representative.
 5. Whether the suit fails the doctrine of exhaustion of remedies.

Jurisdiction

20. The jurisdiction of the Environment and Land Court is provided in article 162 (2) (b) of the Constitution and section 13 of the Environment and Land Court Act.

Article 162. (1) of the Constitution provides as follows:

The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

162 (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).



21. Pursuant to article 162(2) of the Constitution the Parliament proceeded to enact the Environment and Land Court Act 2011, which clearly confers the Environment and Land Court, with jurisdiction as follows under section 13(2) of the Act;

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

- a. Relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b. Relating to compulsory acquisition of land;
- c. Relating to land administration and management;
- d. Relating to public, private and community land and contracts, leases in action or other instruments granting any enforceable interests in land; and
- e. Any other dispute relating to environment and land.”

22. It is now settled that that a dispute relating to land and or the environment can be commenced by way of a constitutional petition and it is only the Environment and Land Court that has jurisdiction to entertain such matters.

23. Although the 1st Respondent has stated that there is a pending succession matter touching on the suit property, I agree with counsel for the 1st Respondent that any dispute relating to the ownership of the suit property must be settled before the succession court can determine whether the suit property is the subject of the succession matter.

Locus Standi

24. The main argument raised by the 1st Respondent is that the Petitioner did not have the *locus standi* to institute this suit as he has no personal interest in the suit property.

25. In the Mumo Matemu case (*supra*) the court observed as follows:

“It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of *locus standi*, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general. In John Wekesa Khaoya v. Attorney General, Petition No. 60 of 2012; [2013] eKLR the High Court expressed itself as follows:

“...the *locus standi* to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in articles 22 and 258 of the Constitution which ensures unhindered access to justice...”

Article 22 of the Constitution thus provides that:

“(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

“(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by–



- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members” [emphasis supplied].

And article 258 provides that:

“(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

“(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members” (emphasis supplied).

26. In the instant case, the Petitioner has instituted this suit in public interest in his capacity as the leader of Baringo Human Rights Defenders Community Based Organization which champions the rights of the communities living in Baringo. It is his contention that the suit property is public land which should revert to the 1st Interested Party. In view of the provisions of articles 22 and 258 of the Constitution and the decision in the Mumo Matemu case (supra) with which I concur, it is my finding that he has the locus standi to institute this suit.

Threshold of Constitutional Petition

27. The 1st Respondent has criticized the Petition for not having met the threshold of a Constitutional Petition. The threshold of a Constitutional Petition was set down in the case of Annarita Karemi Njeru where the Court of Appeal held as follows:

“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”.

28. In the present case the Petitioner has in his amended Petition stated, albeit inelegantly that respondent fraudulently registered the suit property which was public property belonging to Torongo Farmers’ Cooperative in his name contrary to section 75 of the former Constitution thus his actions were an abuse of office.



29. To the extent that the petitioner has articulated the acts which constitute a violation of the rights of the members of Torongo Farmers' Cooperative and the Baringo community in general as well as the Constitutional provision that has been infringed the petition cannot be said to have failed to meet the threshold of a constitutional petition. What remains is for the petitioner to prove those allegations. I would therefore hesitate to strike out the petition on the ground that it does not meet the test of a constitutional petition.

Whether the petitioner can sustain a claim of abuse of office against a surviving spouse

30. The Petitioner has at paragraphs 7 and 8 of the petition pleaded as follows:

“7. That on December 27, 1975 Respondent using his power and influence set in motion a process to acquire land parcel Lembus/Torongo/301 which at the time housed Ministry of agriculture offices) and continues to house) (sic). He sought the permission of Torongo Farmers' Cooperative Society to be allowed to use the land as grazing paddock for his cattle and the request acceded to thereby gaining entry. Upon gaining entry, the respondent proceeded to allocate himself the said parcel of land knowing too well that it was earmarked for Agricultural Demonstration Farm.

8. in 1977 the land was transferred to the 1st Respondent by the Land Commissioner for lands acting for and on behalf of the County Council of Baringo”

31. The allegations contained in the above-mention paragraphs constitute serious infractions in the nature of abuse of office and/or fraud for which the deceased could have been held personally liable. Whether such transgressions can be sustained against the current respondent who is the spouse of the deceased is another matter.

32. It is trite that allegations of fraud must not only be pleaded but must be proved

33. In the case of *Peter Owade Ogwang v Jared Obiero Ouya* [2014] eKLR the Court of Appeal faced with allegations of fraud against a deceased defendant observed as follows:

“We are of that view, because there was no nexus between the appellant and the respondent with the deceased 1st defendant out of the way, since it was the latter who sold the suit land to the respondent. Under order vi rule 4 (1) (now order 2 rule 4 (1)) of the *Civil Procedure Rules*, a party is required in any pleading subsequent to a plaint to plead specifically, among other matters, fraud which he alleges makes any claim or defence of the opposite party not maintainable and rule 8 (1) of the same order (now rule 10 (1) of order 2) provides:-

“..... every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing:-

- (a) particulars of any misrepresentation, fraud, breach of trust wilful default or undue influence on which the party pleading relies; and



- (b) where a party pleading alleges any condition of the mind or any malice, fraudulent intention or other condition of mind except knowledge particulars of the facts on which the party relies.” (emphasis supplied.)

The above provisions have received judicial interpretation in a plethora of authorities including the cases of *Urmila w/o Mabendra Shah v Barclays Bank International Ltd and another* [1979] KLR 76, *Jared Iqbal Abdul Rahman & another v Bernard Alfred Wekesa Sambu & another* [Nairobi CA No. 11 of 2001] (UR), *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] 2 KLR 269, among many other cases. Those decisions are unanimous that allegations of fraud must be specifically pleaded and that proof thereof is higher than mere balance of probabilities. In the *Virani (supra)* case, the Court went further to state that in the absence of such specific pleading, a party is not at liberty to agitate the allegations of fraud or fraudulent intention as fraud is a serious quasi criminal imputation and requires more than proof on a balance of probability though not beyond reasonable doubt.

.....“The plaintiffs made allegations of fraud against the first defendant. Their case against the first defendant abated. Those allegations therefore cannot stand. No allegation of fraud was made against the second defendant and if at all there was such an allegation the same was not satisfactorily proved.”

34. In the instant case, the allegation of abuse of office and fraud have been made against the deceased 1st Respondent and the same cannot be attributed to, or proved against his widow. I am therefore constrained to agree with counsel for the 1st Respondent that the suit against her which is based on fraud cannot be sustained.

Whether the suit fails the test of exhaustion of remedies

35. The 1st Respondent has pointed out that before filing the instant suit, the Petitioner ought to have exhausted the other remedies available to him. What he means is that since the suit involves Torongo Farmers Cooperative Society and the deceased who was a member of the said society, the matter ought to have been determined by the Cooperatives Tribunal.
36. Indeed in the Petition the Petitioner has alluded to the parties having attempted to resolve the dispute through the Department of Agriculture although the same did not bear any fruits. Section 76 of the [Cooperative Societies Act](#) provides as follows

76. Disputes;

- (1) If any disputes concerning the business of a Co-operative Society arises-
- (a) Among members, past members and persons claiming through members, past members and deceased members; or
- (b) Between members, past members or deceased members and the society, its committee or any officer of the society; or



(c) Between the society and any other co-operative society, it shall be referred to the tribunal.

(2) A dispute for the purpose of this Section shall include:-

(a) Claim by a Co-operative Society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) A claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted.

37. The dispute before this court is that the 1st Respondent fraudulently acquired the title to the suit property which is alleged to be public land. I am persuaded that this suit would not constitute a dispute as envisaged under Section 76 of the *Co-operative Societies Act*, cap 490 so as to require the dispute to be referred to the Co-operative Tribunal for determination. The scope of the dispute is beyond the jurisdiction of the Tribunal as it involves the challenge of title on grounds of fraud and it therefore falls within the jurisdiction of this court. In the premises the doctrine of exhaustion does not apply.

38. I must now determine whether the preliminary objection raised by the 1st Respondent meets the test of a preliminary objection in order for it to be upheld. In the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696 the court observed as follows:

“---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

39. In the Notice of Preliminary Objection, the petitioner has raised various issues touching on jurisdiction, locus standi, the threshold of a Constitutional Petition, whether the claim of abuse of office can be sustained against the widow of the original 1st Defendant, the doctrine of exhaustion and whether the suit is sub-judice.

40. From the above analysis, it is clear that the only ground in the Notice of Preliminary Objection that discredits the petition is that the allegations of fraud have been made against a deceased person. This is not a pure point of law as is defined in the case of *Mukisa Biscuits (supra)*. I am of the view that the court cannot reach any definite findings in regard to the allegations of fraud made by the petitioner at this interlocutory stage without hearing the parties.



41. Consequently, the Preliminary Objection cannot be upheld and the same is hereby dismissed with no order as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 24TH DAY OF JANUARY 2024

J.M ONYANGO

JUDGE

In the presence of;

- 1. Miss Rotich for Mr. Martim for the Petitioner**
- 2. Mr. Biko for the 1st Respondent**
- 3. Miss Koross for Ms. Odeyo for the 2nd and 3rd Respondents**
- 4. The 2nd and 3rd Interested Parties present in person**

Court Assistant: H. Akidor

