



Mwirabua & another v National Land Commission & 2 others (Petition E001 of 2023) [2024] KEELC 1096 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1096 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
PETITION E001 OF 2023
CK YANO, J
FEBRUARY 29, 2024**

BETWEEN

MBIUKI MWIRABUA 1ST PETITIONER

JOHN MUTEGI 2ND PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

M'NDEREBA NAICHU 3RD RESPONDENT

RULING

1. Before me for determination is a notice of preliminary objection dated 24th May, 2023 filed by the 2nd respondent seeking the petition be struck out with costs to the 2nd Respondent on the following grounds:
 1. That the Petition is fatally defective, misconceived, and mischievous or otherwise an abuse of the court process and therefore, are unsustainable in the obtaining circumstances.
 2. That the Honourable Court lacks Jurisdiction to hear and determine the petition as the [Land Adjudication Act](#) provides a clear procedure for raising objections against any dealings in land that is subject to adjudication and also provides for appeals to the minister in case one is dissatisfied by the determination of an objection and there is a pending appeal to the minister which is yet to be determined.
 3. That the petition offends the provisions of section 26, 27, 28 and 29 of the [Land Adjudication Act](#).



4. That further, it is an established principle of law that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order would be granted by courts and the plaintiff (sic) herein has not established the existence of an exceptional circumstances.
 5. That the petition offends the statutory provisions of section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya and is statutorily time barred as the same has been brought about 17 years after the cause of action arose.
 6. That the petition does not meet the threshold for a Constitutional petition as set out in Anarita Karimi Njeru case.
 7. That the petition is otherwise frivolous and an abuse of the court process.
2. On the 27th June 2023, the court directed that the preliminary objection be canvassed by way of written submissions which were duly filed by the 2nd Respondent and the Petitioners. The 2nd respondent filed their submissions dated 19th October 2023 through the office of the Attorney General while the petitioners filed theirs dated 27th November 2023 through Ms. Muchangi Gichugu & Co. Advocates.
 3. The 2nd respondent identified three issues for determination: - Whether the Court has jurisdiction to hear and determine the matter; whether the suit is statutorily time bared and whether the petition meets the threshold for a Constitutional petition.
 4. On the first issue, the 2nd respondent cited Section 29 of the *Land Adjudication Act* which provides that any person who is aggrieved by the determination of an objection under Section 26 of the Act may within sixty days after the date of the determination, appeal against the determination to the Minister.
 5. The 2nd respondent relied on the case of Kiroket Ole Punyua –vs- Umash Ole Mwanik & 2 others (2012) eKLR, Speaker of the National Assembly –vs- James Njenjga Karume (1992) eKLR, Mutanga Tea & Coffee Company Ltd. –vs- Shikara Ltd. & Another (2015) eKLR and Geoffrey Muthinja Kabiru & 2 Others –vs- Samuel Munga Henry & 1756 Others (2015) eKLR.
 6. The 2nd respondent submitted that the suit parcels of land were subject of proceedings in the objection proceedings allegedly in the year 2006 and the petitioners though aware of the proceedings did not appeal to the minister against the impugned decision. That the petitioners have not given reason why they could not pursue that avenue before coming to court. The 2nd respondent submitted that in the premises the court lacked jurisdiction to hear and determine this suit and ought to be dismissed with costs to the respondents.
 7. With regard to the second issue, the 2nd Respondent cited Section 7 of the Limitations of Actions Act which provides that an action to recover land may not be brought after the end of twelve years from the date on which the right of action accrued. The Attorney General relied on the case of Edward Moonge Lengasuranga –vs- James Lanaiyara & Another [2019] eKLR and Bosire Ongero –vs- Royal Media Services [2015] eKLR and submitted that the impugned decision was made in 2006 when the cause of action arose and there is not explanation for the delay in filing the suit and neither did the petitioners seek leave to file the suit out of time. The 2nd respondent submitted further that the cause of action herein arose about 17 years ago and such the suit is statutorily time barred.
 8. On whether the petition meets the threshold for a constitutional petition, the 2nd Respondent cited Rule 10 of *the Constitution* of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2013 which provides that a petition shall disclose the petitioner’s name and address; the facts relied upon; the constitutional provision



- violated; the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit, or in a public interest case to the public, class of persons or community; details regarding any civil or criminal case, involving the petitioner or any of the petitioner, which is related to the matters in issue in the petition; that the petition shall be signed by the petitioner or the advocate of the petitioner; and the relief sought by the petitioner.
9. While relying on the case of James Gacheru Kariuki & 19 Others –vs- County Government of Mombasa & 56 others [2019] eKLR, East Africa Pentecostal Churches Registered Trustees & 1754 Others –vs- Samwel Muguna Henry & 4 Others [2015] eKLR, the 2nd Respondent submitted that in the instant petition, the petitioners have failed to set out and show how the Respondents have violated or infringed their rights. It is the 2nd Respondent’s submission that the procedure set out in the case of Anarita Karimi Njeru –vs- Republic (1979) KLR requires a petitioner to particularize the allegations of violations of the constitution as principal goal posts in drafting informed and well-considered petition, and was meant for furtherance of justice. That it is imperative therefore to note that every petition is required to adhere to the set out procedure without undue departure from its tenets.
 10. The 2nd Respondent submitted that the petitioners have failed to set out and show how the Respondents have infringed on their right to property and fair administrative action. That as per the proceedings of 2006, it is clear that the 2nd Petitioner was aware of the proceedings and even attended the proceedings and tendered his evidence in person, and therefore cannot claim infringement of the right to fair administrative action. That there is no evidence to show that the petitioners raised any objections to the proceedings. It is the 2nd Respondent’s submission that the Petitioners have also failed to demonstrate how the constitution has been violated through the alleged violations by the Respondents.
 11. It is also the 2nd Respondent’s submission that the matters at hand were heard and determined by the District Land Adjudication and settlement Officer in exercise of their statutory mandate and as such the exercise of their legal mandate which has not been challenged either through an appeal or judicial review proceedings cannot be said to be infringing rights of an indolent petitioner. That the petitioners’ sole intention is to engage in fishing expedition in the high seas of constitutional litigation to avert the statutory time limitation of appeals and judicial review proceedings. That the petition is imprecise and too general and has failed to meet the threshold of a constitutional petition to warrant any positive order from this court. The 2nd Respondent further submitted that this court must guard against transmission of normal disputes which are frivolous and vexatious into constitutional petitions. It is their submission that this petition is an abuse of the court process and ought to be dismissed with costs.
 12. The petitioners on their part gave brief facts of the case and submitted that they are not before court for an appeal under Section 28 and 29 of Land Adjudication Act as alleged by the 2nd Respondent. It is the petitioners’ contention that they are before court on grounds of constitutional violations and reiterated the prayers they are seeking in the petition.
 13. The petitioners’ counsel submitted that the question before court is whether the court has jurisdiction to entertain the suit. Learned counsel for Petitioners referred to the definition of jurisdiction in Halsbury’s Law of England (4th Edition) Vol. 9, the Black’s Law Dictionary, 9th Edition and Words and Phrases Legally Defined Vol.3, and relied on Owners of Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Limited (1989) KLR 1. On the source of a court’s jurisdiction, the petitioners’ counsel relied on the Supreme court of Kenya in Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Limited & Others [2012] eKLR.



14. It is the petitioners' submission that the issue before the court is on violation of Article 26, 27 and 40 of *the constitution* and cited Section 13 of the *Environment and Land Court Act* which provides for the jurisdiction of this court as envisaged under Article 162 (2)(b) of *the constitution*. The petitioners' counsel submitted that the petitioners' should not be condemned on grounds of misunderstanding and relied on the case of West Kenya Sugar Co. Ltd. –vs- Busia Sugar Industries Limited & 2 Others [2017] EKLR. They reiterated that the matter before court is on violation of fundamental rights and not an appeal. On the issue of limitation, the petitioners' counsel submitted that the violation of rights is a continuous process that can only be determined at the full hearing of the petition. It is their submission that the preliminary objection is not merited and the same should be dismissed with costs.
15. I have considered the preliminary objection raised and the submissions filed together with the authorities relied on. The main issues for determination are whether this court has no jurisdiction over the matter, whether the suit is time barred and whether the objection is merited or not.
16. The law on preliminary objection is now settled by the then Court of Appeal of East Africa in Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd (Supra) where Law J.A and Newbold P (both with whom Duffus V.P agreed) respectively at 700 and 701 held as follows:

Law J. A

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

Sir Newbold, P

“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 points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

17. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lilian S” –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows:

“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. Similarly, the Supreme Court in the case of Sameul Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & 2 Others (2012) eKLR discussed the issue of jurisdiction and the court held as follows:

“A court's jurisdiction flows from either *the constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law.



It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

19. Going by the above decisions, it is my view that the objection raised is well taken since it raises the question of jurisdiction and a plea of limitation.
20. In the petition, the petitioners aver that they were the proprietors of the suit properties. That in 1986, the 2nd Respondent through the Land Adjudication Officer awarded the parcels of land to the 1st and 2nd Petitioners but later after a hearing awarded the same to the 3rd Respondent in 2006. It is the petitioners’ contention that the said action was un-procedural, unconstitutional and a violation of their right to land. The said award must have been done pursuant to the [Land Adjudication Act](#) Cap 284.
21. The [Land Adjudication Act](#) is an Act of parliament to provide for the ascertainment and recording of rights and interest in community land (previously trust land), and for purposes connected therewith and purposes incidental thereto. The same Act has an elaborate procedure on how rights over land can be ascertained and has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of community land are supposed to be dealt with. Since the law gave the respondents the powers under the said Act to award land and considering that there is an elaborate procedure of even lodging an appeal to the minister, it is my view that the Respondents’ action cannot be termed unconstitutional. It is also my view that this court cannot substitute the established bodies under the said Act which are supposed to deal with complaints over land. The petitioners could have exhausted the mechanisms that the law has put in place before approaching this court in the manner they did. Since the process of appeal within the adjudication process has not been exhausted, I hold the view that the rights of the petitioners had not crystalized into rights capable of being protected under Article 40 of [the constitution](#).
22. In ELC (Meru) Petition 7B of 2013 Justus Mugaa M’Impwi –vs- District Land Adjudication & Settlement Officer, Tigania West/East District & Another [2018] eKLR the court was dealing with a similar matter and stated that:

“The most obvious remedy available to the petitioner after the objection was allowed by the adjudication officer was lodge an appeal to the minister pursuant to Section 29 of the [Land Adjudication Act](#) cap 284 Laws of Kenya. Having failed to exercise his right of appeal within the stipulated period, the petitioner avoided Judicial Review Process to escape the limitation imposed by the statute and is now seeking an escape route through [the constitution](#). It is imperative to note that not all grievances should warrant the filing of a petition. Constitutional jurisdiction must not be trivialized as by so doing, the value of [the constitution](#) would be diminished if it is allowed to be used as a general substitute for the normal proceedings for invoking judicial and constitutional rights. It is my view that the subject of this petition being a parcel of land which was undergoing adjudication process, the petitioners’ rights and interest would not have crystalized into rights capable of being protected under article 40 of [the constitution](#) of Kenya 2010. The process of appeal had not been exhausted and those rights are registered under the [Land Registration Act](#) of 2011. In the upshot, this petition lacks merit premature and an abuse of the due process.”
23. Similarly, in Reuben Mwongela M’itelekwa (Suing as the Legal Representative of the estate of M’itelekwa M’mucheke Naituri alias M’itelekwa Mucheke) –vs- Paul Kigea Nabea the court was of the



opinion that all available remedies under the Land Adjudication Act had not been exhausted when it upheld the Preliminary Objection and struck out the constitutional petition. The court further found that “the dispute concerns ascertainment of rights and interest in land which dispute was last decided through Objection Proceedings. These proceedings are anchored under the statutes which are still in force. The dispute therefore does not raise any constitutional issue. I therefore agree that the petition is incompetent.”

24. In the case of Speaker of National Assembly Versus Karume [1992] KLR 425 the Court held that:

“...where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

25. I am also bound by the decision of the Court of Appeal on the issue of exhaustion theory in Geoffrey Muthinja Kabiru & 2 others –vs- Samuel Munga Henry & 1756 Others [2015] eKLR in which it held:

“the exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside courts.”

26. Further, the Court of Appeal in Mutanga Tea & Coffee Company Ltd. –vs- Shikara Limited & Another [2015] EKLR, made the following remarks:

“We entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the constitution or a statute, to resort to that mechanism first before purporting to involve the inherent jurisdiction of the High Court. The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article 159 (2) (c) is not a closed catalogue. To the extent that the constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the high court would not be promoting but rather, undermining a clear constitutional objective. A holistic and purposive reading of the constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165 (3) (a) of the constitution in a way that will accommodate the alternative dispute resolution mechanisms.”

27. As such I find that this petition was prematurely filed, is incompetent and the court has no jurisdiction to deal with the matter. Consequently, I find that the petition dated 18th November, 2022 is devoid of merit and the same is dismissed with costs to the Respondents.

28. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH FEBRUARY, 2024

In the presence of:

Court Assistant – Martha

No appearance for Petitioners

Ms. Kendi for 2nd Respondent



No appearance for 1st and 3rd Respondents

C.K YANO,

JUDGE

