



**Nzioka v Cabinet Secretary for Lands, Housing and Urban Development & 3 others (Environment & Land Petition E006 of 2023) [2024] KEELC 902 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 902 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND PETITION E006 OF 2023  
CA OCHIENG, J  
FEBRUARY 22, 2024**

**BETWEEN**

**MUTHUSI NZIOKA ..... PETITIONER**

**AND**

**THE CABINET SECRETARY FOR LANDS, HOUSING AND URBAN  
DEVELOPMENT ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, MACHAKOS COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**CHARLES MUTUNGA NZIOKA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. What is before Court for determination is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Notice of Preliminary Objection dated the 6<sup>th</sup> July, 2023 based on the following grounds:-
  - a. That the Petition dated 8<sup>th</sup> June 2023 offends the mandatory provisions of Section 9(2) and (3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules, 2010.
  - b. That this Honourable Court is divested of jurisdiction to hear and determine this matter since the time for lodging the proceedings has lapsed.
  - c. That the Petition is devoid of merit and incompetent and the orders sought therein ought not to be granted.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.



## Submissions

### 1st, 2nd and 3rd Respondents' Submissions

3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' in their submissions insist the Petition offends the mandatory provisions of Section 9(2) and (3) of the [Law Reform Act](#) and Order 53 Rule 2 of the Civil Procedure Rules, 2010 as the Petitioner herein filed the instant Petition seeking an order of certiorari against the decision of the 2<sup>nd</sup> Respondent delivered vide a Ruling issued on 9<sup>th</sup> May, 2013, which is more than ten (10) years ago. They argue that the Law is clear that an order of certiorari among other Judicial Review orders can only be issued if leave is sought to apply for such an order within six (6) months, after the date of such decision. They contend that the Petitioner did not file an Application seeking leave and brought this claim through a Petition rather than Judicial Review proceedings, ten (10) years after the decision was issued by the 1<sup>st</sup> Respondent. Further, from the Petition it is clear the Petitioner was aware of the Appeal Case No. 322 of 2008 over land parcel number 248 Adjudication Section Mitaboni/Miumbuni/248, which was filed by the 4<sup>th</sup> Respondent and even attended the first hearing which was conducted on 14<sup>th</sup> February, 2013, but the Petitioner sat on his rights for ten (10) years, after which he decided to file this particular Petition and since he could not seek leave under the provisions of Order 53 of the Civil Procedure Rules, decided to navigate through a Constitutional Petition. They argued that the Petition cannot be filed in utter violation of the Statutes that govern legal processes. They further submitted that this Court is divested of jurisdiction to hear and determine this matter since the time for lodging the proceedings had lapsed and hence the Petition is not merited.
4. To buttress their averments, they relied on Sections 9(2) and (3) of the [Law Reform Act](#) and Order 53 Rule 2 of the Civil Procedure Rules as well as the following decisions: Fredrick Mworira v District Land Adjudication Officer Tigania West/East & 3 others [2016] eKLR; Speaker of National Assembly v Karume [1992] KLR 425 which position was adopted M.J. Anyara Emukule, J, In Mombasa High Court Petition No. 18 Of 2013: Anne Wamuda & 3 Others v Kenya Railways Corporation & Anor [2015] eKLR; Abdallah Mangi Mohamed v Lazarus & 5 Others [2012] eKLR.

### Petitioner's Submissions

5. The Petitioner in his submissions insist that Section 9 of the [Law Reform Act](#) is not applicable in the Environment and Land Court as it only speaks of the High Court and not the Environment and Land Court which are two distinct courts established by the law to deal with different causes of action. He argues that this Court cannot presume jurisdiction and apply the [Law Reform Act](#) without there being any express legislation bequeathing it, to do so. He contends that Order 53 of the Civil Procedure Rules is not applicable to Petitions and argues that this Court has jurisdiction to hear and determine the Petition. He reiterates that the averment does not hold as it is his contention that he was never served with any further hearing notice by the 1<sup>st</sup> Respondent and as such did not know of the existence of the decision as the proceedings were done in an opaque and secret manner. To buttress his averments, he relied on the following decisions: Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 others, Application No. 2 of 2011 [2012] eKLR; Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR where they adopted the finding in the Ugandan case of Hon. Gagawara Nelson G. Wambuzi Vs. Kenneth Lebogo; Penina Nduta Karongo (Suing as the legal representative of the Estate of Eunice Wanjiru Munga) v Samuel Mwaura Felix Kariuki & 3 others [2017] eKLR; Masai Mara (SOPA) Limited v Narok County Government [2016] eKLR: Quick Enterprises Ltd vs Kenya Railways Corporation, Kisumu High Court Civil Case No. 22 of 1999 which was relied on in the case of Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [2019] eKLR; Republic v Teachers Service Commission & Another Ex-Parte Jared Mongare Nyakundi [2009] eKLR; Joan



Akinyi Kabasellah and 2 Others v Attorney General, Petition No 41 of 2014; Dominic Arony Amolo v Attorney General [2003] eKLR; Dry Associates Ltd v Capital Markets Authority and another [2012] eKLR and Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others [2015] eKLR.

### **Analysis and Determination**

6. Upon consideration of the instant Notice of Preliminary Objection including the rivalling submissions, the only issue for determination is whether this Court has jurisdiction to hear and determine the Petition dated the 8<sup>th</sup> June, 2023.
7. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contend that this Court has no jurisdiction to hear and determine the Petition dated the 8<sup>th</sup> June, 2023 as it offends the mandatory provisions of Sections 9(2) and (3) of the [Law Reform Act](#) as well as Order 53 Rule 2 of the Civil Procedure Rules.
8. The Petitioner however insists that since this is a Constitutional Petition, the [Law Reform Act](#) does not apply to the Environment and Land Court and the Court has jurisdiction to handle the Petition since the Appeal to the Minister was done in secrecy.
9. The Petitioner vide his Petition dated the 8<sup>th</sup> June, 2023 which was brought pursuant to Articles 10, 14, 21, 22, 23, 25, 27, 40, 47, 159 and 259 of [the Constitution](#) 2010 and under the [Land Adjudication Act](#) CAP 284 Laws of Kenya sought for the following Orders:
  - a. That an order of certiorari do issue to bring into this Court and quash the decision of the 2nd Respondent contained in the Ruling issued on 09.05.2013 in Land Adjudication Appeal Case No. 322 of 2008 over land parcel number 248 Adjudication Section Mitaboni/Miumbuni/248 Adjudication Section.
  - b. That the registration of land parcels number Mitaboni/Miumbuni/Ngoleni/5413 and Mitaboni/ Miumbuni/Ngoleni/5414 by the 2nd respondent be cancelled and the land register rectified so that the said parcels do revert to their mother title number Mitaboni/Miumbuni/248 Adjudication Section and which should be registered under the names of the Deceased pending the succession of his Estate.
  - c. That injunction to issue against the 1st Respondent either by themselves, their agents and/or servants preventing them from trespassing into the Deceased's land parcel number Mitaboni/Miumbuni/248 Adjudication Section pending succession of the Deceased's Estate.
  - d. That cost of this suit be borne by the Respondents.
  - e. Any further relief or orders that this Honourable court shall deem fit to grant.
10. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents argue that the Petitioner participated in Appeal but filed the Petition ten (10) years later, seeking to quash the decision from the Minister. The Petitioner on the other hand insists that the 1<sup>st</sup> Respondent violated the rules of law by entertaining the Appeal after ten (10) years and acted in excess of his powers. Further, that he was not accorded a fair trial and there was a breach of Article 47 and 159 of [the Constitution](#). From a perusal of the Court record, I note the Petitioner actually participated during the hearing of the Appeal No. 322 of 2008 to the Minister, on 14<sup>th</sup> February, 2013 and even cross-examined the 4<sup>th</sup> Respondent therein. Further, there was a visit at the locus in quo wherein it was indicated, the Petitioner was absent. A decision was delivered on 9<sup>th</sup> May, 2013 which forms the fulcrum of this Petition.



11. On raising of Preliminary Objection, in the case of Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Company Limited [1969] EA 696, the Court held that:-

“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.”

12. The Petitioner has argued the Law Reform Act is inapplicable to the Environment and Land Court as it is a preserve of the High Court. I note the Law Reform Act is a Statute that cuts across and underpins Judicial Review. Further, it was enacted before the promulgation of the Constitution 2010 which created the Environment and Land Court. It is trite that Statute Law should be read and interpreted with necessary adaptation, qualification and exceptions in accordance with Sections 7 and 33 of the Sixth Schedule of the 2010 Constitution which provides that:-

“Section 7: “(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. (2) If, with respect to any particular matter—(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and (b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.”

While Section 33 reads:-

“An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.”

13. Further, I note under the Environment and Land Court Act, this Court has jurisdiction to deal with disputes relating to prerogative orders that are governed by the Law Reform Act as well as Order 53 of the Civil Procedure Rules.
14. In the foregoing, I beg to disagree with the Petitioner that the Law Reform Act is inapplicable to this Court. Further, I opine that the issues raised in the Petition revolve around the Land Adjudication process which are governed by the Land Adjudication Act. Further, the Petitioner actually participated in the Appeal to the Minister which rendered the disputed decision. I note the Land Adjudication Act actually stipulates the process an aggrieved party should adhere to, in instances which they seek to lodge an Appeal from the Minister’s decision.
15. In *Kennedy Odoyo Okello v District Land Registrar, Migori & 2 others* [2015] eKLR, the Court of Appeal held that:-

“With regard to grounds 9 and 10, there is no basis of alleging that the appellant’s constitutional right to property was breached by any of the respondents. It is elementary law that where a property is lawfully charged to a financial institution to secure repayment



of a loan, upon default, the charge has a statutory right to sell the charged property to realize the advanced sum. In such circumstances, it amounts to crying wolf for the appellant to allege that his constitutional right to property and those of his family members have been breached. In our view, the petition did not raise any constitutional issues and whatever complaint the appellant had squarely lay in the domain of private law. Having carefully reviewed and analyzed the evidence that was tendered before the trial court, we see no basis of interfering with the decision of Okongo, J.”

16. In *Fredrick Mworira v District Land Adjudication Officer Tigania West/East & 3 others* [2016] eKLR it was held that:-

“... Constitutional Petitioners cannot be Substitutes for other legal processes and that where there are Specific Provisions litigants ought to prosecute their disputes in concordance with the available Statutory Law and remedies set therein.”

17. While in *Speaker of National Assembly v Karume* [1992] Klr 425, it was observed 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.”

18. Based on the facts as presented while relying on above cited decisions as well as the legal provisions quoted, I find that since the Petitioner participated in the Appeal process which decision was delivered on 9<sup>th</sup> May, 2013, he should have adhered to the procedures set out in the *Land Adjudication Act*, which is a private law and not file a Petition ten (10) years later so as to defeat the issue of timelines. To my mind, the impugned decision from the Minister should have been subjected to Judicial Review and the Petitioner could have sought leave under Order 53 of the Civil Procedure Rules and not file a Constitutional Petition. In the circumstances, I find that this court is hence devoid of jurisdiction to deal with all the issues raised in the Petition dated the 8<sup>th</sup> June, 2023.

19. In the foregoing, I find the instant Notice of Preliminary Objection merited and will proceed to dismiss the Petition.

I make no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF FEBRUARY, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

**In the presence of;**

**Kilonzi holding brief for D.M. Mutinda for Petitioner**

**Kuria holding brief for Mrs. Momanyi for 1<sup>st</sup> – 3<sup>rd</sup> Respondents**

**No appearance for 4<sup>th</sup> Defendant**

**Court Assistant – Simon**

