



**Tuli v Mwaruwa & 4 others (Petition 24 of 2023)
[2024] KEELC 1169 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1169 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 24 OF 2023
EK MAKORI, J
FEBRUARY 21, 2024**

BETWEEN

SAMSON NZAI TULI PETITIONER

AND

MWARUWA CHONGWA MWARUWA 1ST RESPONDENT

**THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT 2ND
RESPONDENT**

THE DEPUTY COUNTY COMMISSIONER, RABAI 3RD RESPONDENT

THE CHIEF LAND REGISTRAR 4TH RESPONDENT

LANDS REGISTRAR, KILIFI 5TH RESPONDENT

RULING

1. The petitioners herein filed this Constitutional Petition seeking a declaration that the administrative decision by the 2nd and 3rd respondent resulting in the registration and issuance of title to the 1st respondent violates the provisions of Articles 10,19,20,21,27,35,40,47,50(1), 60(1) (b) & 259 of the [Constitution](#), a Judicial Review order in the form of Certiorari, an order that the issuance of title to the 1st respondent is irregular, fraudulent and illegal, an order directing the 2nd, 4th & 5th respondents to rectify the record, a permanent injunction against the 1st respondent or in the alternative an order that the suit property be divided into two equal portions.
2. On July 17, 2023, the 1st respondent filed a Notice of Preliminary Objection, arguing that the petition as drafted does not meet the requirements of a Constitutional Petition and that the issues raised are civil in nature and relate to land ownership and registration. The petition should be struck out along with costs because it is vexatious, austerey flawed, and an abuse of the court process.



3. In addition, the first respondent asserts that the petitioners lack standing to file this petition and that a civil lawsuit is the only appropriate means of addressing and solving the grievances raised by the petitioners regarding the acquisition of the land title, registration, and adjudication to establish each party's rights or claim to the suit property.
4. The Court directed parties to canvass the Preliminary Objection through written submissions.
5. The 1st respondent submits that the leading case of *Anarita Karimi Njeru v Republic* [1976-80] KLR 1272 set out the principles on how to originate Constitutional Petitions that a person who alleges a violation of his constitutional rights and freedoms must plead the same with a reasonable degree of specificity and precision on the right they allege has been violated, the manner it has been violated and the relief they seek for that violation.
6. The 1st respondent proceeds to state that the petitioners have referred to several Articles of the Constitution but have failed to provide particulars as to the allegations of infringement of those rights. The petition has generalized the alleged infringement of rights and none has been spelled out in precision as was laid down by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR.
7. The 1st respondent avers that the prayers sought in the petition do not conform to Article 23 (3) of the Constitution, which states that the reliefs that may be granted in a petition include a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law, an order of compensation and an order of judicial review. The petitioners have invited this Court to investigate allegations of fraud and to determine ownership of land which prayers cannot be granted by this Court in a Constitutional Petition.
8. Further the Constitution is not a general substitute for the normal civil procedure and Courts have held that private law claims should not form the basis of Constitutional Petitions and should be resolved by using the usual process of civil litigation. Reliance is placed on the case of *Dennis Wanyonyi Simiyu & 2 Others v Caroline Nafula Omondi & Another* [2020] eKLR.
9. The 1st respondent submits that the allegations of fraudulent registration of land as alleged by the petitioners and the orders of cancellation of title are matters that can only be canvassed in a trial and not through a Constitutional Petition. The issues raised and the documents attached thereto touching on matters of Adjudication, registration, and ownership of land can only be adequately addressed by way of a civil suit. The petitioner should file a civil suit for each party to prove and demonstrate their rights or claim to the suit property.
10. The 1st respondent submits that the issues of fraud or illegality in the issuance of title document are questions of fact and law that can only be heard and determined in a civil suit where parties can be called to produce viva voce evidence that can be scrutinized through cross-examination and not through affidavit evidence as in the case herein and urge this Court to strike out the petition herein with costs to the 1st respondent.
11. On the issue of locus standi the 1st respondent states that it is a critical preliminary issue that must be dealt with and settled before dwelling into other substantive issues. Locus standi is the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, whether or not he has a case worth listening to. The issue herein is whether the petitioners have the requisite locus standi to seek reliefs sought in the petition. The 1st respondent submits that the petitioners are not the legal owners of the suit property



and cannot therefore institute this instant petition or any proceedings before the Court regarding the suit property.

12. In the petition, the petitioners allege that the disputed land was owned by their forefathers who are since deceased, and that they are beneficially entitled to the said suit property. However, there are no letters of administration or a grant issued to allow the petitioners to institute any proceedings on behalf of their alleged late forefathers or on behalf of the community nor have the petitioners presented any documents to show that they are registered or beneficial owners of the suit property. The case of *Sisilia Nyakoe & Another v Attorney General & 4 Others* [2021] eKLR, is cited.
13. The 1st respondent contends that the petitioners have not shown that they are the legal representatives of the alleged forefathers. They therefore lack the locus standi specific to commence or institute any proceeding. In the absence of mandatory grants or letters of administration, the petitioners have no locus and the instant petition ought to be struck out.
14. The petitioners on the other hand support the initiation of the petition and aver that Preliminary Objections ordinarily should be premised upon settled and crisp points of law to the extent that its application to undisputed facts, leads to but a conclusion that the facts are incompatible with that point of law.
15. The petitioners state that the four points raised by the 1st respondent do not purely rest on points of law and are couched in general terms and lack specifics.
16. The petitioners contend that the issues raised can be addressed in the main hearing hereof where the Court will determine whether the issues proffered achieve the Constitutional threshold on infringement and violation of rights or whether a normal civil suit should have been the best option in litigating the issues raised. To support this contention, the petitioners cite the cases of *Patrick Baya Maitha v Cabinet Secretary Industry Trade and Enterprises Development & 2 others* [2021] eKLR and *Francis Angueya Ominde and Another v Vihiga County Executive Committee- Members Finance Economic Planning and 3 Others; Controller of Budget and 10 Others (Interested Parties)* [2021] eKLR.
17. The following issues fall for the determination of this Court:
 1. Whether the Petition meets the threshold of a Constitutional Petition.
 2. Whether the Petitioners have locus standi to institute the Petition herein.
 3. Who bears the Costs?
18. The leading decision in this realm is the *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* [1969] E. A 696 which enunciated the threshold for a preliminary objection to be achieved. Law J.A. and Newbold P. (whom Duffus V-P concurred with), at 700 and 701, respectively, held as follows:

“Law, J.A.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

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.”

19. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & Another* [1995] eKLR also captured the legal principle when it stated as follows:

“A Preliminary Objection 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.”

20. In this petition the petitioners seek from this Court several prayers:

- a. A declaration that the administrative decision by the 2nd and 3rd respondents consequently resulted in the registration and issuance of title No. Miyuni/Mlenji/480 by the 4th and 5th respondents in favour of the 1st respondent violates the provisions of Articles 10,19,20,21,27,35,40,47,50(1), 60(1) (b) & 259 of the Constitution and Section 4 of the Fair Administrative Actions Act.
- b. A judicial review order in the nature of an order of Certiorari to remove to this Court and quash the decision or order of the 3rd respondent made on the 25th May 2022 awarding all the property known as plot No. 480 to the 1st respondent.
- c. An order that the registration and issuance of the said title by the 4th and 5th respondents in favour of the 1st respondent is irregular, fraudulent, and illegal hence null and void.
- d. An order against the 4th and 5th respondents to harmonize and or rectify the records and other documents concerning the suit property to reflect the petitioner’s share.
- e. A permanent injunction restraining the 1st respondent from evicting the plaintiffs herein, entering, occupying trespassing onto, cultivating, continuing with the said cultivation, tilling, planting, and or in any manner whatsoever dealing with the parcel of land known as Plot No. Miyuni/Mleji/480 measuring 75 acres or thereabouts.
- f. In the alternative, an order that the suit property be divided into 4 equal portions between the petitioners and the 1st respondent as per the decision of the district Land Disputes Tribunal dated 5th February 2002.

21. From the petition, it is pleaded that the petitioners have been in occupation of the suit property which was acquired by their ancestors spanning over a century or so. That the land has been subject to court actions, significantly the Land Disputes Tribunal since 1961 with the LDT deciding in their favour, and decreeing that they were to stay in the land pending adjudication, survey, and issuance of the title to the suit property.



22. Adjudication did happen and in 2015, the suit property was surveyed and subdivided, and consequently in 2019, there was a hearing to determine the claims on rights of the suit property. After objection proceedings, it was decided that the new parcel shall be erased from the map and 1st respondent shall have parcel No. 480 generally. An appeal to the Minister has never been availed to date. The 1st respondent got title to the land and intends to evict the petitioners despite several Court actions in their favour. The petitioners are of the view that the adjudication process was fraudulent hence this petition.
23. Considering the issues raised in the petition which largely points to the process in the adjudication of the suit property and issuance of the title to the 1st respondent it seems to me that the grievances raised in the petition are about the process as undertaken in an adjudication which seems to have gone against them. There is an averment that the decision by the Minister is yet to be procured. No reason has been provided why that has not happened. There is also an averment that there is a judgment by the LDT which was in favour of the petitioners.
24. The preliminary objection as it is made states that this petition raises no constitutional issues. It should have started as a typical civil lawsuit.
25. For a matter to fall within the purview of a Constitutional Petition, in *Anarita Karimi Njeru v Republic* [1980] KLR 154 [1979] eKLR. Trevalyan J. and Hancox J. stated as follows:
- “We would however again stress that if a person is seeking redress from the High Court on a matter that involves a reference to the *Constitution* it is important (if only to ensure that justice is done to his/her 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.”
26. Concerning private law claims in *Dennis Wanyonyi Simiyu & 2 others v Caroline Nafula Omondi & Another* [2020] eKLR, the court stated as follows:
- “Courts have held that private law claims should not form the basis of constitutional petitions and should be resolved by using the usual process of civil litigation. See *Benjoh Amalgamated Limited & Another V Kenya Commercial Bank Limited* (2007) eKLR. In *Uhuru Muigai Kenyatta V Nairobi Star Publications Limited* (2013) eKLR Lenaola J applied the holding in the *Re application by Bahadur* (1968) LR C (cost) 297 and held that:-
- “Where there is remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in *Haco Industries* (Supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction”.
- In the *Re-application by Bahadur Case* (Supra), the court held as follows:-
- “The *constitution* is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the *constitution*”.
- I have analysed the petition before me and I do not find it to raise any constitutional issues for due consideration by this court. It is my considered view that the Petitioner’s claim is a



civil claim which will be best determined as prescribed by the Civil Procedure Act and the Rules made thereunder.”

27. I see that the issues raised in this petition hinge on the adjudication process leading to the acquisition of land title No. Miyuni/Mleji/480. The petitioners seem to be seeking the remedies here disguised as a petition but in my view as an appeal from the adjudication process. It is having a second bite on the adjudication process in which they participated. In *Joseph Mudamba Ojwang v John Opondo Onyango & 4 Others* [2022] eKLR, the Court set out the manner one can challenge an adjudication process in this manner:

“The Land Adjudication Act sets out several dispute resolution mechanisms. In addressing a grievance, one starts with lodging a complaint with the Land Adjudication Committee (Section 20), If aggrieved, a party appeals to the Arbitration Board (Section 21), If a party is dissatisfied he can still pursue a further appeal with the Land Adjudication Officer (Section 26). It is common ground between the parties that due process was followed up to the time the Land Adjudication Officer rendered his decision.

69. Upon determination by the Land Adjudication Officer, the adjudication register became final subject to appeal (Section 27(3) (b). The 4th Respondent then registered the suit property in accordance with the final adjudication register and because there was an appeal, a restriction was entered on the register of the suit property (Section 28).

70. A party aggrieved by the decision of an Adjudication Officer could appeal to the Minister within 60 days from the date of determination of the appeal (Section 29). The Minister normally makes final decisions in a manner he deems fit and his decision is final (Section 29) (b).”

28. The petitioners from the materials before me state that their appeal to the Minister has never been supplied to them. In other words, the petitioners want to abandon the elaborate mechanisms under the Land Adjudication Act and have the process commence over again through this petition.

29. Ordinarily, a party aggrieved by the decision of the Minister approaches the ELC via judicial review and not a petition as held by the Court of Appeal in *Amarnath (Suing on Behalf of the Estate of the Late Amarnath Gupta) v Kazungu & 2 others* (Civil Appeal E033 of 2021) [2023] KECA 1280 (KLR) (27 October 2023) (Judgment):

In regards to whether the ELC had the requisite jurisdiction to entertain the suit, there is no dispute that the suit was challenging the decision of the Minister made under Section 29 of the Act. That Section, under Section 29(1) (b) provides:

“(b)and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

21. In addition to declaring that the decision of the Minister is final, Section 30 of the Act all together ousts the jurisdiction of the Courts, providing as follows:

“30. Staying of land suits

(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication



section has become final in all respects under section 29(3) of this Act.”

22. The Act is clear that any person aggrieved by a decision made under the Section 26 of the Act must follow the process under Section 29 and appeal to the Minister. Once the Minister or the panel delegated to decides, his order is final. That means the Minister’s decision cannot be appealed, whether under the Act or in Court. The option the Appellant had was to pursue Judicial Review process provided under Article 47 of the Constitution, and the Fair Administrative Action Act, 2015 a statute enacted pursuant to the Article 47 of the Constitution. He could not re-open the case and challenge it except through Judicial Review. The Appellant was attempting to undo the process he participated in using a process that is not provided for, and that is not allowed.
30. The nature of the orders sought other than wanting to circumvent the Land Adjudication Act, pursues to have the title deed issued under the adjudication process rectified on allegations of fraud and misrepresentation. On this front again, this can only be done through a plaint, not a Constitutional Petition. But then again it will mean reopening the adjudication process in a manner not provided for by the law. It will be up to the legal counsel the petitioners will get.
31. I see no relevance of the Land Disputes Tribunal decision because its purpose as narrated was to have the petitioners stay on the land until adjudication was to be concluded. That came to pass.
32. On the issue of locus standi, whether the petitioners have letters of administration or not, I see no harm in them bringing up the suit in their own right as beneficiaries of the suit property which they claim to be in occupation since time immemorial.
33. At the end, the petition to me is a non-starter. The Preliminary Objection dated July 17, 2023, and as raised herein by the 1st respondent is hereby sustained. The entire petition is hereby struck out with costs for failure to meet the threshold set in the Anarita Karimi Njeru Case (supra).

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 21ST DAY OF FEBRUARY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms Mulonji for the Petitioners

Ms Lutta holding brief for Ojwang for the 2nd to 5th Respondents

Court Assistant: Happy

In the Absence of:

Mr.Nyongesa for the 1st Respondent

