



**Tight Solutions Limited v Kidege Investment Limited & 4 others (Environment and Land Constitutional Petition 24 of 2022) [2024] KEELC 3279 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 3279 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 24 OF 2022**

**EK MAKORI, J**

**MARCH 20, 2024**

**IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23,  
AND 25(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF  
ARTICLES 162(2) (B) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTIONS OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 40 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: FURTHER CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 60(1)**

**(B) AND 64 OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY  
JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
OF INDIVIDUALS) HIGH COURT PRACTICE AND PROCEDURE RULES 2006**

**IN THE MATTER OF: PLOT TITLE CR. NO. 30506 LAMU PORTION 3 - MANDA**

**BETWEEN**

**TIGHT SOLUTIONS LIMITED ..... PETITIONER**

**AND**

**KIDEGE INVESTMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**



SENIOR REGISTRAR OF TITLES, MOMBASA ..... 3<sup>RD</sup> RESPONDENT  
DIRECTOR OF SURVEYS ..... 4<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT

## RULING

1. Notice of Motion application dated 22<sup>nd</sup> May 2023 by the 1<sup>st</sup> Respondent raises the following issues for the determination of this Court:
  - i. That the current petition is based on the recovery of land, as crafted, it is statutory time-barred, and that it does not meet the threshold of constitutional petitions and therefore ought to be dismissed.
  - ii. The petition is bad in law for want of a Board Resolution and therefore ought to be dismissed with costs.
2. The application is brought under the provisions of Sections 1A,1B, and 3A of the *Civil Procedure Act* and supported by the annexed affidavit of Mr. Richard Otara learned Counsel for the Applicant/1<sup>st</sup> Respondent.
3. The application is opposed there is a Replying Affidavit sworn on 19<sup>th</sup> October 2023 by Mr. Nassir Mohammed Omar one of the Local Managers for the Respondent/Petitioner herein.
4. The application was canvassed by way of written submissions.
5. On the issue of Limitation of actions and that this petition is largely a recovery of land as opposed to a constitutional petition Mr. Otara avers that a keen look at the petition herein will show that the same alleges fraud on the part of the respondents, encroachment and overlap of land under different title documents. There is nothing constitutional raised that the petitioner has established, at best the petitioner has just listed several articles of *the Constitution* allegedly violated without proof of the same.
6. Mr. Otara further states that the petitioner ought to have filed a plaint rather than a petition in a normal civil suit, and seek recovery of land based on the manner the petition is crafted. The Court was referred to the decision in *Nzaumi Munyaka v Oliver Nzeki Munyaka & Another* (as Legal Representative of the Estate of George Munyaka Kavuka [2019] eKLR, which decided that not every litigation that refers to *the Constitution* merit being litigated as a constitutional cause. Speaker of the National Assembly v James Njenga Karume [2008] eKLR, which spoke about the issue that where the law provides a manner on how to originate a suit, the same should be followed. In this case, we are talking of recovery of land which ought to have been commenced by way of a plaint. Also cited is the case of *Four Farms Limited v Agricultural Finance Corporation* [2004] eKLR, quoting with approval the decision in *Damian Belfonte v the Attorney General of Trinidad and Tobago* TT 2005 CA 24, enunciating that where there is a parallel remedy, constitutional relief should not be sought unless there are features that make the complaint appropriate as a constitutional cause to avoid abuse of the Court process. According to Mr. Otara, this was the same holding in *John Harun Mwau v Peter Gastrow & 3 Others* [2014] eKLR.
7. Mr. Otara further cites two judicial authorities that articulate that time and again our Courts have ruled that under the doctrine of judicial avoidance, where parties can commence a cause in any manner other than through a constitutional cause, that should be the norm – see Communication Commission of



Kenya & 5 others v Royal Media Services Limited & 5 Others [2014]eKLR and Leonard Jefwa Kalama v Consolidated Bank of Kenya Ltd & 3 Others [2014]eKLR.

8. On the issue that this suit is time-barred, the applicant states that from the averments by the respondent in paragraph 14 of the 1<sup>st</sup> respondent's affidavit in answer to the petition, from the date of purchase and taking possession till the time of filing suit is more than 14 years, the knowledge of the 1<sup>st</sup> respondent's title was reckoned in the year 2010 and therefore this offends Section 7 of the Limitations of Actions Act for recovery of land hence this suit should be dismissed for that reason alone.
9. On the two issues raised by the applicant, the respondent in answer to the same states that Article 40 of *the Constitution* guarantees ownership of property rights and behooves arbitrary deprivation of the same without following due process, and in case of deprivation, reasonable compensation should be awarded to the affected party. It is those rights as enshrined in Articles 19, 20, 21, 22, 23, and 25(c) that the respondent in the current petition will seek protection from this Court. The respondent is of the view that constitutional rights to fair trial cannot be limited or abrogated as provided under Article 25(c) of *the Constitution* hence the Statute of Limitations is not applicable here - see Chief Land Registrar & 4 Others v Nathan Tirop Koech and 4 Others [2018] eKLR, and Dominic Arony Amolo v Attorney General [2003] eKLR.
10. The respondent thinks that the current petition is not meant to circumvent the Statute of Limitations but genuinely seeks redress for the violations of the rights as enumerated in the petition and as held in *Morris Kyengo Makovu v Kenya Power & Lighting Co, Ltd & 3 Others* [2021] eKLR, that each case should be handled on a case to case basis and any delay should be considered as such. In this case, we are dealing with fraud which according to the provisions of Section 26 of the *Limitation of Actions Act* should be reckoned from the time the fraud was discovered. In this case, according to the respondent in this application, fraud was discovered when a search was conducted in November 2010 which is approximately 10 months after the 12<sup>th</sup> year for purposes of the *Limitation of Actions Act*. In this case, the respondent contends that the Court is asked to consider that this is a constitutional petition where such limitation does not apply and that the Court can exercise its discretion on a case-to-case basis to allow the petition to proceed to a full hearing. The Court is asked to consider the following judicial decisions, which address how to reckon what amounts to inordinate delay in a matter like this one – see *Musa Mbwagwa Manasi & 8 Others v Chief of the Defence Forces and Another* [2021]eKLR, *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & Another* [2014] eKLR and *Daniel Kibet Mutai & 9 Others v The Attorney General* [2019]eKLR.
11. I have considered the materials and submissions by both sides concerning the Notice of Motion which significantly seeks the dismissal of the current petition in limine.
12. On the 1<sup>st</sup> issue that the petition suffers laches and delays, that it is a plaint disguised as a petition, and that it does not meet the threshold of originating constitutional petitions, I will agree with Mr. Ota that when you look at the manner the petition is crafted what predominantly features is the recovery of land and that it is alleged the petitioner purchased the land from one Mohammed Abdallah Zubedi and was registered as such since 6<sup>th</sup> June 2006 after successful transfer. Since 1<sup>st</sup> February 2010, the petitioner came to realise the 1<sup>st</sup> respondent/applicant is registered too as proprietors as shown in the certificate of postal search conducted in that year hence this petition. The petitioner has alleged in the petition that it will show that any other allocation will be illegal and unconstitutional since the title issued to the petitioner/respondent was first in time and any subsequent one should be annulled. The question the 1<sup>st</sup> respondent/applicant in this application poses is why the long wait from 2010 to 2022 to bring this petition and why a plaint and not a petition?



13. 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.”

14. 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.”

15. On statutory limitations on constitutional petitions, this Court and the Superior Courts in this Country have held that a constitutional petition albeit a suit sui generis should be brought within a reasonable time to avoid a situation where defending the same is rendered impracticable see, for example, the decision in *Musa Mbwegwa Mwanasi & 9 others v Chief of the Kenya Defence Forces & another* [2021] eKLR:

“I agree indeed in constitutional related matters; the general rule is that there is no limitation of time set for filing constitutional petitions. However that notwithstanding, for purposes of fair trial as provided under Article 50 of *the Constitution*, it is expected that one should not advertently delay commencement of a suit such that the other party is compromised in putting forth a plausible defence. Further, in my view, any delay must be explained fully for purposes of establishing whether it can be excused by the Court and it is the burden of the delaying party, in this case, the Petitioners to put forth a plausible explanation as to why the delay should be considered inadvertent.



23. The Respondents sought reliance in the decision of the Court of Appeal which dealt with similar issue of laches in the case of Daniel Kibet Mutai & 9 others v Attorney General, Civil Appeal (Eldoret) No. 95 of 2016, [2019] eKLR where it is noted, on the issue of laches:

“[47] Again this is an issue that has been addressed by the High Court and we are in agreement with the approach taken by the High Court (Mativo, J) in addressing a similar issue in Edward Akong’o Oyugi & 2 others v Attorney General [2009] eKLR in which the learned judge stated as follows:

80. The next question is whether the delay of 5 years after the 2010 Constitution is unreasonable and whether it has been explained. In my view, the common law delay rule involves a two-stage inquiry: first, whether the proceedings were instituted after a reasonable time has passed, and, second, if so, whether the court should exercise its judicial discretion to overlook the unreasonable delay taking the relevant circumstances into consideration.

81. The Respondent’s counsel’s contention is that this suit is barred by the doctrine of laches. The doctrine of laches is a legal defense that may be claimed in a civil matter, which asserts that there has been an unreasonable delay in pursuing the claim (filing the lawsuit), which has prejudiced the defendant, or prevents him from putting on a defense. The doctrine of laches is an equitable defense that seeks to prevent a party from ambushing someone else by failing to make a legal claim in a timely manner. Because it is an equitable remedy, laches is a form of estoppel.

82. Laches (“laches”) refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in regard to equity; hence, it is an unreasonable delay that can be viewed as prejudicing the opposing [defending] party. When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has “slept on its rights”, and that, as a result of this delay, circumstances have changed, witnesses or evidence may have been lost or no longer available, etc, such that it is no longer a just resolution to grant the plaintiff’s claim. Laches is associated with the maxim of equity, “Equity aids the vigilant, not the



sleeping ones [that is, those who sleep on their rights.]” Put another way, failure to assert one’s rights in a timely manner can result in a claim being barred by laches.

83. To invoke laches the delay by the opposing party in imitating the lawsuit must be unreasonable and the unreasonable delay must prejudice the defendant. Examples of such prejudice include: evidence favourable to the defendant becoming lost or degraded, witnesses favourable to the defendant dying or losing their memories, the defendant making economic decisions that it would not have done, had the lawsuit been filed earlier.
  84. The Respondent’s counsel cited laches but never attempted to mention how the Respondent will be prejudiced. As pointed out earlier, no argument was advanced that witness or evidence cannot be traced. In any event, the Respondent is the government which has institutional succession and perpetuity, hence, evidence and records cannot be easily affected by lapse of time.
  85. In considering whether the delay is inordinate, the court has a discretion, to be exercised judicially upon a consideration of all the facts; enquiry, relevant considerations may include the period of the delay, and the explanation offered, and any possible prejudice to the Respondent. I have already addressed prejudice. The period is five years after 2010. The reasons cited are inability to secure employment after being released from prison forcing them to travel overseas to look for employment and also obtain treatment for the various health conditions and complications inflicted upon them by the cruel torture and inhuman circumstances they were subjected to during arrest, interrogation, and detention. All the Petitioners suffered serious injuries and developed life threatening health conditions which kept them busy. They are and continue to be on medication. To me, the delay has been sufficiently accounted for. They have provided a good and sufficient cause for the delay. I find that the explanation is reasonable.
- (48) Unlike the petitioners in the above quoted case, who provided explanation for the delay in filing their petition, the appellants herein did not give any reasons in their affidavits, for the delay in filing their petition. Instead, an attempt was made



by the appellants' advocate to explain the delay in the written submissions. But of course, written submission are mere arguments postulated by counsel, which cannot pass for proven facts. Moreover, assuming that we were to take judicial notice of the fact that the appellants could not bring their claim during President Moi's regime, there is no explanation given as to why the claim was not filed immediately after he impugned President Moi left power after the 2002 elections.

- (49) In *Peter M. Kariuki v Attorney General* (supra), the Court in addressing a delay of 23 years in bringing a claim similar to that of the appellants stated as follows:

We have already adverted to the fact that the appellant filed his constitutional petition some twenty three (23) years after his conviction by the court martial. We agree with the trial court that this claim was not time barred. However, the consequence of the appellant's delay in lodging his claim was some level of prejudice to the respondent who contended that the matters complained of by the appellant had taken place a while back and many of the actors were not longer available as witnesses. We have already emphasized that he right to a fair trial must be accorded to both the appellant and the respondent.

In *Kamlesh Mansuklal Damji Pattni & another v Republic* (supra), the High Court noted that *the Constitution* did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, the court added that, like all other processes of the court, it is in public interest that such applications be brought promptly or within a reasonable time, otherwise they may be considered an abuse of the process of the court. We respectfully share that view, with the rider that where there has been delay which is likely to prejudice a respondent, the applicant should account for the delay.”

16. The Petitioner /Respondent has not explained why since the discovery of the irregular allocations or overlap happened in 2010 no suit was brought. A blank cheque cannot be accorded to the Respondent, but then again, the Court reckoned that from the thread of authorities from this Court and the Superior ones above, the issues complained against that there were irregular allocations after the petitioner had acquired the same land in question, considering this case on its circumstances, it can be addressed by the production of the relevant official documents from the land offices to explain the complaint raised herein as to who between the petitioner and the 1<sup>st</sup> respondent has a genuine and ‘real’ title. This will also go hand in hand with the position as to whether the claim herein ought to have been commenced as a plaint. I cannot discern that the issues raised can only exclusively be addressed through a plaint, that is based on the materials I have so far. A hearing will be necessary in the circumstances to avoid stealing a march against the respondent in the current application. Courts are more concerned with sustaining suits than dismissals and doing substantial justice at the end. This is not to say that I have suspended the Statute of Limitations. Not at all, the issue can still be reckoned at the hearing hereof



17. On the issue of lack of Board Resolution, to commence this lawsuit, the applicant aver that it is a demand of Order 4 Rule 4 of the Civil Procedure Rules that the petitioner being cooperation, the same ought to have been filed together with the petition besides, the supporting affidavit ought to have been signed by an officer of the company authorised under the seal of the company to do so. This is lacking and therefore the petition ought to be struck out.
18. The respondent is of the view that a resolution from a company can be filed later during the trial or at any stage of the proceedings. The Court was referred to the decision in Fidelity Commercial Bank Limited v Simon Maina Gachie [2016] eKLR, as highlighting that position.
19. I will agree with the respondent in this application that a Board Resolution authorising one to propagate a suit on its behalf as a cooperation can be procured in the course of the trial as held by Mutungi J. in Raymark Limited v John Lokorio [2021] eKLR quoting several authorities including the one cited by the respondent in this application on the issue of the Board Resolution as follows:

“Order 4 rule 1(4) provides as follows:

‘Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.’

8. The plaintiff describes itself as a limited liability company and therefore the deponent of the verifying affidavit ought to annex the authority as provided for under Order 4 Rule 1(4) of the Civil Procedure Rules.
9. In the case of Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR Odunga, J was in agreement with the decision of Kimaru J in the case of Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005]eKLR where the court stated: -

“...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.”

10. The Court of Appeal in the case of Spire Bank Limited v Land Registrar & 2 others [2019] eKLR also stated as follows:-

“...It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out



suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

20. It has not been demonstrated that the officer who deposed the annexed supporting affidavit in support of the petition was not authorised by the petitioner/respondent to swear the supporting affidavit in support of the petition. The officer described himself as the Local Area Manager acting for the petitioner. I cannot state with certainty that the deponent was then not acting under the authority of the petitioner. It is also an issue that can be reserved to sprout at the main hearing.
21. At this point, and looking at the petition in totality, it will be difficult to shoot it down based on the two fronts as proposed by the applicant/1<sup>st</sup> respondent. A hearing on merit will resolve the issues raised fully and finally, a dismissal at this point will not meet the ends of justice.
22. The upshot is that the application dated May 22, 2023 is a result of these dismissed. Each party is to bear own costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 20<sup>TH</sup> DAY OF MARCH 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Otara for the Applicant/1<sup>st</sup> Respondent

Ms. Julu for the Respondent/Petitioner

Court Assistant: Happy

