



**Jefwa & 11 others v Njenga & 11 others; Muslim for Human Rights (MUHURI) (Interested Party)  
(Environment & Land Petition 1 of 2017) [2024] KEELC 1647 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1647 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 1 OF 2017**

**NA MATHEKA, J  
MARCH 19, 2024**

**BETWEEN**

**GEORGE CLEMENT JEFWA ..... 1<sup>ST</sup> PETITIONER  
JAPHETH KAZUNGU MWACHAMBO ..... 2<sup>ND</sup> PETITIONER  
SHAMBA ABDULRAHMAN JUMA ..... 3<sup>RD</sup> PETITIONER  
BADI ABDULRAHMAN JUMA ..... 4<sup>TH</sup> PETITIONER  
MWARO KENGA KAHINDI ..... 5<sup>TH</sup> PETITIONER  
REV SAMUEL JEFWA SIRYA ..... 6<sup>TH</sup> PETITIONER  
PETER KACHONGO ..... 7<sup>TH</sup> PETITIONER  
GILBERT TSUMA RAI ..... 8<sup>TH</sup> PETITIONER  
MORRIS DZOMBO NGOME ..... 9<sup>TH</sup> PETITIONER  
JUMA MOHAMED WANJE ..... 10<sup>TH</sup> PETITIONER  
SAMUEL TEMBO NYENYO ..... 11<sup>TH</sup> PETITIONER  
JOHN MWASI MWASINGO, STEPHEN RAI & HUMPHREY TSUMA (AS  
COMMITTEE MEMBERS AND REPRESENTATIVES OF MAJAONI PRIMARY  
SCHOOL) ..... 12<sup>TH</sup> PETITIONER**

**AND**

**JAMES RAYMOND NJENGA ..... 1<sup>ST</sup> RESPONDENT  
DR STEPHEN NDUNGU ..... 2<sup>ND</sup> RESPONDENT  
DR FRANCESCA WANJIKU KAHIU (ALL 3 SUED AS REPRESENTING  
ESTATE OF LATE NJENGA KARUME-DECEASED) ..... 3<sup>RD</sup> RESPONDENT  
DUNCAN NDERITU NDEGWA ..... 4<sup>TH</sup> RESPONDENT**



SAMSON MUREITHI NDUHIU .....	5 <sup>TH</sup> RESPONDENT
JONATHAN KATANA NZAI .....	6 <sup>TH</sup> RESPONDENT
ASHANTEE INVESTMENTS LTD .....	7 <sup>TH</sup> RESPONDENT
SULEIMAN ENTERPRISED LTD .....	8 <sup>TH</sup> RESPONDENT
RASHID MOHAMED TWAHA .....	9 <sup>TH</sup> RESPONDENT
COUNTY GOVERNMENT OF MOMBASA .....	10 <sup>TH</sup> RESPONDENT
THE NATIONAL LAND COMMISSION .....	11 <sup>TH</sup> RESPONDENT
THE HONOURABLE ATTORNEY GENERAL .....	12 <sup>TH</sup> RESPONDENT

AND

MUSLIM FOR HUMAN RIGHTS (MUHURI) ..... INTERESTED PARTY

### RULING

1. The 12<sup>th</sup> Respondent has filed a notice of preliminary objection on the ground that the petition contravenes the doctrine of constitutional avoidance and hence ought to be struck out with costs. Both parties filed their submissions starting with counsel for the 12<sup>th</sup> respondent on May 4, 2023 followed by counsel for the petitioners on June 26, 2023. Counsel for the 12<sup>th</sup> respondent, Mr Makuto submitted that the amended petition sought declaratory orders for rights under various articles as well as cancellation of title deeds of suit property. However, counsel submitted that according to [Blacks Law Dictionary](#) the doctrine of constitutional avoidance has been described as follows:
 

The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”
2. He cited several authorities such as *John Harun Mwau vs Peter Gastrow & 3 others* (2014) eKLR, *Recreation Commission v Sagittarius Wrestling Club and Another*, *Isaac Makokha Okere v Mumias Outgrowers Sacco Society Limited & 9 others* (2021) eKLR. Mr. Makuto submitted that the petitioners claim is anchored on allegations of fraud, illegalities, collusion which claim can be remedied under section 26 of the [Land Registration Act](#). He added that the other claims of unlawful eviction and sale can be remedied by section 152B, 152C, 152D, 152E, 152F, 152G and section 96 of [Land Act](#) No. 6 of 2012.
3. Counsel for the petitioners relied on [KKB v SCM & 5 others](#) (Constitutional Petition 014 of 2020) where Mativo J. described the doctrine of constitutional avoidance and gave the exceptions to the application of the doctrine as follows:
  - i. where the constitutional violation is so clear and of direct relevance to the matter
  - ii. in the absence of an apparent alternative form of ordinary relief and
  - iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.”
4. In respect of the above counsel submitted that the violations claimed in the petition are clear, relevant and there is no apparent alternative form of remedy and that seeking non-constitutional remedies was



not viable. Finally, counsel submitted that the respondents have not demonstrated which forum would be best suited for determination of the issues herein.

5. I have considered the notice of preliminary objections together with the rival submissions of the petitioners and 12<sup>th</sup> respondent. The issue for determination is whether or not the petition offends the principle of constitutional avoidance. I am guided by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Limited vs West End Distributors Limited* (1969) EA 696 as cited with approval by the Supreme Court in Application No. 50 of 2014 *Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 others* (2015) eKLR as follows;

... 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 objection may dispose of the suit.”

6. The pure point of law here being the doctrine of constitutional avoidance which this court agrees with. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR the Supreme Court held as follows: -

(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“ I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

7. Similarly, in *Uburu Muigai Kenyatta v Nairobi Star Publications Limited* (2013) eKLR, Lenaola, J. (as he then was) stated;

“ I need say no more. Where there is a 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 and as stated in *AG vs SK Dutambala* Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

8. In *Peter O. Ngoge vs Francis ole Kaparo & 4 Others* (2007) eKLR, the Court of Appeal applied the case of *Harriksson vs Attorney General of Trinidad and Tobago* (1980) AC 265, where Lord Diplock stated;

“ The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the *Constitution* is fallacious ... the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”



9. Being guided by the above cases and the exceptions provided in the *KKB case (supra)* by counsel for the petitioners the court looked at the prayers in the amended petition which are as follows:

- " 1. Pending hearing and final determination of this suit, an order of prohibition be issued to prohibit the County Government of Mombasa (10<sup>th</sup> Respondent), National Land Commission (11<sup>th</sup> respondent), Dubai Bank Ltd the 13<sup>th</sup> Respondent and the Ministry of Lands, Housing and Urban Development or any other government agency from establishing a settlement scheme within the suit premises vide The Parcels Of Lands At Majaoni, Shimo La Tewa. Plot Number L.R 4408/ii/mn Cr No. 26463, Plot Number 4410/ii/mn Cr No.26464, Plot Number 4407/ii/mn Cr No. 26461, Plot Number LR 4409/ii/mn Cr 26462, Plot Number LR 4406 Cr No. 26459, Plot Number LR 4411/ii/mn Cr 26460, (plot Number Cr 26659 LR No. Mn/ii/5983, LR No. Mn/ii/5984, LR No. Mn/ii/5985, (cr 31871- LR No. Mn/ii/7015), Cr No. 28075 LR No. Mn//ii/ 6163, Cr 28576 LR No. 6164 And Prison Structure At Shimo La Tewa Annex Prison (all Excised From Original Parcel Number 384/ii/mn Mombasa Mainland North).
2. A Declaration that the petitioners' constitutional rights under article 10, 29,31,35, 40, 47 and 60 of the Kenyan Constitution (2010) which protects acquisition and ownership of land , freedom from arbitrary deprivation and freedom from discrimination has been infringed and was not conducted in line with Part VIII of the *Land Act* (2012) with the involvement of the National Land Commission in line with the guiding constitutional principles on land policy in Kenya.
3. An order for cancellation or nullification of titles to Plot Number LR 4408/ii/mn Cr No. 26463, Plot Number 4410/ii/mn Cr No.26464, Plot Number 4407/ii/mn Cr No. 26461, Plot Number LR 4409/ii/mn Cr 26462, Plot Number LR 4406 Cr No. 26459, Plot Number LR 4411/ii/mn Cr 26460, (plot Number Cr 26659 LR No. Mn/ii/5983, LR No. Mn/ii/5984, LR No. Mn/ii/5985, (cr 31871- LR No. Mn/ii/7015), Cr No. 28075 LR No. Mn//ii/ 6163, Cr 28576 LR No. 6164 and Prison Structure At Shimo La Tewa Annex Prison (all Excised From Original Parcel Number 384/ii/mn Mombasa Mainland North).
4. An order directed to the County Government of Mombasa, the National Land Commission and the Ministry of Lands , Housing and Urban Development to cure the historical injustice caused to the petitioners by cancelling titles issued to the late James Njenga Karume, the 2<sup>nd</sup> to the 8<sup>th</sup> respondents and/or instead subject the suit premises to an adjudication process and/or pick data on the particulars of parcels occupied by each of the claimants, survey them, plan and issue titles to the Petitioners for their respective lands.
5. An order to issue against the Estate of the late James Njenga Karume , the County Government of Mombasa, the National Lands Commission, the Ministry of Lands, Housing and Urban Development and/or the Ministry of Education to provide alternative land to relocate Majaoni Primary School



and or provide alternative schooling solutions for the student population of Majaoni.

6. Compensation for Damages suffered for trespass, invasion and intrusion of privacy, loss of security and arbitrary deprivation of property, and the violation of the petitioners' constitutional rights and values cited in this petition to be paid by the respondents jointly and severally.
  7. An Order for costs to be provided.
10. The articles relied on are as follows:
- a. Article 10- national values and principles of governance
  - b. Article 27- equality and freedom from discrimination
  - c. Article 28- human dignity
  - d. Article 29- freedom and security of a person
  - e. Article 30- slavery, servitude and forced labour
  - f. Article 31- privacy
  - g. Article 32- freedom of conscience, religion, belief and opinion.
  - h. Article 35- access to information
  - i. Article 40 – protection of right to property
  - j. Article 47- fair administrative action
  - k. Article 60- principles of land policy
  - l. Article 62- public land
11. To understand the nature of the case, this court has looked at the history of the suit properties as claimed by the petitioners. The petitioners claim that the original title was LR 384/II/MN which was owned as leasehold by one Alexandra Morrison already had the ancestors of the petitioners and he coexisted in harmony until sometime in 1930's when he left to an unknown place. Sometime in the 1960's, one Kassim Hussein claimed ownership explaining that he acquired the land after the government had repossessed the land from the said Alexandra Morrison. They resisted being bought out of the residents at first but after conducting due search and confirmed that Mr Kassim was the owner and after he demanded that they vacate they sought compensation which Mr. Kassim was unable to pay. Sometime in 1973, one Andrew Saikwa (former commissioner for prisons) and 3 senior prison officers claimed to have bought the whole plot 384 from Hussein Dairy Limited which was formed by Mr. Kassim. The following year in 1974, the residents of the whole plot 384 formed a Co-operative Society called Majaoni Farmers' Co-operative Society Limited with the sole purpose of gathering enough money to buy the parcels of land they occupied. The residents and the senior prison officers were in a tussle for the said plot until when the then president; Daniel Torotich Arap Moi on September 3, 1983 intervened and promised to settle them. It is prudent that the petitioners have admitted that there was a suit instituted by the said prison officers which they lost and were ordered to vacate before the president's intervention
12. Despite the president's assurances no action was taken until sometime in 1985 when the defunct District Commissioner informed them of the government's intention to start the adjudication process.



Sometime in 1995, the late Mr. Yusuf Haji who is a prominent politician and a former provincial commissioner for Coast province claimed a part of the whole plot 384 and tried to evict them. In 2006 the then defunct District Commissioner 'flagged' off the adjudication committee but at that point the petitioners allege that the whole plot 384 had already been illegally allocated to influential persons such as the late James Njenga Karume, 4<sup>th</sup> respondent and 5<sup>th</sup> respondent. The former Commissioner of Lands Wilson Gachanja allocated other parts of plot 384 to the 6<sup>th</sup> and 7<sup>th</sup> respondent. The history continues on and it is clear that the petitioners are lamenting about illegalities in allocation of the different parcels to the respondents.

13. I have perused the petitioner's list of documents dated February 19, 2019 to consider the nature of mother Title 384/II/MN. What has been attached shows different parcels of land and their subdivisions which then means that adjudication had already been conducted and concluded and the original owners had been registered as proprietors. The petitioners are disputing the ownership of the original and current registered proprietors of the suit properties. The violated rights in the court's opinion are several and can best be handled in a constitutional petition.
14. I find that the orders sought can only be granted or dismissed after hearing of the petitioner's case where evidence is brought by both parties to find out whether their constitutional rights were violated. It is trite to note that the National Land Commission is a party to the suit and it would therefore be just and expedient in dealing with the matter as a petition so as for them to explain how the parcels were regularly or irregularly allocated. I reiterate that it would be impossible to give a just determination of the suit without going into the history of the suit properties from the beginning and this cannot be justly concluded in an ordinary suit before this court. I find that the petitioners have satisfied the exceptions in the *KKB case supra* and thus the notice of preliminary objection is dismissed and costs awarded to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19<sup>TH</sup> DAY OF MARCH 2024.**

**N.A. MATHEKA**

**JUDGE**

