



REPUBLIC OF KENYA



**Awino v Njenga (Environment & Land Case 14 of 2022)
[2024] KEELC 3349 (KLR) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 14 OF 2022**

**JA MOGENI, J
APRIL 15, 2024**

BETWEEN

FRANCIS AWINO PETITIONER

AND

MARY WAMBUI NJENGA RESPONDENT

RULING

1. This court has been called upon to determine the Notice of Motion application dated 4/11/2023, brought under Order 51 Rule 1 Sections 1A, 1B and 3A, Oder 2 Rule 15 of the Civil Procedure Rules. The Motion seeks inter alia that the petition be struck out and be wholly dismissed that this court lacks jurisdiction to entertain it.
2. Further that the Chamber Summons of 5/08/2022 and the Petition of the even date does not disclose any constitutional issue but attempts to institutionalize an ordinary civil suit and should be struck out and/or wholly dismissed. Thus the petition offends the doctrine of constitutional avoidance and it is bad in law.
3. That he seeks the cost of the application and the petition.
4. The application is premised on the grounds on its face and is supported by the supporting affidavit of Alex Ngatia Thangei an advocate in the firm of M/S Warihiu, Kowade & Ng'ang'a Advocates sworn on 4/11/2024. The grounds listed on the face of the application are grounds (a) to (r).
5. The Petitioner/Respondent did not rebut any of the issues raised by the applicant/respondent in their supporting affidavit where they averred that the petition as filed is incompetent and ought to be struck out. That the petition seeks to address a common civil suit relating to issues of ownership of land to a constitutional petition. Further that if the court were to be persuaded that this was a constitutional petition then it would have decided the matter upfront without according the applicant an opportunity to be heard.



6. The respondent further averred that apart from the matter being a civil one in nature that would require that all parties are given a chance to be heard, that the matter was not properly filed since it was first listed in the Constitutional and Human Rights Court despite being a land matter. This being the case there is no way this Honorable Court can now assume jurisdiction in the circumstances.
7. The Petitioner/Respondent did not file any response to the application and neither did he file any submissions as at the time of writing this ruling.
8. Before I embark on addressing the issues raised in the petition I will address the issue of jurisdiction since a court cannot be well seized of a matter if it has no jurisdiction. The relevant provisions that grant the Environment and Land Court jurisdiction are article 162(2) of the Constitution which provides as follows:

“ 162.

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - a. employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”
9. Pursuant to Constitutional provisions, the Environment and Land Court Act was enacted which elaborates on the jurisdiction of the Environment and Land Court in section 13 thereof as follows:
 - (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
 - (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the Constitution.



- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
10. Given the provisions quoted above I am convinced that this court is not lacking of jurisdiction to address the application before it and indeed the petition filed by the Petitioner.

Analysis and Determination

11. Now, having considered the application, I find in the instant case that this court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand. It was held in the High Court case of *Bernard Murage vs Fineserve Africa Ltd & 3 others* (2015) eKLR that:

“Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy be pursued first”

12. It is a principle that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of *Anarita Karimi Njeru vs The Republic* (1976-1980) KLR 1272 where the court stated:-

“Constitutional violations must be pleaded with a reasonable degree of precision”.

13. The Articles of *the Constitution* which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.
14. The Court of Appeal in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR provided the standard of proof in Constitutional Petitions. The Court of Appeal judges stated;

“...The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st Respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of



the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent...”

15. In the case of Dr. Rev. *Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority* HC Constitutional and Human Rights Division Petition No. 479 of 2013 stated;

“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which *the Constitution* has been violated by whom and even state the Article of *the Constitution* that has been violated and the manner in which it has been violated.”

16. On perusal of the Petitioner’s pleadings, the evidence as well as the submissions of the parties, it is my considered view that the Petitioner has not met the requirements of a Constitution Petition. Although the Petitioner has pleaded some two provisions of *the Constitution*, he has not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the Respondent/applicant. He has not adduced any evidence to demonstrate the alleged violations. The issues in question here are about ownership of land and these can be canvassed through a normal civil suit.
17. Be that as it may, I find that the petitioner filed a claim on behalf of one Francis Mwaura Kimani where he has claimed that the rights of Francis have been violated. The petitioner did not place before the court the evidence of the alleged abuse of Francis Mwaura Kimani who he states that he is incapacitated to the extent of requiring him as the Petitioner to bring this cause of action on his behalf before the court. There is no evidence presented in this incapacitation.
18. From my reading of the petition, the Petitioner has not sufficiently disclosed the genesis of this claim of violation of constitutional rights to property and also the alleged violation has not been demonstrated to the required standard as it was held in the *Anarita Karimi Njeru v Attorney General* [1979] KLR 154.
19. The court in the case of *Kenya Agricultural and Livestock Research Organization (KALRO)-v- Edison Sonje Taura & 3 others* [2021] eKLR held that;

“There is no escaping that what the petitioner is seeking has no constitutional underpin at all. This is an apparently simple case of trespass and permanent injunction. It appears to me a clear civil dispute alleging the tort of trespass. It should have been commenced through a plaint and not a constitutional petition. It has been said time without number that the



constitutional procedure process should not be subjected to abuse, where persons file all sorts of mundane civil disputes under the constitutional procedure process.”

20. The Court of Appeal in *Gabriel Mutava & 2 others vs Managing Director, Kenya Ports Authority* (2016) eKLR stated as follows: -

“Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

21. Counsel for the applicant submitted that the petitioner’s claim does not meet the threshold for constitutional petitions and hence should be struck out.

22. The Court of Appeal in the case of *Mumo Matemu -vs- Trusted Society of human Rights Alliance & 5 others* (2013) eKLR at Paragraph 41 of its judgment stated thus:-

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important it demands neither formulaic prescription of the factual nor formalistic utterance of the Constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearing, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point”

23. Further at paragraph 42 of the same judgment the Court stated:-

“--- Cases cannot be dealt with unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are tenet of the substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.

24. And in the case of *Grays Jepkemoi Kiplagat -vs- Zakayo Chepkonga Cheruiyot* [2021] eKLR the court stated thus:-

“it is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints”

25. In the petition before the Court the petitioner’s complaints arise from a claim that the petitioner is bring the cause of action on behalf of the owner of the suit property. The action in itself is a nullity



since there is no document filed in court to capture this responsibility. There is no Power of Attorney filed to show that the owner of the said suit property gave the Petitioner power to act on his behalf.

26. The petitioner alleges that the owners of the suit property is incapacitated, again there is not document filed in court to attest to this allegation.
27. That be as it may I would like to address the issue in the applicant's application and ask How does a claim for ownership to a property become a Constitutional matter?
28. I do find that there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well Constitute an abuse of the due process of the court as stated in the application.
29. There is a practice that has developed where parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court. The court addressed this in the case of *Abraham Kaisha Kanziku -vs- Governor of Central Bank & others* (2006) eKLR.
30. Also Chacha J in the case of *Godfrey Paul Okutoyi & others -vs- Habil Olaka & Another* (2018) eKLR addressed himself to the issue of there being an alternative remedy in lieu of constitutional remedies and stated at paragraph 65 thus:-

It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

31. Additionally the court in the case of *Bernard Murage -vs- Fine Serve Africa Ltd & others* (2015) eKLR stated:-

“Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.

32. In the case of *Patrick Mbau Karanja -vs- Kenyatta University* (2012) eKLR Lenaola, J (as he then was) expressed himself as follows in regard to when the Constitutional interpretative mandate of the Court may be invoked:-

“I should only say this as I conclude; in *Francis Waithaka -vs- Kenyatta University* Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in *Teitinnang -vs- Ariong* (1987) LRC (const.) 517 where it was held as follows:-

“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated



by private laws. *The Constitution*, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by *the Constitution* under the fundamental rights provisions are owed by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of *the Constitution* no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

33. Lenaola, J went on to observe as follows after citing the above case:-

“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights”.

34. In terms of determining the application before this court, I do fully associate myself with the sentiments expressed by Chacha, J and Lenaola, J in the above referenced cases and I agree that matters that do not call for the Court’s Constitutional interpretative mandate under the Bill of Rights provisions of *the Constitution* should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights.

35. There ought to be a clear delineation of constitutional matters and the ordinary civil suits. The issue of ownership of the land which is the subject of the petition cannot invite the invocation of violation of Constitutional provisions requiring enforcement by way of a Constitutional Petition. There exist sufficient statutory legal provisions that govern issue of ownership of land and non-interference by any party. The petitioner ought to have invoked the jurisdiction of the ordinary Civil Court.

36. In the premises I am satisfied that in the present matter there was no violation and/or infringement of any Constitutional provisions under the Bill of Rights to justify the Petitioner to invoke the Constitutional jurisdiction of this Court. The Constitutional petition is not sustainable and constitutes an abuse of the process of the Court and is accordingly ordered struck out.

37. The net result is that the applicant/respondent’s Notice of Motion dated 4/11/2023 is upheld and the constitutional petition is struck out. I make no order for costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY APRIL 2024.

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MOGENI J

JUDGE

In the virtual presence of:

Mr. Murigi holding brief for Mr. Gakunju for Petitioner/Respondent

None appearance for the Respondent/Applicant

Ms. C. Sagina: Court Assistant

