



**Rhigo v Hiriba & 6 others (Constitutional Petition E001 of 2023)
[2024] KEELC 6222 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CONSTITUTIONAL PETITION E001 OF 2023**

EK MAKORI, J

SEPTEMBER 26, 2024

**IN THE MATTER OF; PROTECTION OF THE RIGHT TO OWN
LAND BY THE UTA CLAN BEING THE ANCESTRAL LAND
IN HOLA TANA RIVER COUNTY (MEASURING 62 ACRES)**

BETWEEN

SAID BWANAIDI RHIGHO PETITIONER

AND

BUYA HIRIBA 1ST RESPONDENT

JOHN DUKO RHIGHO 2ND RESPONDENT

PHILIP RHIGHO JILLO 3RD RESPONDENT

**JACKSON KIGO (ON THEIR OWN BEHALF AND ON BEHALF OF THE
LARGER DUKO FAMILY) 4TH RESPONDENT**

NATIONAL LAND COMMISSION 5TH RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 6TH RESPONDENT

HON ATTORNEY GENERAL 7TH RESPONDENT

JUDGMENT

1. The Petitioner filed the present Petition seeking the following orders:
 - i. A declaration that the petitioner and the Ali Righo family are the owners of their ancestral land situate along Tana River in Tana River County, now disputed between the Ali Righo and the Duko families measuring approximately 62 acres and the Respondents, be barred from making any further or other claim over the land.



- ii. An order directed to the 5th Respondent, The National Land Commission, to initiate the demarcation and registration process of the land to safeguard the rights of the Petitioners to win their ancestral land.
 - iii. An order barring the 6th Defendant and his junior officers from interfering with the quiet possession, occupation utilization of the disputed land between the Ali Righo family and the respondents and the Duko family in Tana River, Hola along Tana River or aiding the Respondents to harass and intimidate the Petitioners in order to unlawfully remove the Petitioners from the quiet possession, occupation utilization of the disputed land.
 - iv. Costs of the petition.
2. The Petition is supported by an affidavit sworn by the Petitioner herein, Said Bwanaidi Rhigo sworn on 21st July 2023, as well as six (6) undated witness statements appearing from pages 59 to 66 of the Petitioner's bundle of documents. The 2nd, 3rd & 4th Respondents denied the Petitioner's claim in their answer to the Petition dated 30th November 2023 and by the 2nd Respondent's replying to the affidavit sworn on 4th December 2023.
3. The 2nd, 3rd & 4th Respondents have raised issues that this Petition is fatally defective as it runs contra the doctrine of sub judice since there is a pending matter that is Malindi ELC Land No.78 of 2022- Michael Babwoya Bahola & 11 others v Ali Said Rhigo & 9 others. The Petition is an abuse of the Court process and res judicata Malindi Constitutional Petition *No.31 of 2021*—Said Bwanaidi Rhigo v Buya Hiriba & 6 others. The Petition has not met the threshold for a Constitutional Petition. And that the Petition, given the preceding, cannot achieve the reliefs sought.
4. The 6th & 7th Respondents filed grounds of opposition to the Petition dated 1st February 2024, which can be summarised into three main issues;
 - i. That this court cannot issue orders in favour of non-parties.
 - ii. The Petitioner has not proven ownership of the suit land.
 - iii. That order 3, if issued, will act as a blanket moratorium against any criminal investigation and arrest of the Petitioner by the 6th Respondent.
5. On 27 February 2024, the Court directed the Petition be canvassed through affidavits and written submissions. This Court received submissions from the 2nd, 3rd, 4th, 6th, and 7th Respondents. No submissions were received from the Petitioner or his advocate on record, albeit learned counsel for the Petitioner, Mr. Mote, confirmed on 30th April 2024 to have filed the same.
6. In the affidavit sworn by the Petitioner in support of the Petition, he highlights the feud between his family (the Ali Righos) and that of the Respondents' family (the Dukos), which dates back to 200 years, that the land in issues has been in occupation of the Bahiyesa Dhadho family (his ancestors). He was born in this land. No other persons used or occupied the same until 2009, when persons from the Duko Family started to disrupt the peaceful occupation of the land. It was reported to the Gasa Elders. They sat and deliberated on the matter and determined that the land belonged to the Ali Righo family. According to the Petitioner, they expected the Respondents to live by the outcome of the elders' decision, which was never to be. Several criminal cases have been filed against the Petitioner and his family members, particularly the use of police, hence this matter before the Court.
7. In the replying affidavit by John Duko Rhigo, he states that the suit property is not ancestral land owned by the Petitioners. Instead, it is land owned by his family. The Petitioner and his family have invaded the land and trespassed upon it. A suit was filed on 15th December 2022, Malindi ELC No.



78 of 2022—Michael Babwoya Bahola & 11 others v Ali Said Rhigho & 9 others. It is still pending. The issue of ownership will be at the core of that suit. A constitutional Petition *No. 31 of 2021* – Said Bwanaidi Rhigho v Buya Hiriba & 6 others was also instituted, which raised similar issues as those raised in this Petition. The same was struck out by this Court (Odeny J. Dr.)

8. The Respondent further avers that the dispute between the Petitioner before the Gasa Elders involved another family, not his family.
9. Besides, the suit land is categorized as Trust Land, and the process of ascertaining claims and interests in such land falls under the *Land Adjudication Act* Chapter 284 Laws of Kenya. The 5th Respondent has no mandate to adjudicate over the same.
10. The Respondent states that since the issue is ownership, it cannot be addressed or resolved through a Constitutional Petition.
11. Having considered the materials placed before me and the submissions by the parties, I frame the issues for this Court's determination as - whether the current Petition has achieved the threshold of a Constitutional Petition, whether the issues raised herein are both sub judice and res judicata, and whether the orders sought are sustainable. Who should bear the costs of this litigation?
12. Mr. Shujaa, for the 2nd, 3rd, and 4th Respondents, has raised issues that there is a pending suit, Malindi ELC No. 78 of 2022—Michael Babwoya Bahola & 11 others v Ali Said Rhigho & 9 others, substantially dealing with the ownership of the suit property—hence, the proceedings herein offend the doctrine of sub judice.
13. Significantly, he has also raised the issue that this Court already dealt with a similar Petition—Constitutional Petition *No. 31 of 2021*—Said Bwanaidi Rhigho v Buya Hiriba & 6 others, which raised similar issues as those raised in this Petition. This Court struck out the same (Odeny J. Dr.).
14. More significantly, the current Petition has not achieved the Anarita Karimi Njeru v Republic [1979] KLR, 154, test on the framing of Constitutional Petitions.
15. Mr. Ojwang, on the other hand, for the 6th and 7th Respondents, raises issues with the Petition as brought against parties who are not before this Court or who have not authorized the Petitioner to propagate this Petition on their behalf. The issues raised concern ownership, which cannot be addressed through a Constitutional Petition, and some of the orders sought against the Inspector General of Police are unavailable.
16. Mr. Shujaa and Mr. Ojwang referred this Court to various judicial authorities on the issues at hand – which I will refer to in my final analysis if necessary.
17. To start with, a similar Petition involving the same parties and issues was dealt with by this Court (Odeny J. Dr.). It is reported as Rhigho (On his own behalf and on behalf of the Uta Clan/Ali Rhigho Family) v Hiriba & 6 others (1st - 4th Respondents on their own behalf and on behalf of the larger Duko Family) (Constitutional Petition *E31 of 2021*) [2023] KEELC 16665 (KLR) (27 March 2023) (Judgment). The Court struck it out on the following grounds:

“I will start with whether the Petitioner has authority to file this Petition on behalf of unknown persons or clan members. I have checked the Petition, and I see no authority filed with the names of the people that the Petitioner purports to represent.

Looking at the verifying affidavit which is the sole affidavit in support of the correctness of the contents of the Petition, the Petitioner states that he is the Petitioner and well versed with the facts and issues pertaining to the Petition hence competent to swear this affidavit.



Further there are documents which were filed which have not been annexed to an affidavit, marked as exhibits or commissioned by a Commissioner for Oaths. The documents have just been thrown into the Petition without a background and explanation how they fit in the Petition.

A Petition can either be heard *vide viva voce* evidence or by way of written submissions. If it is to be heard by way of written submissions, the documents must be filed in a way that they have evidential value and meet the legal requirements of documents under oath just like through *viva voce* evidence. In this case as earlier stated the documents are neither marked nor commissioned by a Commissioner for Oaths.”

18. We have a similar scenario here, what I usually call a rematch, but with slight modifications. What the Petitioner has done is to remove “On his own behalf and on behalf of the Uta Clan/Ali Rhigo Family as the title of the Petition but proceeded in the body of the Petition, and the reliefs sought to plead for orders on behalf of the said family/clan. Statements were filed by some of the members of the clan/family; some signed, and others unsigned, as obtained in the initial Petition. The same applies to documents. Also missing is a verifying affidavit. It is not on record. No authority was obtained from those members to propagate this Petition on their behalf since none can be seen from the record.
19. Like Odeny J. Dr, I should have downed tools at this juncture since the Petition is still fatally defective on the preliminaries mentioned, but let me go further to deduce whether we have a Constitutional Petition.
20. To fall within the threshold of a Constitutional Petition, in *Trevalyan J. and Hancox J. in Anarita Karimi Njeru v Republic* [1980] KLR 154 [1979] eKLR, enunciated as follows:

“We would however again stress that if a person is seeking redress from High Court on a matter which 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.”
21. The Petitioner’s family/clan has been feuding with the Respondents’ family/clan over ownership of land described as 62 acres of ancestral land along Tana River in Tana River County. Both the Petitioner and the Respondents lay claim of ownership over the suit land. These feuds have led to several Alternative Dispute Resolution Mechanisms activated under the aegis of the Gasa Elders. Criminal cases have also emerged due to the wrangles over this land. A civil suit is pending before this Court - Malindi ELC No. 78 of 2022—*Michael Babwoya Bahola & 11 others v Ali Said Rhigo & 9 others*. From the pleadings, this Court is asked to determine who owns this land: The Petitioner, his family/clan, and the Respondents’ family/clan. The pendency of that suit alone makes this Petition sub judice. Parties (read the Petitioner has a forum to ventilate his grievances and those he purports to represent as a first call before approaching the Constitutional Court.
22. This brings me to the next front, the doctrine of constitutional avoidance; when a party has a remedy provided under the legislation, they must follow the path to exhaustion before petitioning a Constitutional Court. See *KKB v SCM & 5 others [Constitutional Petition 014 of 2020]* [2022] KEHL 289 [KRR] thus:

“Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In



broad terms, justiciability governs the limitations on the constitutional arguments that the court will entertain The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sigittarious Wrestling Club & another* in which Ebrahim J.A. said the following:

“.....courts will not normally consider a constitutional question unless the existence of a remedy depends upon it: if the remedy is available to a Petitioner under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.”

23. The suit land has been described as an ancestral land. There is no title to it. None has been alluded to by the parties. If we take it to be community land, the acquisition of the same, as submitted by Mr. Ojwang, will follow the path as laid by Olola J. in *Robert Bonaya & another v Samuel Hamena Mtetemo* [2021] eKLR:

“From the material placed before me, it was evident that for one to be allocated land, he was required to apply and pay a sum of Kshs 500/- to the elders. In this regard, the Defendant produced a receipt dated 20th August 2012 showing payment of Kshs 500/- to the Council of Elders. He also produced a letter dated 23rd August 2012 from the Area Assistant Chief confirming that the Ngao Village Committee was the custodian of the suit property.

In the premises, I was persuaded that the Plaintiffs have neither possessory nor occupational right or interest over the suit property and that the Ngao Village Gasa Committee is the custodian of the whole parcel of land known as Tana Delta/Ngao "A"/439 within which the disputed plot of land falls. The Plaintiffs did not prove any individual ownership of the subject land and I did not hear them to challenge the legality of the Ngao Village Gasa Committee in the administration and management of the land comprised in the title registered under Ngao Village.”

24. If we take the land to be Trust Land, as submitted by Mr. Shujaa, learned Counsel, the acquisition and ascertainment of interest on the said land must follow the provisions of the [Land Adjudication Act](#), Chapter 284, Laws of Kenya. The Minister responsible must Gazette the area as an Adjudication Section for the process to commence.

25. So, to determine who has superior rights to the other over the suit property (like in this matter where ownership is at stake), the invocation of the constitutional jurisdiction of this Court is undesirable – see *Naitore M’iburi & another v Attorney General & 2 others*; *Sebastian Kaaria (Interested Party) ELC Petition No.8 of 2018* where the Court held that:

“In this particular case, the interested party is the registered proprietor of the suit land since the year 2002. The rights of such a registered proprietor of land is protected and anchored under the statute primarily section 25 and 26 of the [Land Registration Act](#). The impeachment of such a title can only be as provided under section 26 1(a) & (b) of the aforementioned Act on grounds of fraud, misrepresentation illegally, and corrupt scheme. This would then classify the dispute as one of ownership to be dealt with by ordinary courts and not in a constitutional petition. This is hence a matter where evidence needs to be adduced and tested as a land matter. The petitioners cannot, therefore, claim that they have rights which need to be protected via this petition.”



26. The best the Petitioner did in this matter is to dangle provisions of *the Constitution* without substantiating the imminent threat of violation nor the violation itself. The ownership rights of the Petitioner over the suit land have not crystallized to beckon constitutional protection. As noted above, the filing of this Petition, by the Petitioner well aware that this Court dismissed a similar one and that there is a pending civil suit over the same subject matter, represents an abuse of the Court process which must be frowned upon. The reliefs sought, therefore, are not available.
27. The upshot is that the Petition dated 21st July 2023, filed in Court on 24th July 2023, is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 26TH DAY OF SEPTEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Mote for the Petitioner.

Mr. Shujaa for the 2nd, 3rd & 4th Respondents

Mr. Kiilu, for the 5th Respondent

Mr. Ojwang, for the 6th and 7th Respondents

Happy: Court Assistant

