



**Adagula v Ochieng & 3 others (Environment & Land Petition 6 of 2024)
[2024] KEELC 6849 (KLR) (Environment and Land) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6849 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND PETITION 6 OF 2024**

MC OUNDO, J

OCTOBER 17, 2024

BETWEEN

VICTOR LODENYO ADAGULA PETITIONER

AND

GEORGE OCHIENG 1ST RESPONDENT

ELLY OYUGI 2ND RESPONDENT

**KENYA BANKER'S SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LTD 3RD RESPONDENT**

THE LAND REGISTRAR, NAKURU 4TH RESPONDENT

RULING

1. Vide a Petition dated the 4th October, 2023 and amended on 18th April 2024, the Petitioner herein sought for the following orders;
 - i. A declaration be made that the allocation of 1.5 acres and 0.75 acres of LR 3967/1 land meant for public amenities to the 2nd and 1st Respondent is unconstitutional as it offends the provisions of Articles 10, 22, 23, 40(6), 61(4) and 232 of *the Constitution*.
 - ii. A declaration that the allocation by the 3rd Respondent of 1.5 acres and 0.75 acres of LR 3967/1 land meant for public amenities to the 2nd and 1st Respondents is unlawful and in contravention of the duty placed on officers of co-operative society.
 - iii. The decision by the Respondents to annex and unlawfully allocate themselves 1.5 acres and 0.75 acres of LR 3967/1 land meant for public amenities to the 3rd Respondent be reversed and the land do revert to the public.



- iv. The 4th Respondent to ensure compliance with the court orders and also issue separate certificate of titles to the public utilities.
 - v. That the costs of, and incidental to the Petition be awarded to the Petitioner against the Respondents.
 - vi. That the court be pleased to grant such further order or orders as may be just and appropriate.
2. In response to the Petition, the 3rd Respondent filed its Notice of Preliminary Objection dated 4th March, 2024 praying for the Petition dated 4th October, 2023 to be struck out with costs on the following grounds;
- i. That the Petition before the court contravened the principles of constitutional avoidance as stipulated under Article 159 (2) (d) of *the Constitution* of Kenya, 2010 as this was a matter that the Petitioner ought to have instituted at the Cooperative Tribunal before instituting proceedings before the court.
 - ii. That the instant Petition was an abuse of the court process, which did not disclose any infringement of the right(s) of the Petitioner and it ought to be dismissed with costs.
 - iii. That the Petitioner, not being a member of the 3rd Respondent herein, lacked standing to bring a claim against the society regarding the allocation of the land parcels.
3. The Petitioner responded to the 3rd Respondent's Notice of Preliminary Objection vide his Replying Affidavit dated 5th July, 2024 wherein he explained that he had filed the instant Petition on behalf of the people of the Republic of Kenya since whereas the 1.5 and 0.75 acres portions of LR 3967/1 (suit parcels) had been pleaded as part of the 3rd Respondent's land, the same were meant for public amenities hence removing them from the private purview of the 3rd Respondent and bringing them within the public purview.
4. That the instant Petition had been hinged to the use and occupation of the suit parcels that the 1st and 2nd Respondents had unlawfully occupied despite the same having been set aside for public use. That whereas he was not a present or past member of the 3rd Respondent and neither was the instant dispute between him and the 3rd Respondent, the dispute however was in relation to the use and occupation of the suit parcels that had been meant for public amenities. That subsequently, the instant Petition had been brought pursuant to the provisions of Article 22(2)(c) of *the Constitution* because the dispute was not a dispute in persona but a dispute in rem for which the court had the jurisdiction to entertain the same.
5. That further, the issue as to whether the instant Petition did not disclose any infringement of the right(s) of the Petitioner was not a pure point of law and required the presenting of evidence and arguments of facts which required the court to make a finding on evidence. That in any case, Article 22 (2) of *the Constitution* allowed him to institute proceedings for and on behalf of other persons, interests or group(s) of persons and/or in public interest. That infringement against public interest was a sufficient cause of action thus the court had jurisdiction to determine the issues herein. That further, the Respondents had not filed a Response to the Petition thus in the absence of the evidence to rebut the allegations raised in the Petition and the Supporting Affidavit, it was clear by implication that out of his pleading, there was an infringement that had given him sufficient basis to approach the court for redress. That subsequently, he should not be sent away from the seat of justice through a baseless preliminary objection which ought to be dismissed with costs.



6. On 3rd June, 2024, directions were taken to dispose of the Preliminary Objection by way of written submissions, wherein the parties complied and filed their submissions which I shall summarize as herein under.

3rd Respondent's Submissions.

7. The 3rd Respondent vide its submissions dated 21st June, 2024 in support of its Notice of Preliminary Objection dated 4th March, 2024 framed one issue for determination to wit; Whether the Court has jurisdiction to entertain the instant dispute.
8. Its submission was hinged on the provisions of Section 76 of the Cooperative *Societies Act* to the effect that all disputes relating to and arising from the business of the cooperative society should first be referred to the Cooperative Society Tribunal. That whereas Article 22(1) of *the Constitution* invited every person to institute court proceedings claiming violation of fundamental Bill of Rights and whereas the Petitioner had placed reliance on Articles 2, 10, 40(6), 73(1), 73(2) (b) and 232 of *the Constitution*, the instant Petition had not met the threshold of suits to be filed as Constitutional Petitions.
9. That the 3rd Respondent had its members' project known as Nightingale project in Nakuru on L.R No. 3967/1 which it had bought for and on behalf of its members thus the instant suit ought to have been brought by a member and determined by the Co-operative Tribunal. That further, the documents that had been filed by the Petitioner were documents that were privy to the Sacco members only hence the same were private since the Petitioner had even produced a non-registered internal sketch map. That accordingly, owing to the binding nature of the *Co-operative Societies Act*, the statutory requirements had to be complied with before any other steps could be taken. Reliance was placed in the decided case of *Alex Malikhe Wafubwa & 7 Others v Elias Nambakha Wamita & 4 Others* [2012] eKLR.
10. That the doctrine of constitutional avoidance should be considered with utmost regard since it also necessitated reference to the doctrine of exhaustion which stipulated that an aggrieved party should first seek remedies from the agency right in front of them before moving to court to seek judicial recourse. Reliance was placed in a combination of decisions in the case of *Faraj & 3 others v Police & 2 others (Constitutional Petition 165 of 2020)* [2022] KEHC 287 (KLR) (27 April 2022) (Judgment) - *Constitutional Petition 165 of 2020* and *Mwanzia v Rhodes (Constitutional Petition E115 of 2022)* [2023] KEHC 2688 (KLR) to submit that the Petitioner had not exhausted the other available ways of dealing with the dispute as required by the law since he had failed to file the instant suit at the Co-operative Tribunal thus contravening the doctrine and principles of Constitutional avoidance and exhaustion.
11. It thus submitted that the court had no jurisdiction to entertain the instant Petition hence the same should be dismissed with costs.

Petitioner's Submissions

12. The Petitioner did not file a response to the Preliminary Objection but filed submissions dated 3rd June, 2024 in opposition to thereto while placing reliance on the provisions of Section 13 of the *Environment and Land Court Act* to reiterate that whereas the suit parcels herein had been pleaded as part of the 3rd Respondent's land, the same had been set aside for public amenities thus they had been removed from the private purview of the 3rd Respondent and brought into the public purview. Further reliance was placed in a combination of decisions in the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR and *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others* [2012] eKLR and the provisions of Section 76 of the *Co-operative*



Societies Act to reiterate that whereas the suit parcels had been set aside for public amenities, the 1st and 2nd Respondents had unlawfully occupied the same. That although he was not a member to 3rd Respondent, he had brought the instant Petition pursuant to the provisions of Article 22 (2) (c) of the Constitution.

13. On the cause of action, he placed reliance in the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 to submit that the issue as to whether the Petition had disclosed any infringement of his rights was not a pure point of law and required the court to make a finding on evidence. That on the other hand, infringement against public interest was a sufficient cause of action hence the court had jurisdiction to entertain the instant Petition.
14. With regards to the locus standi, the petitioner placed reliance in a combination of decision in the case of Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000 and Alfred Njau & 5 Others v City Council of Nairobi [1983] eKLR to submit that in the absence of the evidence by the Respondents to rebut the allegations that had been raised in the Petition and the Supporting Affidavit, it was clear by implication that out of the pleadings by the Petitioner, there was an infringement that gave him sufficient basis to approach the court for redress.
15. He thus submitted that he should not be sent away from the seat of justice through a baseless preliminary objection and urged the court to dismiss the same with costs.

Determination

16. From the preliminary objection and the submissions herein filed by the parties, it is clear that the 3rd Respondent is challenging the court's jurisdiction to hear and determine the instant Petition for reasons that the issues therein raised ought to have first been instituted before the Cooperative Tribunal and therefore the same was in breach of the doctrine of exhaustion, secondly, that the Petition did not disclose any infringement of the Petitioner's rights and was in breach of the doctrine of constitutional avoidance and lastly that the Petitioner herein lacked locus standi to file the Petition as he was not a member of the 3rd Respondent.
17. Accordingly, I find the issues standing out for determination as being: -
 - i. Whether the Petitioner was in breach of the doctrine of exhaustion.
 - ii. Whether the Petitioner herein had the locus standi to institute the same.
 - iii. Whether the instant Petitioner was in breach of the doctrine of constitutional avoidance
 - iv. Whether the Preliminary Objection raised is sustainable.
18. In the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited [1969] EA. 696 the court of Appeal had outlined what comprised a Preliminary Objection as follows; -

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



19. It is therefore evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily as was observed by the High Court in the case of David Nyekorach Matsanga & Another v Philip Waki & 3 Others [2017] eKLR when it held as follows:

“Traditionally, the case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969]1 EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR also pellucidly 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... This statement of the law has been echoed time and again by the courts: see for example, Oraro v Mbaja [2007] KLR 141.”

20. On the first issue for determination, it is trite that the doctrine of exhaustion requires that an aggrieved party should first seek remedies from the agencies right in front of them before seeking judicial recourse. Subsequently, the 3rd Respondent has filed the instant Preliminary Objection based on its understanding that there had been non-compliance with the provisions of Section 76 of the Co-operative Societies Act.

21. Section 76 of the Cooperative Societies Act provide as follows:

“If any dispute concerning the business of a co-operative society arises: —

- (a) among members, past members and persons claiming through members, past members and deceased members; or
 - (b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or
 - (c) between the society and any other co-operative Society;
- it shall be referred to the Tribunal.
- (2) A dispute for the purpose of this section shall include—
- (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
 - (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not.
 - (c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.”

22. As per the above provisions, the disputes to be referred to the tribunal are disputes arising among members, past members or persons claiming through them or a claim of a debt due to the cooperative society from such members. In the instance case it is not in dispute that the Petitioner herein was



neither a member, past member or claiming through a member of the 3rd Respondent hence as rightly put by the 3rd Respondent, he had no locus standi to bring a claim before the tribunal. Indeed, it should also be noted that the claim herein concerned the use and occupation of the suit land and not among the claims to be heard before the cooperative societies' tribunal. I find that for the above reasons, the Petitioner was not bound to institute the instant matter before the cooperative tribunal before he could seek judicial recourse and therefor this line of objection fails.

23. On the second issue for determination as to whether the instant Petition was in breach of the doctrine of constitutional avoidance, the Petitioner has stated that he has brought the instant Petition on behalf of the people of Kenya to the effect that whereas the suit parcel No. Nakuru 3967/1 had been bought for and on behalf of the 3rd Respondent's members, by virtue of the 3rd Respondent setting aside part of the land for public amenities, they had been removed from the private purview of the 3rd Respondent and brought into the public purview pursuant to the provisions of Article 22 (1) of *the Constitution* which invites every person to institute court proceedings claiming violation of a fundamental bill of right.
24. Whereas the 3rd Respondent did not dispute the Petitioner's standing in that respect, it alleged that the instant Petition had not met the threshold of suits to be filed as Constitutional Petitions and that the same had thus violated the doctrine of Constitutional avoidance.
25. In the case of *Anarita Karimi Njeru v Republic* [1979] eKLR, the Court held as follows:

“ ... if a person is seeking redress from the 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 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. Accordingly, in order to decide whether the instant Petition has met the threshold for suit to be filed by way of a Constitutional Petition, a court of law would have to look at the Petition and the provisions of *the Constitution* cited to ascertain whether the Petitioner has set out with a reasonable degree of precision;
 - i. The provisions of *the Constitution* alleged to have been contravened.
 - ii. The manifestation of contravention or infringement.
 - iii. Whether there are other remedies available to the aggrieved party other than through the declaration of constitutional right.
27. That whereas the instant Petition had referred to certain Articles of *the Constitution* in its title, it had provided little or no particulars as to the allegations and the manner of the alleged infringements. Indeed no details or specifics of the requirements had been enumerated nor were any identification made of the specific requirements that were allegedly disregarded, making it impossible to determine what Constitutional or legal provisions had been contravened.
28. The complaint that the Petitioner seems to mount runs from paragraphs 18 through to paragraph 21 of the amended Petition wherein he had alleged that the 1st, 2nd, and 3rd defendants had appropriated and allocated themselves parcels of land alienated and reserved for public utilities which occasioned loss of public property which was criminal in nature. That the 2nd Respondent had abused his office contrary to the *Public Service (values and principles) Act* by influencing, inducing and prevailing upon the officers of the 3rd Respondent, to collude and grab public utility land. He therefore sought for a declaration as herein above enumerated.



29. In *Uhuru Muigai Kenyatta v Nairobi Star Publication Limited* [2013] eKLR at paragraph 15 cited the case of *Minister of Home Affairs v Bickle & Others* [1985] L.R.C. Cost.755, where Georges CJ had held as follows;

“It is an established practice that where a matter can be disposed off without recourse to *the Constitution, the Constitution* should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (*Wahid Munwar Khan v The State* AIR [1956] Hyd.22).

The judge went on to add that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant 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.”

30. It is clear that the Petition is not pleading with specificity on matters related to or seeking redress with reference to *the Constitution* or an infringement of some Constitutional right but rather, it is clear that the Petition is hinged to the use and occupation of parcels of land set aside for public utility but which land has been allegedly grabbed by the 1st and 2nd Respondents in cohorts with the 3rd Respondent.

31. I find that the determination that the Petitioner seeks herein are orders whose resolution requires the full trial hearing and the interpretation of a statute rather than through a Constitutional Petition because a constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. The particular question to be decided herein so as to put this matter into the ambit of a Petition was whether the state was liable for acts committed by its agents while on duty. In this case, I find the answer in the negative as constitutional rights protect individuals from governmental injury and regulate the discretion of the government to inflict injury, which evidence I find has not been adduced herein.

32. Since it is trite that courts must at all times guard against improper transmission of normal disputes or ordinary issues of litigation being clothed as Constitutional Petitions, I find that this Petition does not raise constitutional issues. The Petitioner ought to have approached the appropriate court by way of an ordinary suit. For the above captioned reasons, the preliminary objection on this point is herein allowed with the result that the Petition is hereby struck out with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 17TH DAY OF OCTOBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

