



**Yusuf & another v County Land Adjudication & Settlement Officer  
Mombasa & 3 others (Environment & Land Petition E001 of 2024)  
[2024] KEELC 13908 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13908 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION E001 OF 2024  
NA MATHEKA, J  
DECEMBER 19, 2024**

**BETWEEN**

**SAID HIRIBAE YUSUF ..... 1<sup>ST</sup> PETITIONER**

**WARIO YUSUF DOY (SUING AS THE ADMINISTRATORS OF THE ESTATE  
OF YUSUF WAYU WARIO) ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE COUNTY LAND ADJUDICATION & SETTLEMENT OFFICER  
MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**MATHEW KIBET MUTAI ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The 1st 2nd and 3rd Respondents raised a preliminary objection on the grounds that;
  1. That, the Petition offends the Doctrine of Constitutional avoidance.
  2. That, the Petition is a simple claim for land alleging illegality of a settlement scheme but is disguised as a Constitutional Petition and ought not to have been filed as a Constitutional Petition but as an ordinary plaint.
  3. That the matter can be properly decided on another basis other than constitutional petition such as an ordinary civil suit.
2. I have considered the notice of preliminary objection and the rival submissions of the petitioner and 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondent. In the case of KKB vs 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.”

3. In respect of the above counsel for the petitioner submitted that the violations claimed in the petition are on the face of the record as provided by article 23 of *the Constitution* of Kenya 2010. Finally, counsel relied on the case of KKB vs SCM (supra) and stated that this suit fits the exceptions to the application of the doctrine of constitutional avoidance. That the violations claimed are clear and relevant and there is no apparent alternative form of ordinary relief and it would be a waste of effort to seek nonconstitutional solution.

4. The issue for determination now 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.”

5. 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.”

6. Similarly, in *Uhuru Muigai Kenyatta vs 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 S.K. Dutambala Cr. Appeal No.37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.



7. In *Peter O. Ngoge vs Francis ole Kaparo & 4 Others* (2007) eKLR, the Court of Appeal applied the case of *Harrickson 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.”

8. The rights said to be infringed by the Respondents are under article 40 and 47 of *the constitution* which is the right to own property anywhere in Kenya and the right to fair administrative action. In *Anarita Karimi Njeru vs Republic* (1979) eKLR the court stated follows;

We would, however, again stress that if a person is seeking redress from the High court on a matter which involves a reference to *the constitution*, it is important (if any 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.”

9. The Court of Appeal in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR, emphasised the principles set out in *Anarita Karimi* and held that,

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.

10. 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.”

11. I have perused the petition and the Petitioner has cited Article 156 of *the Constitution*, no particulars of the alleged violations and the manner of the alleged infringements have however, been pleaded. The Petitioners have also not cited the provisions of *the Constitution* which they allege are threatened with violation. It is well established that a petitioner who seeks redress under *the Constitution* must state his claim with precision by reference to the provisions of *the Constitution* violated and the manner of the alleged violation. The petitioner asks for among other orders an order of certiorari for the purposes of quashing the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondent to recall the petitioners title for plot



number Mombasa/Mwembelegeza/1145 and releasing transfer and discharge of charge in favour of the 4<sup>th</sup> respondent. This is a dispute relating to ownership of land and is a civil matter. I find that the preliminary objection is merited and I strike out this petition with costs to the respondents.

It is so ordered.

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

**N.A. MATHEKA**

**JUDGE**

