



**Kitheka (Suing as administrator of the Estate of Kitheka Mweta) v Mwova & 8 others
(Constitutional Petition E001 of 2021) [2023] KEELC 351 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 351 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
CONSTITUTIONAL PETITION E001 OF 2021**

LG KIMANI, J

JANUARY 26, 2023

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES
25(C); 47(1) AND 50(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: ARTICLES 2(1); 19(1); 19(2); 19(3)(A),(B) AND
(C); 20(1); 20(2); 20(3);20(4)(A) AND (B); 22(1);23(3); 25(A); 47(1);
159 2(B)(D) AND 162(2)(B) OF THE CONSTITUTION OF KENYA.**

AND

**IN THE MATTER OF: THE LAND ADJUDICATION ACT CAP 284 AND IN
THE MATTER OF THE SPECIAL MINISTER APPOINTED FOR PURPOSES OF
APPEALS UNDER SECTION 29 OF THE LAND ADJUDICATION ACT CAP 284.**

AND

**IN THE MATTER OF: THE RULING AND/OR AWARD OF THE DEPUTY COUNTY
COMMISSIONER, KYUSO IN LAND APPEAL NO.395 OF 2011 DATED 13/8/2018**

BETWEEN

**KILONZO KITHEKA (SUING AS ADMINISTRATOR OF THE ESTATE OF
KITHEKA MWETA) PETITIONER**

AND

ALEXANDER MWENDWA MWOVA 1ST RESPONDENT

LAND ADJUDICATION OFFICER-KYUSO 2ND RESPONDENT

DEPUTY COUNTY COMMISSIONER, KITUI KYUSO 3RD RESPONDENT

LAND REGISTRAR (MWINGI) 4TH RESPONDENT

SURVEYOR, MWINGI KYUSO 5TH RESPONDENT



ATTORNEY GENERAL	6 TH RESPONDENT
RUKIA IKUTHU MULUKI	7 TH RESPONDENT
JOHN KYALO MUNYITHYA	8 TH RESPONDENT
ESTHER KAMOLI MWOVA	9 TH RESPONDENT

RULING

1. The Notice of Preliminary Objection dated 6th December 2021 is raised by the 1st Respondent on the points that:
 - 1) That this suit has been brought under a Petition whereas due to the weighty issues in contention, the same should have always been filed by way of a Plaint.
 - 2) That the decision rendered by the Minister was so delivered on 13/8/2019 over 2 years and 4 months back and this Petition is incompetent as the Petitioner should have filed an appeal within time.
2. The background to this petition is a dispute over a parcel of land between Nyamu s/o Kitheka and Kitheka s/o Mweta which matter started litigation at Migwani District Magistrate’s Case No. 31 of 1978 Nyamu S/O Nzeka vs Kitheka S/O Mweta and Mwingi Resident Magistrates court case N. 68 of 1994. When the area where the suit land is located was declared an adjudication section land parcel No 179 and later 597 and 734 became the subject of the dispute between Alexander Mwenda Mwova and Francis Kitheka Mweta the successors in title of the original disputation committee Case No. 20 of 2009, Arbitration Board Case No. 11 of 2010 and finally the Appeal to the Minister Case No. 395 of 2011.
3. The Petitioner claims in the petition that he exercised his rights of appeal under section 29 of the [Land Adjudication Act](#) in filing the appeal to the Minister but his rights to fair hearing under Article 50 (1) and right to fair administrative action under Article 47 (1) of the [constitution](#) were violated and in the process he was denied what he believes to be his right to the properties cited.
4. However according to the 1st Respondent, the parties exhausted all the available judicial processes in relation to the suit property and therefore the court lacks jurisdiction to hear the petition.
5. The 1st Respondent did not file any submissions in support of the preliminary objection.

The Petitioner’s submissions

6. The Petitioner submitted that a preliminary objection ought to raise matters that are pure on law and not on facts and cited the cases of [Charles Onchari Ogoti v Safaricom Ltd & Another](#) [2020] eKLR and [David Nyekorach Matsanga & Another v Philip Waki & 3 others](#) [2017] eKLR
7. On the test of what constitutes a true preliminary objection, the Petitioner cited the case of *Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd* (1969) EA 696. The 1st Respondent submitted and relied on the statement of Lord Newbold that “the improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and on occasion confuse the issues. This improper practice should stop. Counsel for the 1st Respondent further submitted that the court should award punitive costs against the 1st Respondent because his preliminary objection is so vague that it does not disclose which point of law it has raised.



Analysis and Determination

8. As noted above the 1st Defendant did not file any submissions with regard to the preliminary objection and on that basis alone the same ought to be dismissed for failure by Counsel to prosecute the same in accordance with the directions given by the court on 22nd March 2022. However, the Petitioner herein filed submissions and due to the heavy contestation between the parties in this suit and for purposes of disposing of the said objection on merit, I will proceed to consider the same.
9. According to the *Black Law Dictionary* a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
10. The test of a true preliminary objection has been cemented in the now famous case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] E.A. 696. The Court then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”
11. On the 1st ground in the preliminary objection, I am of the view that the same cannot be a point of law or even fact since a litigant has the freedom to choose what cause of action to litigate under either by way of a petition or a normal suit. Article 22(1) and (2) of the *Constitution* of Kenya(2010) provides that:

“(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
12. In order to be accorded the legal relief afforded by a Constitutional Petition, it is trite in law that anyone seeking declaration from the Court that their rights have been infringed must specifically state which rights have been infringed and how they have been infringed as was observed by the Court in the case of: *Anarita Karimi Njeru v Republic* [1979] eKLR where the High Court held:

“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 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.”
13. The Petitioner has stated in his Petition that his rights to fair hearing under Article 50 (1) and right to fair administrative action under Article 47 (1) of the *constitution* were violated and in the process he was denied what he believes to be his right to the properties cited. I do therefore find that the Petitioner has a right to be heard is well within his rights to file this Petition on behalf of his father’s estate.



14. Secondly, the 1st Respondent contends that the decision in the Minister’s Appeal was delivered on 13/8/2019 over 2 years and 4 months back and this Petition is out of time. The 1st Respondent has not supported this objection by pointing to any provisions of the law that limit the time for filing a constitutional petition.
15. Courts have held in numerous precedents that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights. In the case of the Mumbi Ngugi, J (as she then was) noted as follows:

“Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as *Dominic Arony Amolo v Attorney General* Nairobi HC Misc. 494 of 2003 (Unreported), *Wachira Wabeire v Attorney General* Nairobi HC Misc. Civil Case No. 1184 of 2003 (OS) [2010] eKLR, *Otieno Mak’Onyango v Attorney General & Another* Nairobi HCCC No. 845 of 2003 (Unreported)), courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights. I note also the sentiments of the court in *James Kanyiita Nderitu v Attorney General and Another*, Nairobi Petition No.180 of 2011 that:

“Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the *Constitution*, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim.”

In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filing of the present claim.”

16. The grounds raised in the 1st Respondent’s Notice of Preliminary Objection are in my view neither points of law or points that can render the petition struck out.
17. For the above reasons, the Notice of Preliminary objection dated 6th December 2021 is hereby dismissed with costs to the Petitioner.

DELIVERED, DATED AND SIGNED AT KITUI THIS 26TH DAY OF JANUARY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court in the presence of-

Musyoki - Court Assistant

