



**Olembo v County Government of Kakamega & another (Environment & Land  
Petition E003 of 2021) [2023] KEELC 35 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 35 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND PETITION E003 OF 2021  
DO OHUNGO, J  
JANUARY 17, 2023**

**BETWEEN**

**KENNETH SHITSUGANE OLEMBO ..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF KAKAMEGA ..... 1<sup>ST</sup> RESPONDENT**

**KAKAMEGA COUNTY LAND APPLICATION EXTENSION OF LEASES AND  
LAND ADMINISTRATION TRIBUNAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner commenced proceedings in this matter through petition filed on April 21, 2021. He averred in the petition that he is the heir and the administrator of the estate of the late Reuben James Olembo who was the registered owner of the parcel of land known as Kakamega/Town/Block 111/34. That the first respondent formed the second respondent with the intention of repossessing undeveloped plots within Kakamega County and that the second respondent has earmarked the suit property for repossession. That the second respondent is unconstitutional, offends his right to own property and is unlikely to afford him a fair hearing.
2. The therefore prayed for judgment for:
  - a. A declaration that the continued pursuit of the proceedings in Kakamega County Land Application Tribunal is unconstitutional and infringes on the petitioners right to fair hearing and right to own property.
  - b. A declaration that the 2<sup>nd</sup> respondent herein has no mandate to investigate, question and/or repossess private property being Land Title No. Kakamega/Town/Block 111/34.



- c. A permanent injunction restraining the respondents from repossessing Land Title No. Kakamega/Town/Block 111/34.
  - d. Costs of this petition.
  - e. Such other order(s) as this Honourable Court shall deem just.
3. The petition is supported by an affidavit sworn by the petitioner. He deposed that he is the heir and administrator of the estate of the late Reuben James Olemba (deceased) and that prior to his demise, the deceased was the allottee and subsequently the registered owner of land title number Kakamega/Town/Block 111/34 (the suit property). That he has been diligently paying the requisite land rates and rent to the first respondent and that he has presented the draft drawings to the first respondent with a view to developing the suit property.
4. The petitioner further deposed that the first respondent established the second respondent with a view of repossessing all undeveloped plots within Kakamega County including the suit property and further that he believes that the motive is to re-allocate the plots to senior politicians and public servants within the county. That the second respondent's intended actions and motive are malicious and calculated to deprive the petitioner of the suit property. He further deposed that he was invited for a meeting with the second respondent on April 7, 2021 and April 12, 2021 and that he attended both meetings and duly submitted all the relevant documents for consideration but to his surprise, he learnt during the hearings of a third party known as Sebastian Machika Mambili who was also claiming ownership of the suit property claiming that he had bought it from Alfred Walter Namai. That Alfred Walter Namai is a stranger to both the petitioner and the deceased's estate. The petitioner added that he reported the matter to the Directorate of Criminal Investigations vide OB number 29/13/4/2021 and that the matter is under investigation. That the second respondent indicated that its ruling would be delivered on notice.
5. The petitioner filed a supplementary affidavit on February 17, 2022 stating that the suit property featured in the list of undeveloped plots within Kakamega Municipality which the first respondent was to repossess or had repossessed owing to non-development. That upon learning of the intended re-possession, the petitioner, and his mother (now deceased) instructed the firm of Munikah & Company Advocates to appeal to the respondents against the decision to repossess the suit property. That on February 23, 2021, the advocate wrote to the appeals panel of the Kakamega County Land Application Extension of Leases and Land Administration Committee stating the circumstances giving rise to the non-development of the suit property and urging to the first respondent to revoke its decision to repossess the suit property.
6. The petitioner added that the suit property is not completely undeveloped and that he has constructed a site house on it in anticipation of developing it to the expected respondents' standard. That he appeared before the committee and was heard on April 7, 2021, but no decision had been pronounced as at the date he filed his supplementary affidavit. That failure to develop the suit property to the standard expected by the respondents was not deliberate but was due to circumstances beyond the petitioner's control as explained in the petitioner's advocates' aforesaid letter and further due to the death of the petitioner's father on March 13, 2005 and the death of the petitioner's mother on March 11, 2021.
7. He further deposed that from the time his father died until letters of administration in respect of his estate were issued on April 13, 2021, there was nobody with legal authority to act in matters of the estate and as such the development of the suit property had not been easy. The petitioner further deposed that an official search conducted in the Kakamega land registry reveals that the petitioner's late father



was the registered proprietor of a leasehold interest of 99 years from December 1, 1975 and that the suit property is charged to Barclays Bank of Kenya Limited to secure financial facilities. That he is willing and able to commence construction as soon as the building plans he has submitted to the county physical planning division are approved. The petitioner concluded by stating that he is apprehensive that the respondents can employ unorthodox procedure to deprive his family of the suit property.

8. In response, the respondents filed a replying affidavit sworn by Kelvin Marangu, the first respondent's Deputy Director of Physical Planning. He deposed that on several occasions, he was co-opted to the Kakamega County Land Application, Extension of Leases and Land Administration Committee, which he also referred to as the second respondent, to offer technical support and advise. That the second respondent is a committee gazetted by the first respondent through Gazette Notice Number 103 dated 30<sup>th</sup> December 2020 and published in the Kenya Gazette Volume CXXIII - No. 12 dated January 15, 2021.
9. Mr Marangu further deposed that through a letter of allotment dated February 12, 1973, the Commissioner of Lands, on behalf of the defunct Kakamega County Council, allocated the suit property to Professor R.J. Olemba for a term of 33 years from February 1, 1973 subject to the conditions attached thereto. That condition number 2 of the special conditions provided that the grantee shall within six months of the commencement of the term submit in triplicate to the local authority and the Commissioner of Lands building plans of the buildings the grantee proposes to erect on the land and shall complete the erection of such buildings within 24 months of the commencement of the term. He added that the suit property has remained vacant without any development contrary to the said special condition.
10. Mr Marangu went on to depose that in line with the first respondent's aspirations to elevate Kakamega Municipality to city status, the first respondent expressed its intention to lawfully repossess public land which had been allocated to private individuals within Kakamega Municipality but which land had remained undeveloped contrary to the provisions of their allotments and proceeded to publish a notice with the list of plots that had been identified as undeveloped. That being alive to the need for fair administrative action and fair hearing, the first respondent constituted the second respondent to hear appeals from persons whose plots had been identified for repossession. That on February 16, 2021, the first respondent published a notice in the daily newspapers inviting persons affected by the notices published by the County Government to pick suitable hearing dates for the consideration of their appeals and that in response, the petitioner wrote to the committee's secretariat through the law firm of Munikah & Company Advocates vide a letter dated February 23, 2021 detailing the grounds to be considered by the committee. That on April 7, 2021, the petitioner appeared before the committee through his said advocates at a public and open place wherein his case was presented for consideration by the committee. Further, that on April 12, 2021, the petitioner together with his advocates appeared before the committee to provide further information for consideration by the committee after which the committee retired to prepare its recommendations. That no sooner had the committee deliberated and made its final recommendations, than the petitioner filed the present petition.
11. Mr Marangu further stated that it is grossly inaccurate for the petitioner to allege that the process was meant to unlawfully repossess the suit property for ulterior motives. That the process leading to repossession was robustly public, transparent, fair, impartial, and strictly adhered to the rule of law and principles of justice and fairness and that the second respondent drew its membership from both staff of the first respondent, a representative of the National Land Commission and land experts from the private sector to ensure that the appeals were considered in a professional and impartial manner. That during the hearings, another party Sebastian Machikha Mambili came forth claiming ownership of the suit property and presenting reasons for the lack of development.



12. Additionally, Mr Marangu deposed that the decision of the committee will be communicated to the petitioner once its recommendations have been submitted to the first respondent. That pursuant to Section 12 (9) of the [Land Act](#), 2012, where public land that has been allocated to public individuals but has not been developed in accordance with the terms and conditions specified in the lease, it automatically reverts to the relevant level of county government. That Sections 73, 74 and 75 of the [Land Act](#), 2012 expressly provide for a process to be followed by a lessor in exercising the right to forfeiture, which process will be enforced through an action in court. That the petitioner has not demonstrated with a reasonable degree of precision what he is aggrieved by, the provisions infringed and the manner in which they are alleged to have been infringed. In conclusion, he urged the court to dismiss the petition with costs.
13. An order was made that the petition be canvassed through written submissions. In the end, only the respondents filed written submissions. The respondents identified the following issues for determination: whether the petition meets the threshold of a constitutional petition, whether the first respondent has a right to forfeit the lease and whether the second respondent is a body capable of being sued.
14. On whether the petition meets the threshold of a constitutional petition, the respondents submitted that although the petitioner has cited Articles 19, 20, 22, 40, 47, 48 and 50 (1) as having been allegedly infringed by the respondents, no particulars of the manner in which the said articles were contravened or violated were provided, contrary to Rule 10 (2) (d) of the [Constitution of Kenya \(Protection of rights and fundamental freedoms\) Practice and Procedure Rules](#), 2013. Relying on the cases of [Anarita Karimi Njeru v Republic](#) [1979] eKLR, [David Mathu Kimingi v SMEC International PTY Limited](#) [2021] eKLR, and [David Gathu Thuo v Attorney General & another](#) [2021] eKLR, the respondents submitted that the petitioner has failed the test on the threshold of a constitutional petition.
15. On whether the first respondent has a right to forfeit the lease, the respondents submitted without prejudice that the first respondent has a right to seek to lawfully forfeit the lease since that is provided for in law. The respondents relied on Sections 73, 75 and 76 of the [Land Act](#) and argued that the lessor's right to forfeiture cannot be permanently extinguished or curtailed. That the petitioner has not demonstrated that the first respondent has commenced the repossession proceedings as provided for in law.
16. On whether the second respondent is a body capable of being sued, the respondents submitted that the petitioner mischievously replaced the word 'committee' as it appears in the gazette notice with the word 'tribunal' which is an attempt to mislead this court on the legal standing of the committee appointed by the first respondent. That the committee's mandate was only for ninety days after publication in the Kenya Gazette, which period has since lapsed. In further submitting that the committee is incapable of being sued, the respondents relied on [Andrew Inyolo Abwanza vs. Board of Trustees of Pentecostal Assemblies of God- Kenya & 3 others](#) [ 2009] eKLR.
17. In conclusion, the respondents submitted that the petition has fatally fallen short of a constitutional petition and that the prayers sought by the petitioner are unavailable. They urged the court to dismiss the petition with costs.
18. I have carefully considered the petition, the affidavits filed and the submissions. The issues that arise for determination are firstly, whether there is a valid petition before the court, secondly, whether the second respondent is a body capable of being sued and finally whether the petitioner is entitled to the reliefs sought.



19. Pursuant to Rule 10 (2) (b), (c) and (d) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, a petitioner moving the constitutional court is required to disclose the facts that he relies upon, the constitutional provision violated, and the nature of injury caused or likely to be caused to him or to the person in whose name the petition has been instituted. Caselaw has refined those requirements with the result that procedural law relating to constitutional petitions is that a person seeking redress on a matter which involves a reference to the constitution must 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. See *Anarita Karimi Njeru v Republic* [1979] eKLR. The Court of Appeal reiterated as much in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where it stated:

Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. 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. ...

(43) 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. ... No particulars were enumerated. ....

(44) 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 1<sup>st</sup> 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 ....

20. A perusal of the petition herein reveals that the petitioner in the heading of his petition alleged contravention of rights under articles 19, 20, 22, 40, 47, 48 and 50 (1) of the *Constitution*. Within the body of the petition, the petitioner averred that his right to a fair hearing and his right to own property have been offended. Beyond the general heading of the petition and the allegation of infringement of right to a fair hearing and right to own property, the petitioner has not provided particulars as to the allegations and the manner of the alleged infringements. I have no hesitation in holding, as I now do, that the petition fell short of the substantive test.
21. There is another aspect of the question of whether there is a valid petition before the court. To have a valid petition before the court would require that the constitutional jurisdiction of the court be properly invoked. Jurisdiction, as has often been stated, is everything. It is the very life and soul of any proceedings. Without it, the proceedings come to a certain end and the court cannot make any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.
22. The law regarding constitutional matters is that where there exist ample statutory avenues for resolution of a dispute, the statutory options for redress must be followed and the constitutional court will decline to entertain the dispute. This is what is called the principle of constitutional avoidance. It frowns upon the practice of bringing ordinary disputes to the constitutional court. The Supreme



Court observed as follows in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR:

(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.” ....

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1<sup>st</sup>, second and 3<sup>rd</sup> respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

23. The implication of the principle of constitutional avoidance is that when formulating his claim, a litigant must be careful to avoid the constitutional route where an adequate statutory route is available. Ultimately, an ordinary claim disguised as a constitutional matter and filed in the constitutional court is a claim filed in the wrong court, in a court without jurisdiction. The Court of Appeal discussed the principle in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR as follows:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission* case (supra).

(17) In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ....

24. The essence of the petitioner’s claim is that the respondents have the intention of repossessing the suit property thereby depriving him of the property. Thus, the dispute ultimately boils down to whether the repossession process is lawful. As the respondents have pointed out, there are ample statutory provisions at Sections 73 to 77 of the *Land Act*, 2012 that deal with a lessor’s right of forfeiture, procedure for forfeiture and a lessee’s relief against forfeiture. Since the petitioner had adequate statutory recourse, the matter herein was wrongly filed as a constitutional petition in the wrong court, in a court without jurisdiction.

25. A suit filed in a court without jurisdiction is dead on arrival and cannot be remedied. The only remedy available to the claimant in such a situation is to withdraw it and file a compliant case in the proper court. If the claimant does not withdraw the case, the court must sanitize the situation by striking out



the case. See [Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service](#) [2019] eKLR.

26. The petition herein having fallen short of the substantive test and having run afoul of the principle of constitutional avoidance, is beyond redemption. That being the case, I do not find it necessary to enquire into the other issues for determination.
27. In the result, I strike out the petition. In view of the circumstances of the case, I make no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF JANUARY 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the petitioner

Ms Imbosa holding brief for Ms Mmbaka for the respondents

Court Assistant: E. Juma

