



REPUBLIC OF KENYA



KENYA LAW
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**Omar v State Department of Housing & Urban Development & another
(Petition E004 of 2025) [2025] KEHC 5484 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION E004 OF 2025
JN ONYIEGO, J
APRIL 30, 2025**

BETWEEN

ABDISALAN ADAN OMAR PETITIONER

AND

**STATE DEPARTMENT OF HOUSING & URBAN DEVELOPMENT 1ST
RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The applicant/petitioner herein moved this court via a petition filed contemporaneously with a notice of motion of even date dated 18.02. 2025. The petition sought for orders that:
 - a. A declaration be issued under articles 10(1)(c), (2)(b)(1) and (2), 27, 47, 232(1)(d) of *the constitution*, that the respondents are under duty to let the project be implemented in Buna as earlier advertised and intended.
 - b. A declaration be issued that the respondents have failed to have a regard to equality, equity and fairness to the people from Buna.
 - c. A declaration be issued that the decision to change location of the project from Buna to Korondille is null and void ab initio and ought to be reversed so as to pave way for the implementation of the project.
 - d. An order do issue to remove to this court and quash the respondent's decision to change the location of the project from Buna to Korondille.
 - e. A permanent mandatory order do issue directing the 1st respondent to carry out the project in Buna.



- f. The cost of this petition be borne jointly and severally by the respondents.
 - g. This court be pleased to grant such further order or orders as it may deem to be just and appropriate.
2. As a response, the respondents filed a preliminary objection dated 27.02.2025 on grounds summarized as follows:
 - i. That this Honourable Court lacks jurisdiction to hear this petition pursuant to article 162(2) of *the constitution*.
 - ii. That the petition does not meet the test of a constitutional petition as laid down in the case of Anarita Karimi Njeru v Republic [1979] KLR 154.
 3. In the same spirit, the respondents through Mr. Charles M. Hinga, the principal secretary in charge of the State Department for Housing and Urban Development at the Ministry of Lands swore a replying affidavit on 12.03.2025 deposing that it was the member of parliament for Wajir North Constituency who wrote to the 1st respondent requesting that the proposed Buna Economic Stimulus Project Market hereinafter, ESP market be moved to Korondille Sub County. That the rationale behind the member of parliament's request was that Buna Town has an existing market that is under-utilized and that the town is also set to benefit from the Affordable Housing Programme (A.H.P) of 400 units.
 4. It was averred that Korondille and Wajir North sub counties had no project at all and sought the intervention of the regional design team to issue an addendum to relocate the proposed ESP from Buna to Korondille as the adjustment was crucial to ensuring and aligning projects with the current regional needs. That the State Department in considering the request noted that there was need to balance developments in Wajir North Constituency as expressed by the local leadership. It was stated that Buna and Korondille are two of the seven wards that form Wajir North Constituency and as such, developments of the ESP market in Korondille is still for the betterment of the lives of the people of Wajir North Constituency.
 5. Additionally, that the suit herein as filed ought not be entertained by this court for the reason that this Honourable Court lacks the requisite jurisdiction to handle the matter. That the court specified under article 162(2)(b) is the proper court where the suit ought to have been filed. Further, that the petitioner did not demonstrate any allegations of corruption, impunity and arbitrariness of the decision to transfer the market from Buna to Korondille.
 6. The preliminary objection was canvassed by way of written submissions.
 7. The respondents filed submissions dated 14.03.2025 urging that the main issues that fall due for determination are:
 - i. Whether this Honourable court has jurisdiction to hear the petition.
 - ii. Whether the petition meets the threshold of a constitutional petition.
 8. In regards to the first issue, it was urged that this court lacks jurisdiction as the petition herein has been brought to court pursuant to article 162(2)(b). That it is evidently clear that the petition stems from the publication of tender MLPWHUD/SDHUD/AHP/213/2024 – 2025 through which a change of previous proposal for the construction of a market in Buna Town to Korondille was effected. It was argued that the change of location of a particular piece of land is a matter that falls within the court stipulated under article 162(2)(b) of *the constitution* (ELC). That in as much as the petitioner argues



that relocation of the said market has propelled the filing of this matter, it is important for the court to ask itself what is the underlying purpose of the market.

9. That the foregoing is actively supported by the fact that the people of Buna had already taken proactive steps to secure land for the market through community fundraising thus demonstrating their commitment to the project. That it therefore means that the said land is not only identifiable but also distinguishable from other parcels of land within the community that residents secured for the purpose of setting up a market.
10. The respondent relied on the case of Benson Makori Makworo v Nairobi Metropolitan Services & 2 Others [2022] eKLR to urge that the petition relates to an issue of land use as the predominant issue. This court was therefore implored to find that in reference to section 13 of the Environment and Land Court Act, the court under article 162(2)(b) has the requisite jurisdiction to handle the matter herein.
11. On the second issue, it was submitted that in line with the guidelines of Anarita Karimi Njeru (supra) and as emphasised in the case of Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR, it is trite that a petition must meet a certain threshold. That in the instant case, the petition merely states at paragraph 3 of the petition that it is anchored on violation of article 10(1)(c), (2)(b)(1) and (2), 27,47 and 232(1)(d) of the constitution. That the suit did not even expound on the provisions allegedly violated by the respondents and further, the petition does not state the acts which the petitioner complains of as against the constitutional provisions.
12. It was further contented that, the petition did not give the particulars of the alleged complaints nor the manner of the alleged infringements and therefore, the same ought to be struck out. In addition, counsel submitted that the petition also offends the doctrine of constitutional avoidance as enunciated by this court in the case of Apollo Mboya v The Attorney General and National Employment Authority, Nairobi constitutional Petition Number E335 of 2023 (Unreported). In the end, it was urged that this court lacks the requisite jurisdiction to handle the matter at hand and therefore it should strike out the same.
13. The petitioner in his submissions dated 18.03.2025 urged in regards to the issue whether this Honourable Court is seized with the requisite jurisdiction to adjudicate over this matter. It was urged that this court holds the jurisdiction to deal with the subject matter. That clearly, the 2nd respondent misapprehended the subject of the suit and therefore the preliminary objection raised is not tenable and ought to be dismissed with costs.
14. It was submitted that the dispute is a clear human rights issue and the petitioner has clearly highlighted the alleged infringements and/or violation of the rights and fundamental freedoms of the people of Buna. To that end, reliance was placed on the case of Anarita Karimi Njeru v Republic [supra] where the court stated that a litigant seeking for redress from the High Court which involves the constitution should set with reasonable degree of precision the provisions violated and how. To that end, the petitioner urged this court to dismiss the preliminary object with costs.
15. I have considered the grounds of the preliminary objection and submissions by the parties. In my view, the only issue for determination is whether the preliminary objection is sustainable.
16. The case of Mukisa Biscuits Manufacturing Ltd v West End Distributors [1969] EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus: -

“...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”.



17. Further in the case of *Hassan Nyanje Charo v Khatib Mwashetani & 3 others*, [2014] eKLR the Supreme Court held that: “Thus a preliminary objection may only be raised on a ‘pure question of law.’ To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
18. Evidently, a preliminary objection must be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with the point of law.
19. The respondents argue that this Honourable Court lacks the requisite jurisdiction to entertain the matter herein while the petitioner holds the view that the respondent misapprehended the contents of the petition. To that end, the petitioner urged that the dispute is a clear human right issue and the petitioner has clearly highlighted the alleged infringements and/or violation of the rights and fundamental freedoms of the people of Buna.
20. Having perused the suit herein, it is my considered view that the petitioner is aggrieved by the fact that previously, the respondents had scheduled to erect at Buna, an Economic Stimulus Project Market but after sometime, the same was moved to Korondille Sub County. In my view, this is not an issue or dispute pertaining ownership over land but rather an issue touching on social-economic rights under Article 43 of *the constitution*. These rights should not in any way be confused with land rights which none of the parties is claiming. To that extent, this court has jurisdiction to determine the matter as it does raise critical constitutional issues arising from anticipated benefits associated with the location of an economic facility or point.
21. As to whether the petitioner has met the threshold in the *Anarita Karimi* case, it is paramount again to assess the centrality of the dispute being the location of the disputed market centre. Obviously, what is in contestation is the expected benefits and development impact the market is likely to have to the residents. These benefits have an automatic effect on the social economic rights of the people around the facility pursuant to article 43 of *the constitution*. This is a precise constitutional issue calling for determination
22. It is thus met that this court grants the petitioner an opportunity to present his case and the same be heard to its logical conclusion. [See article 50 (1) of *the constitution*]. On the question that the petition offends the doctrine of constitutional avoidance there was no elaboration over the same and therefore, I also choose to leave the same at that for it was the responsibility of the respondents to prove their allegations. [See sections 107 – 109 of the *Evidence Act*].
23. To that end, it is my holding that this court has jurisdiction to handle the petition as per the provisions under article 165 (3) (b).
24. For the above reason stated, I find that the preliminary objection herein is destitute of any merit and therefore, I dismiss it with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL 2025

J. N. ONYIEGO

JUDGE

