



Mwongera v Agricultural Development Corporation & another (Environment & Land Petition 29 of 2021) [2023] KEELC 15720 (KLR) (20 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15720 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 29 OF 2021
MAO ODENY, J
FEBRUARY 20, 2023**

BETWEEN

FRANK KAMUNDE MWONGERA PETITIONER

AND

AGRICULTURAL DEVELOPMENT CORPORATION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. This ruling is in respect of a Notice of Preliminary Objection dated January 25, 2022 by the 1st Respondent seeking to dismiss this suit on grounds that:-
 - a. The Petition dated November 4, 2021 is premature as there is an active investigation and enquiry on the allocation of subject property by Ethics and Anti-Corruption Commission which is yet to be concluded.
 - b. The Petition does not raise any constitutional issues for deliberation as envisaged under Article 40 of the [Constitution of Kenya](#) and as such the petition should be dismissed with costs.
 - c. What the petitioner has raised are issues that are criminal in nature being trespass and malicious damage to property which can be adequately canvassed in the Environment & Land Court.
 - d. The Petition as drawn does not meet the threshold of the constitutional litigation as it does not disclose any fundamental breach. It falls squarely in the realm of the Environmental and Land Court.



- e. That the petition is an abuse of the court process and should thus be dismissed with costs to the respondent.

2. Counsel agreed to canvas the Preliminary Objection vide written submissions which were duly filed.

2nd Respondent's Submissions

3. Counsel submitted that the Petition does not meet the threshold of what constitutes a Constitutional Petition as was described in the case of *Anarita Karimi Njeru v Republic* (No 1[1979] 1KLR 154 restated in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance* Civil Appeal No 290 of 2012 [2013] eKLR.
4. Counsel further submitted that the Petition as framed shows no allegation of irregularity or irrationality committed by the 2nd Respondent hence the same should be dismissed against the 2nd Respondent.
5. The 1st Respondent did not file any submissions

Petitioner's Submissions

6. Counsel for the Petitioner submitted that the Preliminary Objection does not meet the threshold of what amounts to a Preliminary Objection and cited the case of *Mukisa Biscuit Manufacturing Ltd – v- Westend Distribtors Ltd* [1969] EA 696; and in *Nzele Nzomo –v- Moses Namayi* [2009] eKLR as the grounds are based on allegations of facts that would require the adducing evidence.
7. It was counsel's further submission that the 1st Respondent filed a Replying Affidavit sworn by Rodgers Karumpu on January 20, 2022 where the same issues were raised and the said Rodgers Karumpu did not produce any evidence of the alleged investigation allegedly being conducted by the Ethics and Anti-Corruption Commission.
8. Counsel also submitted that under Article 162(2) (b) of the *Constitution* and Section 13 of the *Environment and Land Court Act*, Parliament has established the Environment and Land Courts with the status of the High Court to hear and determine disputes relating to the Environment and the use and occupation of Title to land hence the Petition herein is competent and has been filed in the proper forum for adjudication and determination.
9. Counsel urged the court to dismiss the Preliminary Objection with costs.

Analysis and Determination

10. The issue for determination is whether the Preliminary Objection as framed has merit.
11. The principles on preliminary objections are now settled as per the *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (supra)* case.
12. Looking at the grounds in the Preliminary Objection one of the grounds is that there is an ongoing investigation by the EACC. This is a ground that the court cannot consider as appoint of law as it would require evidence to be adduced as to what is the nature of the investigation, and accord the Petitioner a right to respond to the allegations.
13. There are many land cases before the courts which EACC and DCI are investigating and that does not stop the court from hearing and determining a matter. The reports of the investigation can be produced to assist with the findings if called upon by the parties relying on such investigation. Further unless there is a stay of proceedings where the court has determined that there is a valid reason to do so,



the court will not allow a Preliminary Objection to terminate a matter. I therefore find that the ground does not hold any water hence the Preliminary Objection fails.

14. On the ground that the Petition does not raise any constitutional issues and that it does not meet the threshold of what amounts to a constitutional Petition, this ground also fails, the court will hear the Petition and will determine whether the Petitioner's rights have been infringed or not on merit. There is no need of using Preliminary Objection as a sword for ruminating cases prematurely. However, there are hopeless cases which are an abuse of court process which the court will terminate via a Preliminary Objection.
15. In the case of *Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others* [2015] eKLR the Supreme Court explained as follows regarding preliminary objections: -

“(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

16. Preliminary Objections should only be raised on pure points of law and not to clog the court with unending rulings on issues of facts. Having said that I find that the Preliminary Objection lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF FEBRUARY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

