



REPUBLIC OF KENYA



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Ragen & another v Director(s) of Ack Primary School & 9 others (Environment & Land Petition E003 of 2023) [2025] KEELC 1486 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1486 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E003 OF 2023
SM KIBUNJA, J
MARCH 26, 2025

BETWEEN

AINEA RAGEN 1ST PETITIONER

DIRECTOR OF ACK PRIMARY SCHOOL 2ND PETITIONER

AND

DIRECTOR(S) OF ACK PRIMARY SCHOOL 1ST RESPONDENT

**MOMBASA COUNTY LAND ADJUDICATION AND SETTLEMENT
OFFICER 2ND RESPONDENT**

CHIEF LAND REGISTRAR MOMBASA 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

KUZA FREEZER LIMITED 6TH RESPONDENT

PRIME MASTER AUTO CARE 7TH RESPONDENT

MECHAUTOMAN SPARES AND ACCESSORIES LTD 8TH RESPONDENT

AINEA RAGEN 9TH RESPONDENT

NASSIR SWALEH 10TH RESPONDENT

JUDGMENT

1. The petition dated 30th January 2023, as amended on 24th February 2023, is premised on grounds on its face, petitioner's statement of even dates and affidavit sworn on 30th January 2023. It is the petitioner's case that he is the executive director of Center for Litigation on Environment and Governance, CLEG, and filed this petition in the public interest, in a matter of allocation of public land, that is plot No. 168



Mwembelegeza Settlement Scheme, suit property, which was allegedly being used by private business and a perimeter wall had even been erected around it. That he wrote to several government entities to enquire about the status of the suit property and he received replies that the suit property was set aside for building of an ACK primary school, and in Mombasa ELC Pet. No. 35 of 2020, in which he was the petitioner, one Sammy Chombo, then Mombasa Land Adjudication and Settlement officer had deposed in a replying affidavit that the suit property was reserved as a nursery school, and a caveat placed on it by the then Mombasa County Land Adjudication and Settlement Officer through a letter to the Mombasa Land officer dated 28th February 2007. That there is no school established on the suit property and he filed this petition seeking for the following reliefs:

- i. "A declaration that:
 - a. The suit land no. 168 Mwembelegeza scheme in Mombasa County is public land reserved for the construction of public secondary school only.
 - b. Learning institutions which include Nursery schools, Primary schools, Secondary schools, TVET Colleges and Universities among others owned; owned and run by religious organizations are not state/public institutions but private institutions.
 - c. The letter Ref No. DLASO/MSA/208VOLIII/154 dated 28th February 2007 placing Caveat on the suit land No. 168 Mwembelegeza scheme is still valid.
 - d. The allocation and subsequent title deed and all and any entries registered in the parcel of land No. 168 Mwembelegeza scheme in the name of ACK Primary School is null, and void ab initio.
 - e. The 1st, 2nd, 3rd, and 4th, respondents violated the 2010 Constitution and all relevant laws and regulations governing alienation, allocation and usage of public utility land.
 - f. The 5th respondent failed in its advisory mandate.
 - g. The current officer in charge of Mombasa County Land Adjudication and Settlement Office Mr. Sammy Mchombo is an impediment in the administration of public land in Mwembelegeza scheme.
- ii) A Permanent Injunction:
 - a. Restraining the 1st respondent or any private organization or any person not mentioned in this suit working either individually or by their staff or their agents or their representative from trespassing, constructing, sub-dividing, transferring, developing, selling or occupying the suit land number 168 Mwembelegeza Scheme in Mombasa County.
- iii) An order:
 - a. Annuling the allocation of Land No. 168 Mwembelegeza scheme to ACK Primary School.
 - b. Automatically reverting back Land No. 168 Mwembelegeza scheme to the National Government of Kenya or County Government of Mombasa pursuant to sections 12 (8) and (9) of the *Land Act* of 2012.
 - c. Compelling the 1st respondent to within 30 days of the court's judgment, demolish all and any illegal structure erected and or built within and on the suit Land No. 168 Mwembelegeza scheme.



- d. Compelling the 2nd, 3rd and 4th respondents in conjunction with the Director of Survey of Kenya and in conjunction with the National Director of Physical Planning to within 60 days of the court's judgment demarcate and delimit the exact boundary of the suit Land No. 168 Mwembelegeza scheme including removal of any individual(s) or person(s) or entity not mentioned in this suit who might have encroached on any part of the suit Land No. 168 Mwembelegeza scheme in Mombasa County.
 - e. Compelling the 2nd respondent herein, Mombasa County Land Adjudication and Settlement Officer, to within thirty (30) days of the court's judgment, avail to the National Land Commission hard or soft copy of the list of all public utility lands in Mwembelegeza scheme and in all the settlement schemes within Mombasa County in his jurisdiction pursuant to Article 67(2) of the Constitution and section 8 of the Land Act.
 - f. Compelling the 2nd respondent herein, Mombasa County Land Adjudication and Settlement Officer, to within thirty (30) days of the court's judgment, that in public interest avail to the petitioner herein Ainea Ragen hard or soft copy of the list of all public utility lands in Mwembelegeza scheme and in all the settlement schemes within Mombasa County in his jurisdiction pursuant to Article 35(1) of the Constitution and section 4 (1), (2), (3) and (5) of the Access to Information Act.
 - g. Compelling the Chief Land Registrar at Mombasa, the 3rd respondent herein, to cancel any existing title deeds and all and any entries registered in the parcel of Land No. 168 Mwembelegeza scheme in the name of ACK primary School.
 - h. Directing the 1st, 2nd, 3rd, 4th, and 5th respondents to within ninety (90) days of the court's judgment to file affidavit in this court detailing out their compliance with prayers (iii) c, d, e, f and g above.
 - i. Compelling the respondents to bear the costs of this suit.
- iv) Any other relief the Honourable court may deem just to grant.”
2. The 1st, 6th to 8th respondents opposed the petition through the replying affidavit of Venerable Cannon William Katana, sworn on 17th February 2023, and their statement of grounds of opposition and cross petition dated 22nd March 2023, inter alia stating that the suit land is private property, that the 1st respondent acquired lawfully through the Settlement Fund Trustee, during the adjudication of Mwembelegeza Settlement Scheme; that prior to the commencement of the Mwembelegeza Settlement Scheme, the 1st respondent was occupying the suit land and other adjoining plots; that the 1st respondent applied for allocation of the suit land to the Mwembelegeza Plot Allocation Committee around 18th February 1998 and in April 1998 the said committee recommended that the suit property be allocated to the 1st respondent; that the Director of Land Adjudication /Settlement offered the suit land to the 1st respondent on 1st December 1998 on the condition that the 1st respondent deposits 10% deposit, and on 20th April 1999, 1st respondent paid Kshs.2,750 to Settlement Fund Trustees (SFT), and on 15th June 1999, the Ministry of Lands waived stamped duty on transfer of properties owned by the 1st respondent; that on 6th October 1999, 1st respondent paid the SFT Kshs.7,250 for the suit property, and on 27th December 2006, SFT issued a title deed to the 1st respondent; that they submitted their building plans for building of primary and secondary school on the suit property for approval which was granted on 16th December 2014 by the County Government; that the suit land has beacons as delineated in RIM Sheet 3 (201/1/5/1) for the Mwembelegeza Settlement Scheme; that on 26th March 2018, the Ministry of Lands prepared a report which disclosed that the petitioner and



one Nassir Swaleh had interfered with the beacons, and on 23rd July 2018 the 1st respondent applied for and was issued with a license by NEMA to construct a perimeter wall around the suit property to keep off squatters; that the 1st respondent is raising funds to develop a primary and secondary school on the suit property to be run by Kengeleni Church, ACK Mombasa Diocese..

3. In the cross-petition against the petitioner and Nassir Swaleh, the cross-petitioner [1st respondent], reiterated the facts in his ground of opposition and stated that he gave notice to the Nassir Swaleh, 2nd respondent, to stop further activities on the suit property and vacate, but he instead conspired with the petitioner to unlawfully dispossess the cross-petitioner, and alter records at the Director of Survey by redefining the boundaries thereby excising a portion of the suit property; that the respondents attempted to violently evict the 6th, 7th and 8th respondent who are tenants of the cross-petitioner from the suit property, and the beacons on the suit property were removed; that the document from the Ministry of Lands dated 28th February 2007 stating that the suit land is public land is a fabrication, and the petition herein has an objective to delay eviction of the 2nd respondent. The cross-petitioner sought for the following reliefs:
 - a. A declaration the suit property Mombasa/Mwembelegeza/168 is the private property of the cross petitioner.
 - b. A declaration that the boundaries of the said Mombasa/Mwembelegeza extend to all that land within beacons BP1, BP2, BP3, BP4, BP7, KE94, KE123, KE124, B and 26C and marked as 168 in the Registry Index Map Sheet 3 (201/1/5/1) for Mombasa /Mwembelegeza Settlement Scheme initially published by the survey of Kenya in August 1999.
 - c. A declaration that the respondents in the cross-petitioner are not entitled to occupy any part of the suit property described by the said map and beacons.
 - d. A prohibitory injunction restraining the respondents in the cross-petition from entering remaining into, constructing, leasing, selling, mortgaging or otherwise dealing with any part of the land known as Mombasa/Mwembelegeza/168.
 - e. A mandatory injunction compelling the respondents in the cross-petition to vacate the portion of the suit property that they occupy and at their cost to demolish the structures they have erected on any part of the suit property known as Mombasa/Mwembelegeza/168 under the Registry Index Map Sheet 3 (201/1/5/1) for Mombasa/Mwembelegeza Settlement Scheme and failing within beacons BP1, BP2, BP3, BP4, BP7, KE94, KE123, KE124, B and 26C.
 - f. Any other relief that the court may deem fit.
 - g. Punitive costs for abusing public interest litigation platform as an instrument for conspiracy to injure.”
4. The 2nd, 3rd and 5th respondents opposed the amended petition through their answer to the petition dated 24th November 2023, stating among others that Mwembelegeza Settlement Scheme was set up in Bamburi to settle members of the public and that some land was set aside for public purposes; that the petitioner has not provided part development plans and minutes by the aforementioned planning committee, and has not exhausted the remedies under the [Access to Information Act](#) for violation of rights under Article 35 of the [Constitution](#); that the area list of the scheme shows the suit property was allocated to ACK primary school.



5. Nassir Swaleh, 2nd respondent in the cross-petition, opposed it through his replying and further affidavits sworn on 13th October 2023 and 22nd November 2023 respectively, deposing inter alia that he has never lived on the suit property and the cross-petitioner was mistaken in issuing him with a notice to vacate; that he lives in the adjacent property MN/I/309 on which he has resided on since 1964, and that the permanent structures alleged to have encroached the suit property have been there since 1964; that the cross-petitioner was allocated the suit property in 1998 and found the structures on the ground; that the cross-petitioner wrote to the land surveyor in 2010 to re-establish the beacons and in the process moved the beacons from where they originally were, towards his plot MN/I/309; that the suit property was carved out of plot 337 which was in existence with his plot MN/I/309.
6. The petitioner responded to the cross-petition through his replying affidavit sworn on 8th May 2023, inter alia reiterating the grounds and depositions in support of the amended petition, and added that in ELC PET 35 of 2020 the court held that “.....none of the 23 plots set aside for planning of MWEMEBELEGEZA Settlement Scheme was reserved for a mosque, church, temple or any religious purpose”; that it was not true to claim he has structures on or interfering with the suit property; that the cross-petitioner is benefitting from rental remittances while the children are being denied a right to basic education.
7. During the hearing, the petitioner testified as PW1, reiterating the contents of his statement dated 24th Feb 2023. He stated that he discovered the suit property was set aside for a secondary school through a letter dated 28th February 2007, but no school had been built there. He accused the cross-petitioner for taking possession of the suit property and changing its beacons. He termed the witness statement of one Daniel Benjo Kibet stating that the suit property was allocated to ACK Primary School, as inaccurate as no proof was tendered to show a review had been done for the area list of 2007, that had reserved it for a secondary school. On cross-examination PW1 admitted that the suit property was not the suit property in ELC PET 35 OF 2020 and that the ACK was not party in the suit. He also stated that Mr. Sammy Mchombo had been transferred out of Mombasa and was thus unable to call him as a witness or even obtain the list of beneficiaries marked as SAM 2. He added that adjudication process took place from 1997 to 1998 and that the letter dated 28th February 2007 was done about ten years after adjudication, and the author of that letter, one Kiteto, was unavailable as a witness as he had passed on. He admitted that in the area list annexed as SAM 2, the plot meant for a nursery school was plot 1476, and that in the current area list the suit property was for ACK primary school. He indicated that he did not know when the area list was prepared and that he did not avail minutes of the scheme’s planning committee, and that the 2nd respondent to the cross-petition was not party to petition 35 of 2020, and he had no claim against him.
8. The 2nd to 5th respondents to the amended petition called Benjo Kibet, the County Land Adjudication and Settlement Officer in Mombasa, who testified as DW1, stating that the suit property was allocated for ACK Primary School on 1st December 1998, and a letter of offer was issued and the fees due were paid on 20th April 1999. He stated that the allottee made outright purchase on 6th December 1999, but what was and still remaining was the discharge of charge by SFT. He produced an area list showing acreage and that plot 168 was allocated for ACK Primary School. He disputed the contents of the letter dated 28th February 2007 stating that it was not reflective of the realities on the ground and the records he has. Further, he stated at the time the said letter was written, the suit property was private property. He was adamant that the area list is what discloses whether land is for public utility or not and in this case, it did not state so. On cross-examination he admitted that Mwembelegeza Settlement Scheme is on government land and that it was for settlement of people and not for sale. He reiterated that allocation of the suit land to ACK Primary School was regularly done. He could not however confirm or deny that the aforementioned letter of 28th February 2007 was from his office or not, or whether there was



a letter from his office reviewing the said letter. He agreed that a discharge is issued before title comes out and that only then can his office confirm if one was issued with the suit property. He stated that his office identifies deserving persons and explained that ACK paid a lump sum of the suit property instead of payment by instalment. He stated that the allocation of the plot was done in accordance with the accountabilities list, which shows the suit property was for the ACK Primary School. He testified that parcel 167 was for a public cemetery, which was also in the letter of 28th February 2007, and that there was an error in the letter dated 28th February 2007 of referring to plot 168 as a public utility plot.

9. The 1st, 6th to 8th respondents and cross-petitioner called Meshack Mwalukuku, and William Katama, an Anglican clergyman and Vicar General at Emmanuel Kisauni, who testified as DW2 and DW3 respectively.
10. DW2 told the court that he has lived in the scheme for over sixty years, and that he was elected as the secretary to the planning committee where he served from 1996 to 1998. He identified the letter dated 8th April 1998 from the said committee to the ACK administrative secretary and that was signed by the chairman and himself. He testified that the suit property was allocated to ACK Primary School and it is not true to say it was public utility land. During cross-examination DW2 stated that the suit property was set aside for purposes of the school and the ACK church. That in their application letter, the ACK had indicated that they wanted to build a school and that is why they recommended they be allocated the suit property. He also stated that there is a school being built on the suit property, but it is not operational yet as the church is in the process of raising fund. He added that they have Mwembelegeza Primary and Secondary school at the settlement scheme built by CDF recently.
11. DW3 relied on his affidavit filed on 28th March 2023 and the attached documents as his evidence. He averred that the church has built three schools and handed over two to the government. He reiterated how they followed due process in applying for the suit property until they were issued with title document. That the suit property is situated next to St Stephens ACK Bamburi, and that they have built a perimeter wall to safeguard it. They have also prepared architectural drawings for school development on the suit property that has been approved by the County Government and Ministry of Education but they have not started the actual construction. He told the court that when they were building the perimeter wall they were stopped by the 2nd respondent in the cross-petition as well as other members of the community. It was his testimony that there has been encroachment onto the suit property and that is what has hampered the commencement of the development of a school. He added that the church will need around Kshs.28 Million which will be raised through offerings and donations. That they have erected temporary structures made of iron sheets on the plot, towards the road, which they have rented out to the 6th and 7th respondents and that the said structures occupy an area of about 2 to 3 per cent of the suit property. That they built the temporary structures to stop encroachment. That it was the 2nd respondent in the cross-petition who has encroached onto the suit property at a corner where there is a carpenter business. That they discovered that encroachment when the survey of the plot was done. During cross-examination DW3 stated that he was not aware that the suit property was a subdivision of another plot, and that the structures on the encroached portion were constructed in 1964. He further testified that he was in the process of following up on their claim against the 2nd respondent when they were served with this petition. He acknowledged that the 2nd respondent had already settled on his parcel of land before they erected the perimeter wall. That the 2nd respondent's encroachment is on a portion of about 20 x 30 meters. That though they are yet to commence construction to date of the school on the suit property, there were other schools in the neighbourhood, both private and public schools, that have since been established. That the 6th to 8th respondents pay the 1st respondent/cross-petitioner rent for the structures on the suit property, and that they also protect the suit property from illegal encroaching. He denied colluding with a surveyor to alter the survey plan for the suit property and pointed out that the surveyor's report did not mention



the petitioner as an encroacher. He agreed that the acreage in the title deed and certificate of search are different, and he could not tell the exact acreage of the plot, but could be around three or four acres.

12. The 2nd respondent in the cross-petition testified as DW4 and relied on his statements dated 13th October 2023 and 22nd November 2023. He testified that his mother and himself were born on the suit property in 1956 and 1976 respectively. That the plot he resides on is 309 which he acquired title of in 2001, and in February 2018, the church committee and its pastor went into discussions with his mother and mosque elders where they gave out information that they intended to build a perimeter wall, and they were given support by all who were in the discussion, and to date none of the parties have raised a complaint over the fence. On cross-examination DW4 stated that the suit property was fenced and was meant to be a secondary school because the other schools are far away. The suit land was proposed by residents to be a secondary school in 1997/1998 when adjudication was being conducted and no school has been erected as at now. He admitted that he had not filed any evidence to show that the suit property was meant to be a secondary school, and that despite claiming that the beacons were moved by the surveyor in 2010, he has never seen the survey report. That he has not done any survey of the plot, and that the house that is close to the fence belongs to one Hamisi, who is now deceased. That the said Hamisi and another had erected their houses there on agreement that they would be paying him rent for their houses.
13. The petitioner filed his submissions dated 25th October 2024 and further submissions dated 13th February 2025, while the learned counsel for the 1st, 6th to 8th and the 2nd respondent in the cross-petition filed theirs dated 10th February 2025, and 12th February 2025 respectively, which the court has considered.
14. The following are the issues for the court's determinations:
 - a. Whether the suit property is public or private land.
 - a. Whether the 1st respondent/cross-petitioner title to the suit property was lawfully and regularly obtained.
 - b. What reliefs to issue in the petition and cross-petition, if any.
 - c. Who bears the costs?
15. The court has carefully considered the grounds on the amended petition and cross-petition, affidavit, documentary and oral evidence tendered by PW1, DW1 to DW4, submissions filed and superior courts decisions cited thereon, and come to the following determinations:
 - a. That due to the claims by the petitioner that the suit property was public land set aside for secondary school, the 1st respondent's/cross-petitioner's claim that it was private land allocated to it for a school, and the 2nd respondent's claim that the suit property was carved out of a plot 337, it is important then to start by tracing the origin of the plot. Though DW4 had claimed in his depositions that his family and himself were already settled on the suit property which was carved from plot 337, he did not pursue that line of defence in his testimony in court. The documents that is certificate of title and deed plan that he provided are not clear at all. The rule of evidence under section 109 of the *Evidence Act* chapter 80 of Laws of Kenya has been that he who alleges must prove. DW4 failed to prove his claim that the suit property was carved out of their plot 337. He has also failed to prove that the 1st respondent/cross-petitioner conspired with the surveyor to move the suit property's beacon into his land thereby making his structures to encroach into the suit property. The undisputed fact is that the suit property is within the Mwembelegeza Settlement Scheme, that leads to the conclusion that



the Government of Kenya must have owned or had acquired the lands comprising the scheme thereof, before the establishment of the scheme. That in case the 2nd respondent's family were settled already on land that became part of the scheme, then after the surveying and allocations of the plots thereof to the beneficiary in accordance with the area list, it was each allottee's duty to ensure they confine their developments within their respective plots, and remove any that had fallen outside their plots. They could only retain structures that were outside their plots with authority or consents of the respective plot owners, as in the alternative they would be in actionable trespass.

- b. The threshold for constitutional petitions in a civil claims lies on prove of that a constitutional right has been violated or is threatened. The petition must also raise justiciable issues and seek clear reliefs. While the general requirement is to exhaust other remedies first, this is not always mandatory, especially if the case involves a clear constitutional issue that requires judicial intervention. The Court of Appeal in the case of *Geoffrey Muthinja & another versus Samuel Muguna Henry & 1756 others* [2015] KECA 304 (KLR) held as follows:

“The jurisprudence of this jurisdiction in this regard has been settled for a long time that a petitioner should be specific as to the right violated and give particulars of it. It is a rule of good sense that aids in the crystallization of issues before the court and, moreover, gives opportunity to the other party to know the exact nature of the complaint leveled against him and therefore be in a position to give an appropriate answer. It provides structure, sense and symmetry to the litigation and prevents it from being an unruly free-for-all. The *ANARITA KARIMI NJERU* and *MATEMU* cases (Supra) are clear and authoritative expositors of that position. Indeed, the *Constitution* of Kenya (Protection of Rights and Procedure Rules, 2013) reflect that thinking in requiring under Rule 10(2) that constitution petitions must contain, inter alia,

- (i) The facts relied upon,
- (ii) The constitutional provision violated,
- (iii) The nature of injury caused or likely to be caused,
- (iv) The relief sought.”

In a cursory perusal of the petition, the petitioner has alleged the rights in the *Constitution* to have been violated or threatened, including, Article 62 (4), that provides Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use; and Article 43 (1) (f), that provides that every person has the right to education. The other Articles appear irrelevant as they speak about persons with disability, which was not the main concern of the petitioner. He was concerned that the children of the area have only two schools namely Hassan Joho Girls Secondary and Kwa Bullo Mixed Secondary Schools, which are far away and lack enough space for classes and playground respectively. The petitioner has not specifically illustrated how the rights under the other Articles have been violated.

- c. The only title document in respect of Mombasa.Mwembelegeza/168, suit property, is the one issued in the name of Church Commissioners of Kenya, on 27th December 2006 under the Registered *Land Act* (repealed). Though the land was initially public land being part of Mwembelegeza Settlement Scheme, it became private land upon issuance of a freehold



title with nil encumbrances in favour of the 1st respondent/cross-petitioner. Though none of the parties explained who the Church Commissioners for Kenya are, or their relationship with the Anglican Church of Kenya, the court takes judicial notice that it is a trustee of the assets of the Anglican Church of Kenya. A certificate of title is so sacrosanct that any party claiming ownership of land must possess it as was agreed in the case of *Nairobi Permanent Markets Society & 11 others versus Salima Enterprises & 2 others* [1997] KECA 350 (KLR). The 1st respondent's title to the suit property was reiterated by DW2, the County Land Adjudication and Settlement Officer, and DW1 who was secretary to the Mwembelegeza Settlement Scheme Planning Committee, who confirmed the correspondence exchanged and their recommendation for the plot to be allocated to ACK Primary School. The only evidence the petitioner relied on to show otherwise was the letter from the County Land Adjudication and Settlement Officer dated 28th February 2007 by Felix M. Kiteto which showed that the suit property was a public utility plot slated for a secondary school. The author of the said letter, Mr. Kiteto was the then District Land Adjudication and Settlement Officer, but was unfortunately, said to have passed on and therefore unavailable as a witness, to defend its contents which are now disputed by DW2, the current County Land Adjudication and Settlement Officer who said letter was erroneous, as it did not tally with the contents of the area list. It is not clear why the County Lands officer was availed as a witness to explain their position with regards to the suit property.

- d. The court cannot ignore the said letter based on an averment made by the current officer in testimony. The author was condemned unheard. Furthermore, despite the current county land adjudication settlement officer being in office for over a year they had not taken any steps to correct the said letter. Furthermore, the previous holder of the office of whom the petitioner has sought orders against did not take any steps for all the years he held office. Under section 79 (1) (a) (iii) of the *Evidence Act* Chapter 80 of the Laws of Kenya, the said letter is a public document which cannot be revoked capriciously by statements made otherwise than through formal actions. In fact, it is deemed authentic under the presumption of validity section 66 of the *Evidence Act*. The court is aware that state had recently taken a different position from the one it has taken in this matter in Mombasa ELCLPET No. E008 of 2023. In ELCLPET No. E008 of 2023 also involving a public utility plot in the same Mwembelegeza Settlement Scheme, the documents attributed to Benjo Kibet Daniel, who testified in this petition as DW1, were to the effect that the letter dated 28th February 2007, was reliable in respect to the public utility plots in the scheme. And, as the petitioner pointed out, in ELCPET No. E035 of 2020 Sammy Chombo, then Mombasa Land Adjudication and Settlement officer had deposed in a replying affidavit to the effect that the letter dated 28th February 2007 contained public utility plots at Mwembelegeza Settlement Scheme. One is left wondering why the same officer has changed tune in this matter, and it is necessary for the matter to be further interrogated beyond the courtroom. This is especially important as the accountabilities list which is what was used to prepare the area list marked SAM 2 was never availed in court. The issues relating to the letter dated 28th February 2007 by the County Land Adjudication and Settlement officer, need to be investigated properly by the DCI, with the assistance of the National Director for Land Adjudication and Settlement Officer, to finally settle on its legality and bring to rest the identity of the all plots set aside in Mwembelegeza Settlement Scheme, and initiate legal action if evidence of any criminal activities is detected in the alienation of those public utility plots.
 - i. Article 40 of the *Constitution* provides for the right to own property and it the 2nd respondent/cross-petitioner has illustrated how it is being violated in respect of the suit property. However, before a party takes the route of filing a constitutional



petition, superior courts have time and again, emphasized that parties should exhaust the statutory alternative remedies available. The cross-petitioner has failed to establish or prove any infringement or violation of its right to the suit property by the petitioner. The action of the petitioner filing this petition cannot amount to an actionable infringement or threat of infringement or violation of right to property. Though the cross-petitioner has shown that some structures belonging to the 2nd respondent are encroaching onto the suit property, that is a question that could easily have been addressed through a boundary dispute resolution through the County Land Registrar as provided for under section 18(3) of the *Land Registration Act* chapter 300 of Laws of Kenya. The cross-petition was therefore filed prematurely and should be struck out, for offending the doctrine of exhaustion.

- ii. Ordinarily costs follow the event and is at the court's discretion. As this petition was commenced in the public interest, the court finds it fair and just that each party bears their own costs in both the petition and cross-petition.

16. From the foregoing determinations on the petition and cross-petition, the court finds and orders as follows:

- a. That the petitioner has failed to establish his claim in the amended petition and it is dismissed.
- b. The cross-petitioner has failed to establish its claim and hereby struck out.
- c. The court on its own motion directs the DCI, with the assistance of the National Director of Land Adjudication and Settlement Office, to investigate establish the number and identity of the public utility plots that were set aside in Mwembelegeza Settlement Scheme, the legality of the letter dated 28th February 2007 by the County Land Adjudication and Settlement Officer, in view of the statement and evidence of Benjo Kibet Daniel, the County Land Adjudication and Settlement Officer, Mombasa, in this petition denouncing the contents of the aforementioned letter, which differed with his earlier evidence in the Mombasa ELCLPET No. E008 of 2023, that was decided on 12th March 2025, and initiate legal action if evidence of any criminal activities is detected in the alienation of any of those public utility plots.
- d. Each party to bear their own costs in the petition and cross-petition.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 26TH DAY OF MARCH 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Petitioner : Present

1st Respondent/Cross-Petitioner : Mr Kariuki for Dr. Ndegwa.

Respondents : Mr Kariuki for Dr Ndegwa for 6th to 8th Respondents and M/s Kagoi for 2nd, 3rd and 5th Respondents.

Shitemi – Court Assistant

S. M. KIBUNJA, J.

ELC MOMBASA.

