



**Gikunji & 3 others v Nyaga & 3 others; Wahome & 16 others (Objector) (Environment and Land Case Civil Suit 808 of 2012) [2023] KEELC 16395 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16395 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 808 OF 2012**

**JO MBOYA, J  
MARCH 16, 2023**

**BETWEEN**

**JOSEPH MWANGI GIKUNJI ..... 1<sup>ST</sup> PLAINTIFF  
SAMUEL MUGUCHIA NDUNGU ..... 2<sup>ND</sup> PLAINTIFF  
SYLVESTER MAGENI KISANJI ..... 3<sup>RD</sup> PLAINTIFF  
JAMES KURIA NGARA ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**CRISPUS RAINI NYAGA ..... 1<sup>ST</sup> DEFENDANT  
MARY KAMAU ..... 2<sup>ND</sup> DEFENDANT  
PETER CHEGE ..... 3<sup>RD</sup> DEFENDANT  
CITY COUNCIL OF NAIROBI ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**MILICENT W WAHOME ..... OBJECTOR  
ROBERT M WARUI ..... OBJECTOR  
LYDIA WAMBUI KIARIE ..... OBJECTOR  
PETER IRUNGU MUIGA ..... OBJECTOR  
PAUL NJUGUNA ..... OBJECTOR  
DOMITRA W MIITHI ..... OBJECTOR  
MONICA M MURAGE ..... OBJECTOR  
JACINTA W NGUGI ..... OBJECTOR  
OSCAR S MUSIOMI ..... OBJECTOR**



<b>BENARD K MANKONE .....</b>	<b>OBJECTOR</b>
<b>ALICE W IRUNGU .....</b>	<b>OBJECTOR</b>
<b>EZRA M KIRIKA .....</b>	<b>OBJECTOR</b>
<b>KELVIN N NJOROGE .....</b>	<b>OBJECTOR</b>
<b>STANLEY M KINYUA .....</b>	<b>OBJECTOR</b>
<b>MARTIN P NJUGUNA .....</b>	<b>OBJECTOR</b>
<b>JAKTAN G KIRUJA .....</b>	<b>OBJECTOR</b>
<b>JOHN K GITHAITE .....</b>	<b>OBJECTOR</b>

## RULING

1. The Ruling herein relates to two (2) Application, namely, the Application dated the February 6, 2023 and the February 17, 2023, respectively, which have been mounted and filed by (sic) the various Objectors named therein.
2. In respect of the Application dated the February 6, 2023, the named objectors have sought for the following reliefs;
  - i. That this matter be certified as urgent, to be heard ex parte in the first instance, service dispensed with and the orders sought herein be granted on priority basis.
  - ii. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue an order of temporary injunction restraining the 2nd Defendant by herself, her agents, employees, servants and anyone under her instructions or authority from attaching, selling, entering, trespassing on, taking possession of, wasting, demolishing structures, evicting the Objectors or otherwise interfering or dealing with the Properties known as Plot Numbers 8A, 8B, 8C, 8G and 8F Kahawa West, Phase II, along Jubilee Avenue Road being portions of Plot No 8, Kahawa West, Phase II, and the Officer Commanding Kahawa West Police Station to supervise and ensure compliance.
  - iii. That pending the hearing and determination of this Application, there be a Stay of Execution of the Decree issued on February 8, 2019.
  - iv. This Honourable Court be pleased to declare that the 1<sup>st</sup> to 4<sup>th</sup> Objectors are the Legal owners and occupants of the Properties known as Plot Numbers 8A, 8B, 8C, 8G and 8F Kahawa West Phase II, along Jubilee Avenue Road being portions of Plot No 8 Kahawa West, Phase II.
  - v. That costs of this Application be provided for.
3. Though served with the application herein, the Defendants neither filed any Replying affidavit nor Grounds of opposition. However, it is imperative to state and underscore that counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, duly participated during the hearing of the subject application.



4. The Second Application is dated the February 17, 2023 and in respect of the said application, the Objectors have sought for the following reliefs;
  - i. Spent.
  - ii. That pending the hearing and determination of this Application, there be a stay of execution of the Decree issued on February 8, 2019.
  - iii. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue an order of Temporary Injunction restraining the 1<sup>ST</sup> Defendant by himself, his agents, employees, servants and anyone under his instructions or authority from attaching, selling, entering, trespassing on, taking possession of, wasting, demolishing structures, evicting the Objectors or otherwise interfering or dealing with the Properties known as Plot Numbers 13A, 13B,13C,13D,13E,13F,13G,13H,13I. 13J,13K,13L, 13M, 13N, 13O, &13Q Kahawa West, Phase II, being portions of Plot No 13,Kahawa West, Phase II, and the Officer Commanding Kahawa West Police Station to supervise and ensure compliance.
  - iv. That this Honourable Court be pleased to issue an order of Permanent Injunction restraining the 1st Defendant by himself, his agents, employees, servants and anyone under his instructions or authority from attaching, selling, entering, trespassing on, taking possession of, wasting, demolishing structures, evicting the Objectors or otherwise interfering or dealing with the Properties known as Plot Numbers13A, 13B, 13C, 13D, 13E,13F,13G,13H,13I,13J,13K,13L,13M,13N,13O,&13Q Kahawa West, Phase II, being portions of Plot No 13, Kahawa West, Phase II,and the Officer Commanding Kahawa West Police Station to supervise and ensure compliance.
  - v. Thatcosts of this Application be provided for.
5. Similarly, though served with the subject applications, the Plaintiffs and the Defendants never filed any response to the applications.
6. Be that as it may, when the application came up for hearing on the February 28, 2023, the advocates for the Objectors as well as the Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents duly attended court and same agreed to canvass and ventilate the two applications simultaneously. In this regard, the Honourable court issued directions that the said applications shall be heard and disposed simultaneously.
7. Furthermore, the advocates for the Parties, (details in terms of the preceding paragraph), also agreed to canvass and ventilate the two named applications by way of oral submissions. Consequently, the said two application were canvassed on the February 28, 2023.

## **Submissions By The Parties**

### **a. Objectors' Submissions:**

8. Learned counsel for the objectors relied on and adopted the grounds contained at the foot of the two named applications and similarly adopted and reiterated the contents of the supporting affidavit(s) thereto.
9. Furthermore, learned counsel raised, highlighted and amplified four salient issues which same invited the Honourable court to consider and pronounce itself on.



10. Firstly, learned counsel for the Objectors submitted that the Objectors herein are the owners of various plots, namely, Plot No's 13A, 13B,13C,13D,13E,13F,13G,13H,13I. 13J,13K,13L, 13M, 13N, 13O, &13Q, which fall within and form part of the larger Plot No 13, Kahawa West Phase II along Jubilee Road.
11. In addition, learned counsel also contended that the named Objectors had been allocated the various plots alluded to by the 4<sup>th</sup> Defendant herein, namely, (Nairobi City County), who proceeded to and issued the requisite Letters of allotment.
12. On the other hand, counsel further submitted that upon being issued with the respective letters of allotments, the objectors herein entered upon and took possession of the various Plots and thereafter commenced to develop same. In this regard, it was pointed out that the Objectors have been in occupation and possession of the said Plots for more than 15 years.
13. In view of the foregoing, learned counsel has therefore submitted that the named objectors are the lawful and legitimate owners of the named Plots and hence their rights thereto ought to be protected and vindicated by the Honourable court.
14. Consequently, learned counsel has submitted that despite being the lawful and legitimate owners of the named Plots, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, have since procured a Judgment from this Honorable court and are now threatening to execute the Judgment rendered on the February 8, 2019.
15. In any event, learned counsel added that the imminent and threatened execution of the impugned Judgment, shall culminate into the Eviction of the Objectors from their various Plots, which were duly allocated unto them by the 4<sup>th</sup> Defendant herein.
16. Besides, learned counsel has also submitted that the eviction, premised and based on the Judgment delivered on the February 8, 2019, will also culminate into the demolition of the Permanent structures, which have been constructed by the Objectors.
17. Thirdly, learned counsel has contended that though the Objectors are not seeking to set aside and or challenge the Judgment of the Honourable court, however, same are seeking to protect their legal and equitable rights over and in respect of the various plots, which fall within the suit property.
18. Furthermore, learned counsel added that the Objectors herein are also not seeking to reopen the suit proceedings, in any way whatsoever.
19. Fourthly, learned counsel for the objectors conceded and admitted that same did not lodge or file the requisite Notice of objection prior to and before of the commencement of the objection proceedings herein. However, counsel added that the failure to file the Notice of Objection was not fatal to the objection proceedings herein.
20. On the other hand, counsel also submitted that the failure to file the Notice of objection was a mere irregularity, which cannot invalidate or vitiate the objectors' Right of Access to Justice. In this regard, counsel has invited the Honourable court to take cognizance of the provisions of Article 159(2)(d) of the Constitution 2010.
21. Additionally, learned counsel also submitted that the Objectors herein have since filed two other suits, namely, ELC E029 of 2023 and ELC E063 of 2023; and in respect of which, same are also pursuing their rights and claims over the various plots alluded to.
22. Furthermore, learned counsel also submitted that the Objectors have also filed applications seeking for orders of temporary injunction in respect of the said suit and touching on the same Plots.



23. Notwithstanding the foregoing, learned counsel for the Objectors has submitted that the Honourable court is still seized and possessed of the requisite Jurisdiction to grant the reliefs sought at the foot of the two named applications.
24. Premised on the foregoing, learned counsel for the Objectors has implored and impressed upon the Honourable court to proceed and allow the applications dated the February 6, 2023 and the February 17, 2023, respectively and to grant the reliefs sought thereunder;
  - b. 1<sup>st</sup> Defendant/respondent Submissions
25. On behalf of the 1<sup>st</sup> Respondent, learned counsel Mr Njeru conceded that same had not filed any response to the two Applications. Nevertheless, counsel contended that same was at liberty to raise and ventilate issues pertaining to the law and not otherwise.
26. Premised on the foregoing, the Honourable court granted liberty to learned counsel to respond to the two applications, albeit on issues of law. In this regard, counsel thereafter proceeded to and highlighted four pertinent issues for consideration by the court.
27. First and foremost, learned counsel for the 1<sup>st</sup> Respondent submitted that any claimant who wishes to take out objection proceedings, the Objectors herein not excepted, are obligated to issue/lodge and serve the requisite notice of objection within the stipulated time line. In this regard, counsel invited the court to take cognizance of the provisions Order 22 Rules 51 and 52 of the [Civil Procedure Rules 2010](#).
28. Be that as it may, learned counsel submitted that the current objection proceedings were, however, taken and commenced, albeit without the requisite notice of objection.
29. Owing to the foregoing, learned counsel has therefore submitted and contended that the objection proceedings before the Honourable court are therefore premature, misconceived and legally untenable.
30. Secondly, learned counsel for the 1<sup>st</sup> Respondent has submitted that though the objectors are laying a claim to the various plots as the owners thereof, same have however not placed before the Honourable court any evidence of ownership or at all.
31. Furthermore, learned counsel has added that ownership is never assumed but must be proved, based on legal documents and/or instruments bearing the name of the claimant.
32. In this respect, learned counsel has submitted that in the absence of the requisite and appropriate ownership documents, the objectors claim herein, are therefore misconceived and legally untenable.
33. Thirdly, learned counsel has submitted that the supporting affidavits attached to the objection proceedings are incompetent, defective and invalid, insofar as same have exhibited annexures that have not been serialized in accordance with the provisions of Rule 9 of the Oaths and Statutory Declarations Rules. In this regard, counsel has invited the court to strike out and expunge the various annexures attached to the affidavit as well as the paragraphs relative thereto.
34. Fourthly, learned counsel has submitted that though the objectors have attached and exhibited assorted photographs to show (sic) the buildings/structures constructed on various portions of the suit plot, the impugned photographic evidence have not been accompanied with the requisite electronic certificate either as required by the law or at all.
35. To the extent that the photographic evidence attached to the affidavits, have not been duly authenticated in line with the provisions of Section 106B of the [Evidence Act](#), Chapter 80 Laws of Kenya, learned counsel has invited the court to strike out and expunge the impugned photographic evidence.



36. In addition, learned counsel has also submitted that the objections proceedings before the Honourable court constitute an abuse of the due process of the court. In this regard, learned counsel has singled out the fact that the objection proceedings have also been taken and mounted by some of the Plaintiffs, who are now purporting to be objectors.
37. Other than the foregoing, counsel has also pointed out that the Objectors, while filing the Objection Proceedings herein, also proceeded to and filed some other suits, relating to the same issues, being raised herein. For coherence, Learned counsel contended that the filing of the related suits, was admitted by counsel for the objectors.
38. In the premises, it was contended that the filing of the Objection proceedings, while at the same time, filing the primary suits, seeking similar or near similar reliefs, amounts to an abuse of the due process of the court.
39. Finally, counsel invited the Honourable court to find and hold that the rules of procedure were never made in vain. In this regard, learned counsel has submitted that it was incumbent upon the objectors to comply with the provisions of Order 22 Rules 51 and 52 of the Civil Procedure Rules, 2010, as well as, Rule 9 of the Oaths and Statutory Declarations Rules.
40. In any event, learned counsel has added that the provisions of Article 159(2)(d) of the Constitution 2010, which has been alluded to and invoked by counsel for the Objectors is not panacea for all indiscretions and deliberate infractions of the law.

**c. 2nd Respondent's Submissions:**

41. On behalf of the 2<sup>nd</sup> Respondent, learned counsel raised, highlighted and amplified five pertinent issues for consideration by the court. First and foremost, learned counsel for the 2<sup>nd</sup> Respondent has submitted that the objection proceedings which have been taken and filed on behalf of the objectors herein are incompetent and thus invalid. In this regard, learned counsel has invited the court to take cognizance of Order 22 Rules 51(3) of the Civil Procedure Rules, which is couched in mandatory terms.
42. Secondly, learned counsel has submitted that other than the failure and neglect to comply with and abide by the provisions of Order 22 Rules 51(3) of the Civil Procedure Rules, the Objectors have also reached the provision of Order 1 Rule 13(2) of the Civil Procedure Rules, 2010.
43. In the premises, learned counsel has submitted that the objection proceedings by and on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Objectors, as well as the 5<sup>TH</sup> to the 16<sup>TH</sup> Objectors, in respect of the Application dated the February 17, 2023, are incompetent for want of the requisite supporting affidavit.
44. Similarly and in the same vein, learned counsel has further submitted that the objection proceedings on behalf of the 2<sup>nd</sup> to 4<sup>th</sup> Objectors, at the foot of the Application dated the February 6, 2023, are also incompetent for want of compliance with Order 1 Rules 13(2) of the Civil Procedure Rules, 2010.
45. Thirdly, learned counsel has submitted that the current objection proceedings constitute and amounts to an abuse of the due process of the Honourable court. In this respect, learned counsel has submitted that the same objectors have also filed three separate suits, namely, ELC No E029 of 2023, ELC No E063 of 2023 and ELC No E229 of 2023, respectively, which are also touching on the same issues/ claims.
46. Furthermore, Learned Counsel has contended that the filing of the objections proceedings on one hand; and the primary suits on the other hand, is calculated to create confusion and attract conflicting orders from various courts which is itself an abuse of the due process of the court.



47. Fourthly, learned counsel for the Second Respondent has also submitted that the objectors herein have neither established nor demonstrated their claim of ownership to and in respect of the subject suit property. For clarity, counsel added that no ownership documents have been placed before the Honourable court to authenticate and vindicate the ownership claims, whatsoever.
48. Finally, learned counsel for the 2<sup>nd</sup> Respondent has also added his voice to the fact that the photographic evidence attached to the supporting affidavit in respect of the objection proceedings have violated and contravened the mandatory provisions of Section 106B of the *Evidence Act*, Chapter 80, Laws of Kenya.
49. Consequently and in this regard, learned counsel has reiterated the submissions made on behalf of the 1<sup>st</sup> Respondent and in particular, that the photographic evidence be struck out and/or expunge.

### **Issues for Determination**

50. Having reviewed and evaluated the two named Applications, together with the Supporting affidavits; and having considered the oral submissions, which were ventilated by and on behalf of the respective Parties, the following issues do arise and are thus worthy of Determination;
  - i. Whether the Objection Proceedings filed by and on behalf of the Objectors herein, are Competent and Valid.
  - ii. Whether the Objectors herein have established and proved ownership over and in respect of the various Plots which form the basis of (sic) the Objection proceedings herein
  - iii. Whether the Objection Proceedings amount to and constitute an abuse of the Due process of the Honourable court.

### **Analysis and Determination**

#### **Issue Number 1 - Whether the Objection Proceedings filed by and on behalf of the Objectors herein are Competent and Valid.**

51. It is common ground that what are before the Honourable court are objection proceedings, taken and mounted by the various objectors, who are laying claims to various plots (sic) falling within and forming part of Plots no's 8 and 16, Kahawa West, Phase II, respectively.
52. Given that what have been placed before the Honourable court are objection proceedings, it was incumbent upon the objectors herein to first and foremost issue and lodge the requisite Notice of objection in accordance with Order 22 Rules 51(3) of the Civil Procedure Rules, 2010.
53. Before venturing to analyze and determine whether or not the provisions of Order 22 Rule 51(3) of the Civil Procedure Rules, 2010, are mandatory or peremptory, it is imperative to reproduce same.
54. For coherence, the provisions of Order 22 Rules 51(3) of the Civil Procedure Rules, 2010, are reproduced as hereunder;



51.	<p>Objection to attachment [Order 22, rule 51.]</p> <table border="1"> <tr> <td data-bbox="810 264 1098 987">(1)</td> <td data-bbox="1098 264 1394 987">Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.</td> </tr> <tr> <td data-bbox="810 987 1098 1406">(2)</td> <td data-bbox="1098 987 1394 1406">Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.</td> </tr> <tr> <td data-bbox="810 1406 1098 1697">(3)</td> <td data-bbox="1098 1406 1394 1697">Such notice of objection and application shall be served within seven days from the date of filing on all the parties.</td> </tr> </table>	(1)	Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.	(2)	Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.	(3)	Such notice of objection and application shall be served within seven days from the date of filing on all the parties.
(1)	Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.						
(2)	Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.						
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	court and to all the parties and to the decree-holder of his objection to the attachment of such property.
(2)	Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.
(3)	Such notice of objection and application shall be served within seven days from the date of filing on all the parties.
52.	Stay of execution [Order 22, rule 52.] Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

55. My reading of the foregoing provisions, drives me to the conclusion that any claimant, who wishes or seeks to object to the attachment of any property, in execution of a decree, ( the current Objectors not excepted), is obligated to lodge and serve the requisite notice of objection in accordance with Order 22 Rules 51(1) of the Civil Procedure Rules.
56. Furthermore, it is the said notice of objection that must be accompanied by the requisite application by and on behalf of the named objector(s).
57. To my mind, the Notice of Objection constitutes and forms the legal foundation and basis upon which the objections proceedings are anchored and predicated. In this regard, where no Notice of objection is lodged, then the objection proceedings cannot be mounted. In any event, if same are mounted, then the impugned Objection Proceedings, would be stillborn.
58. In addition, I am of the considered view that where the application for objection, like the one beforehand is commenced and taken, albeit in the absence of the requisite notice of objection, then the objection proceedings shall have been taken and mounted in vacuum.
59. In respect of the instant matter, learned counsel for the objectors conceded and admitted that same had not filed or lodged the requisite Notice of objection prior to and before the filing of the objection proceedings.
60. Despite the foregoing, counsel contended that the failure and neglect to file the notice of objection, prior to and before the commencement of the objection proceedings was not fatal to the objection proceedings or at all.
61. Additionally, learned counsel submitted that the failure to file and lodge the notice of objection was (sic) a minor defect and irregularity, which cannot vitiate or invalidate the objection proceedings and by extension , the right of the objectors.



62. Furthermore, learned counsel contended that the failure in question constitutes and amounts to procedural lapse and hence same is curable vide the provisions of Article 159(2) (d) of the Constitution 2010. For clarity, learned counsel implored the court to deem the failure as a procedural and technical lapse and ignore same.
63. Other than the failure to comply with the provisions of Order 22 Rules 51 of the Civil Procedure Rules, in the manner that has been articulated in terms of the preceding paragraphs, the objectors herein also failed to comply with and abide the provision of Order 1 Rules 13(2) of The Civil Procedure Rules, 2010.
64. To this end, it is imperative to point out that where two or more persons file or mount a joint claim, (like the objectors herein), all the claimants are called upon to swear the requisite affidavit, where appropriate.
65. On the other hand, the other claimants, are at liberty to authorize and mandate any one or more of them to swear the requisite affidavit, albeit on their behalf. However, in the event of such other claimants appointing and authorizing, one or more of them to act or plead on their behalf, then same must sign and execute a Written authority.
66. Furthermore, such written authority must thereafter be filed and lodged with the court. Clearly, it is upon the execution and ultimate lodgment of the authority with the court that the appointed person(s), shall have the mandate to act and plead on behalf of the rest of the claimant/objectors.
67. Despite the foregoing, it is worthy to state that the objectors herein neither executed nor signed any written authority in respect of the 3<sup>rd</sup> Objector to the application dated the February 17, 2022, or the 1<sup>st</sup> objector in respect of the application dated the February 6, 2023.
68. In my humble view, the net effect of such failure to generate, sign and execute the requisite authority is that the objection proceedings by and on behalf of the 2<sup>nd</sup> to 4<sup>th</sup> Objectors, as pertains to the application dated the February 6, 2023, are incompetent, misconceived and legally untenable.
69. Similarly, in the absence of the requisite authority executed by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> to 16<sup>th</sup> Objectors, in respect of the Application dated the February 17, 2023, it then follows that the objections proceedings by the said/ named objectors are also invalid and legally untenable.
70. Perhaps, at this juncture, it is appropriate to reproduce the provisions of Order 1 Rules 13 of the Civil Procedure Rules, 2010, whose tenor and meaning has been discussed in the preceding paragraphs.
71. In this regard, the provisions of Order 1 Rules 13 of the Civil Procedure Rules, 2010, provides as hereunder;



13.	<p>Appearance of one of several plaintiffs or defendants for others</p> <p>[Order 1, rule 13.]</p> <table border="1" data-bbox="810 360 1385 1267"> <tr> <td data-bbox="810 360 1098 1043">(1)</td> <td data-bbox="1098 360 1385 1043">Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.</td> </tr> <tr> <td data-bbox="810 1043 1098 1267">(2)</td> <td data-bbox="1098 1043 1385 1267">The authority shall be in writing signed by the party giving it and shall be filed in the case.</td> </tr> </table>	(1)	Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.	(2)	The authority shall be in writing signed by the party giving it and shall be filed in the case.
(1)	Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.				
(2)	The authority shall be in writing signed by the party giving it and shall be filed in the case.				
(1)	Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.				
(2)	The authority shall be in writing signed by the party giving it and shall be filed in the case.				

72. In my humble, albeit considered view, the provisions of the law, which have been reproduced herein before are couched in mandatory/ peremptory terms. Consequently, it behooves all and sundry, the Objectors herein not excepted, to comply therewith.

73. Additionally, it is important to state and underscore that Rules of Procedure were neither made nor crafted in vain. For clarity, same were meant to aid and assist the orderly pursuit of Substantive Justice.



74. To my mind, it is imperative to underscore that where Procedural Justice is sacrificed and or disregarded, there arises a blemish in Substantive Justice. In this regard, there arises a likelihood of utter and flagrant disregard of the Rules, merely because in the mind of the Proponents of such a scheme, nay, School of thought, what matters is Substantive Justice.
75. I am afraid that such an approach ,or better still, way of thinking, if wholesomely nurtured, fostered and adopted, would be tantamount to applying the Machiavellian Rule of; the end justifies the Means.
76. Luckily for us, both the Court of Appeal and the Supreme Court of Kenya, have intervened. In this regard, it suffices to restate and reiterate the holding of the Court of Appeal in the case of *Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No 290 of 2012, (2013) eKLR*, where the Honourable Court as follows;
- ' In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.'
77. Other than the Court of Appeal, the Supreme Court of Kenya has also added its voice on the need to comply with and adhere to the Rules of Procedure in the case of *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR*, where the court held as hereunder;
- (65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.
78. Premised on the foregoing observations, I am of the considered opinion that the objection proceedings, which have been mounted in complete disregard of the set and established rules, are not only premature and misconceived , but same are invalid and bad in law.
79. Consequently and in the premises, I would have been minded to terminate the ruling at this juncture, but for the sake of completeness, I shall endeavor to address the remaining issues, which are similarly critical and imperative.

## **Issue Number 2**

### **Whether the Objectors herein have established and proved Ownership over and in respect of the various Plots which forms the basis of (sic) the Objection Proceedings herein**

80. The Objectors herein have mounted and lodged the objection proceedings claiming that same are the lawful and legal owners of the various plots that have been alluded to in the body of the two applications.
81. Having contended and claimed that same are the lawful and legitimate owners of the named plots, it was incumbent upon the objectors to tender and place before the Honourable court credible and cogent evidence of ownership.



82. In this regard, it is worthy to recall that the Objectors contended that same were duly and lawfully allocated the named plots by the 4<sup>th</sup> Defendant.
83. Furthermore, the objectors have gone ahead and stated that upon being allocated the named plot, each and every one of them, was issued with a Letter of allotment.
84. Additionally, the objectors have further averred that upon being issued with the requisite Letters of allotment, same duly paid the requisite fees, contained and alluded to at the foot of (sic) the Letters of allotment.
85. Be that as it may, the objectors have further averred that later on, same ( read, the Objectors) handed over (sic) the letters of allotment to one Paul Nganga, who offered to assist the objectors to procure and obtain individual certificate(s) of title to their respective plots.
86. Nevertheless and despite the foregoing, the objectors have contended that the said Paul Nganga was unable to procure and obtain the individual certificate(s) of tile, either in the manner promised or at all.
87. Other than the foregoing, the objectors have also averred that the said Paul Nganga, has also failed and neglected to return the original copies of the Letter(s) of allotment and the revenue receipts, which were handed over to him by the objectors.
88. Arising from the failure by Paul Nganga to return the original letters of allotment and (sic) the revenue receipts which were handed over to him, the objectors herein have contended that same were therefore constrained to lodge a complaint with the police, culminating into same being issued with Police Abstracts.
89. Simply put, despite the long and winding story, the objectors herein have neither tendered nor availed to the court any scintilla or iota of evidence to show that same were ever allocated the named plots, either as contended or at all.
90. On the other hand, assuming for the sake of arguments that the objectors were ever allocated the named plots and assuming that same handed over the original letters to (sic) Paul Nganga, common sense and prudence would have required that the objectors do retain photocopies of (sic) the impugned letters of allotment.
91. In the alternative, common sense and prudence would also have led the objectors to the offices of the 4<sup>th</sup> Defendant (who is said to have allocated the named plot to the objectors), for purposes of procuring and obtain certified copies of (sic) the letters of allotment, if at all.
92. Curiously, the objectors herein have neither placed before the Honourable court or tendered any document to confirm and vindicate their claim of allocation of the impugned plots. For clarity, the only documents exhibited are police abstracts, which for good measure, are never an end in themselves.
93. Suffice it to point out that a police abstract is a precursor and prelude to enable the victim of an incidence (for example loss of documents) to escalate the issue further and where appropriate/ necessary, to obtain certified and duplicate copies from the relevant authority.
94. Clearly, what the objectors herein ought and should have done, ( assuming that their claim of loss, was genuine) was to procure certified copies of the impugned documents, if at all, their contention was valid and correct.
95. Unfortunately and for reasons, only known to the Objectors, the objectors herein did not deem it appropriate and expedient to venture forward and procure any valid and legal documents, to vindicate their claim of ownership.



96. I beg to point out that the burden of proving that the objectors were duly allocated the named plots and therefore are (sic) the Legal owners thereof, laid at the door steps and shoulders of the objectors. See Section 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya.

97. Furthermore, it is also appropriate to take cognizance of and reiterate the holding in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & another [2014] eKLR, where the Court of Appeal held as hereunder;

'On perusing the judgment and hearing Mr Mwangi, what comes through clearly and was repeated several times over, was the position that since the appellant did not deny the facts stated in the affidavits of the 1<sup>st</sup> respondent then he was deemed to have admitted those facts. With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1<sup>st</sup> respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1<sup>st</sup> respondent that:'

'The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.'

That he did not do.

98. Additionally, the incidence of burden of proof was deliberated upon by the Court of Appeal in the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) versus Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR, the Court expounded on section 107 and 109 of the Evidence Act as;

' The standard of proof is on a balance of probabilities which Lord Denning in the case of Miller vs Minister of Pensions (1947) explained as follows:-'That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties? explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.'

99. Recently, the Supreme Court of Kenya also had occasion to address the burden of proof and on whom same lies. In this regard, it is appropriate to take cognizance of the holding in the case of Dr Samson Gwer & 5 others versus Kenya Medical Research Institute (KEMRI) & 3 Others [2014] eKLR, where the Supreme Court observed as hereunder;

(47) 'It is a timeless rule of the common law tradition  $\frac{3}{4}$  Kenya's juristic heritage  $\frac{3}{4}$  and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the 'balance of probability'. Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.'



(48) The petitioners' case is set around the constitutional right of freedom from discrimination Constitution, of Kenya, 2010 Article 27). It is already the standpoint of this Court, as regards standard of proof, that this assumes a higher level in respect of constitutional safeguards, than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights-safeguards bear generalities, or qualifications, which call for scrupulous individual appraisal for each case. This is the context in which the rights-claim in the instant case, founded upon racial discrimination, is to be seen.

(49) Section 108 of the Evidence Act provides that, 'the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;' and Section 109 of the Act declares that, 'the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'

[50] This Court in Raila Odinga & Others . Independent Electoral & Boundaries Commission & Others, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

'A Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden.'

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1<sup>st</sup> respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.

100. In my humble albeit considered view, the objectors herein bore the burden of proving their claim(s) pertaining to ownership of the named plots, which anchor or color the objections proceedings.

101. However, despite bearing the burden of proof, the objectors herein failed to discharge the burden either on a preponderance of probability or at all.

102. Other than the foregoing observation, there is yet a second aspect to the issue. In this regard, it is appropriate to state and underscore that even if the objectors had tendered and availed evidence of the letters of allotment (which is not the case), it is common knowledge that Letters of allotment per-se, do not constitute Title to land.

103. To this extent, it is appropriate to reiterate the holding of the Court of Appeal in the case of Joseph N K Arap Ngok versus Moiwo Ole Keiwa & 4 Others (1997) eKLR, where the Court stated and observed as hereunder;

' This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.'



104. Consequently and in the premises, it becomes evident that it would not be enough for the objectors to merely state that same were allocated the named plots; and waive the impugned letters of allotment, as (sic) a basis of ownership.
105. Lastly, there is also the aspect pertaining to the fact that this Honourable court (differently constituted) rendered a Judgment wherein the Honourable court declared that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the legitimate owners of Plot Numbers 8 and 13 Kahawa West, Phase II, along Jubilee Avenue road. See the Judgment delivered on the February 8, 2019.
106. Despite being privy to and aware of the said Judgment, the objectors herein stated that same are not challenging the named Judgment. Additionally, learned counsel for the objectors also submitted that same are not keen to re-open the proceedings culminating into the rendition and delivery of the named Judgment.
107. In view of the foregoing, the question that does arise is whether this Honourable court can make an ancillary declaration that the objectors are owners of sub-plots contained in the main plot, without impeaching and invalidating the Judgment, which declared that the named properties belong to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
108. In my humble view, the Judgment of the Honourable court rendered on the February 8, 2019; and which has neither been appealed against nor impeached, was/is a Judgment in rem. Consequently, the named Judgment is valid and holds sway against the whole World.
109. In the premises, it would be absurd and inimical to the rules of the law for this court to purport to declare that the objectors herein are the lawful owners of the impugned sub-plots, whilst the main Judgment rendered on the February 8, 2019 remains standing.
110. From the foregoing analysis, I come to the conclusion that the objectors herein have neither established nor demonstrated that same have any legal or lawful rights to and in respect of the named plots, which are contained at the foot of the objection proceedings.

### **Issue Number 3**

#### **Whether the Objection Proceedings amount to and constitute an abuse of the Due process of the Honourable court.**

111. During the course of the submissions, learned counsel for the Objectors intimated to the court that other than the objection proceedings, the Objectors herein have also filed two primary suits, namely, ELC NO E029 of 2023 and ELC NO E063 of 2023, respectively.
112. Furthermore, learned counsel proceeded to and submitted that the objectors have also filed interlocutory application seeking for orders of temporary injunction in respect of the named suit. For clarity, counsel added that the interlocutory application were pending hearing and determination before various Judges of the Environment and Land Court.
113. On the other hand, learned counsel for the 2<sup>nd</sup> Respondent also intimated to the court that other than to the two suits which were alluded to by counsel for the objectors, there is yet another suit, which has also been filed by a different set of objectors. For coherence, learned counsel alluded to ELC No E229 of 2023.
114. What becomes evident and apparent is that the current objectors herein have similarly filed and lodged other sets of proceedings, wherein same are seeking, similar or substantially similar reliefs like the one beforehand.



115. Clearly, the objectors herein have adopted a multi-pronged approach, whereby same have filed a multiplicity/ plethora of suit and proceedings, in a bid to procure numerous albeit various orders from the Honourable court.
116. In my humble view, the approach adopted and applied by the objectors herein is one, which is calculated to obtain orders from various courts, some of which are likely to conflict and thus culminate into absurdity.
117. Surely, the filing of the multiplicity/plethora of suits, touching on and concerning the same dispute, cannot be sanctioned, sanitized and/or countenanced by a court of law. At the very least, I am not a disciple of such an approach to Litigation, which by itself breeds anarchy and impugns on the Rule of Law.
118. Consequently and in this respect, it is my firm and unwavering position, that such kind of behavior constitutes and amounts to an abuse of the due process of the court; and is also tantamount to playing Lottery with the Due process of the Law.
119. For coherence, No court of law ought to stomach and countenance such a flagrant and unmitigated abuse. In this regard, I am of the view that the objection proceedings herein, ought to fall on this head, as well.
120. As pertains to what constitutes and amounts to an abuse of the due process of the court, it is appropriate to adopt and reiterate the observation and holding of the Court of Appeal in the famous case of *Muchanga Investments Ltd Versus Safaris Unlimited (africa) Ltd & 2 others [2009] eKLR*, where the court held as hereunder;

' The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice.'

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

- (a) 'Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.
- (d) (sic) meaning not clear)
- (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.'

121. Additionally, the issue of what constitutes and amounts to an abuse of the due process of the court was also canvassed and addressed in the case of *Satya Bhamu Gandhi versus Director of Public Prosecutions & 3 others [2018] eKLR*, where the court stated and held as hereunder;

22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized



that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]

23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-
- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
  - (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
  - (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
  - (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
  - (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]
  - (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
  - (g) Where an appellant file an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
  - (h) ) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]
122. Without belaboring the point, the objectors herein cannot , nay, should not be allowed to play lottery with the due process of the court. Consequently, once the court takes the view that its process is being abused or better still, misused, it behooves the court to stamp its authority and strike down, any such process/ proceedings.
123. In this regard and for purposes of vindicating the integrity of the Court, I feel obligated to and do hereby declare that the objections proceedings herein constitute and amounts to an abuse of the Due process of the Honourable court.

### **Final Disposition**

124. Having analyzed the itemized issues for determination, (which were captured in the body of the Ruling), I have come to the conclusion that the impugned objection proceedings are premature, misconceived, bad in law and or otherwise constitutes an abuse of the Due process of the court.



125. Consequently and in the premises, the Objection Proceedings vide applications dated the February 6, 2023 and February 17, 2023, respectively, be and are hereby Dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents.

126. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16th DAY OF MARCH 2023.**

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

**Benson. Court Assistant:**

**Mr. Mutunga h/b for Mr Mwale for the Objectors/Applicants**

**Mr. Njeru for the 1<sup>st</sup> Defendant/Respondent**

**Mr. A K Kiluva for the 2<sup>nd</sup> Defendant/Respondent**

**N/A for the Plaintiffs/Respondents**

**N/A for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents**

