



**Ojera (The legal administrator of the Estate of Isaa Ouma Mutangili Mwanthi
- Suing on their behalf and on behalf of the residents of Birikani Estate
Changamwe) v Kenya Railways Corporation & another (Environment & Land
Case 126 of 2015) [2025] KEELC 1495 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1495 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 126 OF 2015**

LL NAIKUNI, J

MARCH 21, 2025

BETWEEN

**ALPHONSE OJERA (THE LEGAL ADMINISTRATOR OF THE ESTATE
OF ISAA OUMA MUTANGILI MWANTHI - SUING ON THEIR BEHALF
AND ON BEHALF OF THE RESIDENTS OF BIRIKANI ESTATE
CHANGAMWE) PLAINTIFF**

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

THE HON ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to a civil suit through the Complaint dated 8th June, 2015. It was instituted by Alphonse Ojera Administrator of the Estate of Isaa Ouma Mutangili Mwanthi (Suing on their behalf and on behalf of the Residents of Birikani Estate Changamwe), the Plaintiff herein against Kenya Railways Corporation and the Honorable Attorney General the Defendants herein.
2. Upon service of the pleading and summons to enter appearance, the 1st Defendant entered appearance through a memorandum of appearance dated 16th May, 2018 and filed on 16th May, 2018 and subsequently filed their Statement of Defence on 1st August, 2018 dated 27th July, 2018. The 2nd Defendant never entered appearance at all.



3. For record purposes, it will be noted that although there had been consensus by the parties, on 16th September, 2024 for the Honourable Court to conduct a site visit (“Locus in Quo”) but unfortunately this never happened due to lack of proper logistical arrangement.

II. Description of the parties

4. The Plaintiff was described as being a resident of Birikani (Gang 2A), Changamwe East – Mombasa. The Plaintiffs claimed having resided on that area since the year 1973 with their families. They brought this Plaint on behalf of 31 other families living in the same area.
5. The 1st Defendant was described as a State Corporation (parastatal) of the Government of Kenya which provides transport services through railway line. The 2nd Defendant was sued under the provision of Article 156 of *the Constitution* of Kenya, 2010.

III. Court directions before the hearing

6. On account of all the parties having fully complied with the provisions of Order 11 of the Civil Procedure Rules 2010, on 1st March, 2022, the Honourable Court fixed the hearing date on 27th April, 2022. Nonetheless, the hearing date was deferred to 6th October, 2022. Indeed, the matter proceeded on for hearing by way of adducing “Viva Voce” evidence with the Plaintiff’s witnesses – PW - 1 and PW - 2 testifying in Court on 6th October, 2022 at 12.30 p.m. Thereafter, they marked their case as closed. The 1st Defendant called their witness DW - 1 on 12th June, 2024 and later closed their case. However, the 2nd Defendants never called a witness they marked their cases closed.

IV. The Plaintiff’s case

7. From the filed pleadings, the Plaintiffs had been living in that area subject matter for a period of more than 40 years on average. Hitherto, they did so peacefully, without any force and Secrecy. They claimed that the former and current local administration including Chief, Sub - Chief, District Officer and Divisional Officer of the Provincial administration, Mombasa were well aware of this fact. The Plaintiffs, residents of Birikani area in Changamwe had over the years established Semi - Permanent Settlements, established Social amenities which include Churches, places of worship, cemetery and Schools where their Children went to have education and other essential services.
8. In the year 2013, the 1st Defendant started issuing the Plaintiffs with threats of possible forceful eviction. In February 2013, the 1st Defendant, issued a written threat/notice of eviction to some of the Plaintiffs of imminent eviction of what they were calling ‘illegal tenants’ in this case referring to the Plaintiffs, copied to all the Security Agents in Mombasa and also the local provincial administration. The Plaintiffs were very apprehensive that the 1st Defendant would make good the threat of eviction causing the Plaintiffs tremendous harm, loss and instability to them.
9. According to the Plaintiffs, the alleged reason for the intended evictions from the 1st Defendant was that they would like to lease out to a private firm the go-downs adjacent to the Plaintiffs’ houses in order to boost their income as they do not get enough allocation of finances from the Central government of Kenya to run their activities. Therefore, the Plaintiffs averred that there were no exceptional circumstances and/or full justification for the intended eviction. Furthermore, there were no procedural guarantees for upholding the Plaintiffs’ fundamental rights.
10. There were no adequate steps taken by the Defendants to protect the fundamental rights of the Plaintiffs prior to, during and after intended evictions. The Defendant had not even carried out any or any comprehensive eviction-impact assessments prior to the planned displacements. The Defendants



had not provided any restitution and adequate rehabilitation consistent with human rights standards. The Plaintiffs averred that the occupiers, leases and/or tenants of the suit premises together with their families were entitled to the fundamental rights and freedoms guaranteed by the Constitution of Kenya 2010 including but not limited to the following:-

- a. The right to accessible and adequate housing and to reasonable standards of sanitation as provided for under the provision of Article 43 (1)(b) of the Constitution of Kenya, 2010, Article 11 of the International Covenant of Economic Social and Cultural rights as read with Article 2 (6) of the Constitution of Kenya, 2010.
 - b. The right of access to information held by the state and another person and required for the exercise or protection of any right or fundamental freedom as protected by the provision of Article 35 (1) of the Constitution of Kenya and the provision of Article 9 of the African Charter on Human and Peoples Rights as read with Article 2 (6) of the Constitution of Kenya, 2010.
 - c. The right not to be treated in a cruel, inhuman or degrading manner as protected by the provision of Article 29 of the Constitution of Kenya, 2010.
 - d. The right to Fair Administrative Action as protected by the provision of Article 47 of the Constitution of Kenya, 2010.
 - e. The right of every child to be protected from inhuman treatment as guaranteed by the provision of Article 53 (1) (d) and Article 37 on the convention of the right of the child as read with the provision of Article 2 (6) of the Constitution of Kenya. Further, the best interests of the child are of paramount importance in every matter concerning the child as recognized in the provision of Article 53 (2) of the Constitution of Kenya, 2010.
 - f. The right of older members of society to live in dignity and respect as protected by the provision of Article 57 of the Constitution of Kenya, 2010.
 - g. The rights of person with disabilities to be treated with dignity and respect as protected by the provision of Article 54 (1)(a) of the Constitution and Article 26 of the convention on the rights of persons with disabilities.
11. Though the Plaintiffs never had a title to the suit land, the Defendants as state actors had a constitutional duty to guarantee Security of tenure to all those currently lacking titles to home and land like the Plaintiffs under the provision of Article 40 of the Constitution of Kenya, 2010. The children of the Plaintiffs had a right to adequate housing. They urged this Honorable Court to protect them as stipulated under the provision of Article 53 of the Constitution of Kenya, 2010. The County of Mombasa had had a history of numerous evictions against marginalized groups, less privileged and slum dwellers with serious and permanent impact on those affected. The Defendants as state actors had a duty to ensure and take intervening measures to ensure that market forces never increased the vulnerability of low-income and Marginalized groups to forced eviction contrary to the provision of Article 56 of the Constitution of Kenya, 2010.
12. The threatened eviction by the Defendants was unfair upon the Plaintiffs from their homes and shared property resources. It would adversely affect their ability to reside and work in the particular dwelling without provision of alternative dwelling place or any form of legal or other protection. The Defendants had not given the Plaintiffs any or any appropriate notice that eviction was being considered nor had they conducted any public hearings on the proposed plans and alternatives. The relevant information was not effectively disseminated to the Plaintiffs in advance.



13. The Defendants should have conducted public hearings that provide the Plaintiffs with opportunities to challenge the eviction decision and to present alternative proposals. Therefore, the Plaintiffs had been denied a chance to be part of a decision that would adversely affect them directly and without sufficient notice. The Defendant should have prior to issuing eviction notice put in measures for resettlement before anyone was moved from their original areas of dwelling.
14. The Defendants should have taken special measures to ensure that women and children were not subjected to gender based violence and discrimination. The rainy season in the County of Mombasa had arrived and without shelter the Plaintiffs would be at the mercy of all the elements of bad weather including the long rains, scorching sun and violent winds. *The Constitution* of Kenya, 2010 had adequate measures to ensure that no one was subjected to violence and arbitrary deprivation of property and possessions.
15. According to the Plaintiff they had a right to sufficient alternative accommodation be provided for them. At the moment there were no safeguards as to how the Plaintiffs would be provided with safe access to essentials like food, water, sanitation, basic shelter and housing, clothing, medical services, access to common property resources, education and child care facilities especially to women and children. According to the Plaintiff, the Defendants should be condemned to pay the resettlement costs to the Plaintiffs as the parties responsible for the evictions. The Plaintiffs and all the affected persons prayed to be given not less than 1 year notice of the re - settlement and the exercise supervised by reputable human rights institutions. The Plaintiffs had filed this matter in the High Court at Mombasa as “Mombasa High Court Constitutional Petition Number 18 of 2013” which was struck out on the 15th May, 2015 for lack of jurisdiction of the Court under the provision of Article 162 (2) (b) of *the Constitution*. This Honorable Court has jurisdiction to hear this matter pursuant to article 162(2)(b) of *the constitution*.
16. The Plaintiff humbly prayed for Judgment to be entered jointly and severally against the Defendants in the following terms:-
 - a. A declaration that the Plaintiffs the persons they represent and their families are entitled to the rights set out at Paragraph 12 of this Plaint.
 - b. A declaration that the Defendants’ notice of eviction to the Plaintiffs is null and void to the extent that it does not comply with the constitutional and international standards of the right to housing and eviction procedures.
 - c. An injunction restraining the Defendants by themselves, servants and/or their agents from interfering with the Plaintiffs’ rights to a peaceful and quiet enjoyment and possession of their dwelling place at Birikani (Gang 2A) in Changamwe East within Mombasa county or in any way demolishing houses, transferring, alienating the suit premises and/or in any other manner evicting the Plaintiffs and the persons they represent from the suit premises.
 - d. An order compelling the Defendants to avail information relating to the suit premises including but not limited to the following; resolutions of all the organs of the 1stD defendant that authorized the demolition, alienation of the suit premises, sale and eviction of the Plaintiffs.
 - e. Without prejudice of the foregoing, and in the alternative, declaration that in that in the event of an eviction and prior to such eviction the Defendants shall ensure and provide that:
 - i. One (1) year notice in writing to the Plaintiffs and all affected persons and the parties herein to hold public hearings on the proposed plans and alternatives and those Plaintiffs may act in person and/or through their Advocates and/or representatives.



- ii. During such hearing, the plaintiffs be given opportunity to challenge the eviction decision and to present alternatives and issue priority rights and interests, which shall be incorporated in the final decision.
 - iii. Prior to such meetings and hearings, the Defendants shall furnish the Plaintiffs in advance with all relevant information in advance including land records and a comprehensive proposal on the resettlement plan specifically addressing the Plaintiff's rights in the Plaintiff herein and all rights of vulnerable persons.
 - iv. The proposal in (b) above shall incorporate reasonable time for public review of, comment on, and/or objection to the proposed plan
 - v. The Plaintiffs be accorded reasonable opportunity to obtain legal, technical, or other professional advice on the Plaintiffs' rights, interests and other options.
 - f. Any other order that this honorable court may deem fit to grant
 - g. An order that the costs of this plaint be paid by the Defendants.
17. The Plaintiff called their witnesses on 6th October, 2022 who testified as follows:-

A. Examination – In – Chief of PW - 1 by Mr. Muchiri Advocate.

18. PW - 1 testified under oath and in Swahili language. He identified himself as being Alphonse Ademba Ojera, a Citizen of Kenya, bearing all the particulars as founded on his national identity card shown to the Court. He was born in the year 1958 and lived at a place known as Birika. He recorded a witness statement which he signed it on 8th June, 2015 and filed on 9th June, 2016. He wished to rely on it as his evidence in this case. He had a list of documents:-
- a. A set of Photographs (20) – Plaintiff Exhibits No. 20(a) to (u)
 - b. A copy of a letter dated 8th February, 2013 – Plaintiff Exhibit 2
19. PW - 1 told the court that he was born on the suit land and he lived there. However, his parents died and were buried up – Country. They had never seen anyone claiming the suit land including the Kenya Railways Corporation. They filed the suit to prevent any eviction from taking place.

B. Cross examination of PW - 1 by Mr. Ndegwa Advocate.

20. PW - 1 confirmed that he had an identity card. It showed that he was born at Goru Ndere Village. He was 63 years old. He had never served the Kenya Railways with a demand Letter/Notice. From the photographs, there was nothing to show that he had a house. He had no documents issued by the elders, chief or any letter to indicate he had a house there. He had not received any evictions notice from Kenya Railways. He had nothing to show that there were complaints lodged by children, disabled or women.
21. PW - 1 stated that he was born there on the land. He had not had a title to the land. He had not been given any rights or documents to occupy the land. He confirmed that they were occupying the suit land as squatters.

C. Cross - examination of PW - 1 by M/s. Kiti Advocate.

22. PW - 1 confirmed that there were 32 people who had authorized him to file the case. Those were names of households. He did not know the size of the land they had occupied there. They had never engaged



a Land Surveyor. From the time they instituted the case, they would be awaiting its verdict. Upon the old parents had gone home at GEM, in Siaya. While still occupying the land both his mother and father died and buried Up – Country.

D. Re – examination of PW - 1 by Mr. Muchiri Advocate.

23. PW - 1 stated that he had a list of authority to plead. There were old people and women in the land. Since they occupied the land they had never seen any title deed to the land. That was all.
24. The Plaintiff also called PW 2 who testified as follows:-

E. Examination - in - Chief of PW - 2 by Muchiri Advocate.

25. PW - 2 was sworn and testified in Swahili language. He identified himself as being MUTANGALI MWANTHI. He was a Citizen of Kenya and a holder of the national identity card bearing all the relevant information shown to Court. He told the court that he was born on 23rd March, 1971 in Kitui. He lived in Birikani and was a businessman. He signed a witness statement on 9th June, 2015. He would like to be assisted by Court. He was born there and he sold water. He had worked very hard. He had build a house. He had 7 children. They were over 100 people occupying the suit land. There were churches – made of Iron Sheet – Ebenezer Church. There were 3 schools and there were children who attended school there. His 1st born was 20 years.

F. Cross - examination of PW - 2 by Mr. Ndegwa Advocate.

26. PW - 2 told the court that from his national identity card, it indicated that he was born in the year 1971. However, from his witness statement, it showed that he had been born in the year 1963. He was misled and he misinterpreted the facts. He was born in Kitui District. From the statement he indicated he was born in Birikani. He also misrepresented facts since they filed the case. It was now 7 years. He had requested to be given 1 year but now it was 7 years. He did not have any documents from the Elder, Chief, Mzee wa Mtaa (Village Elder) to show that he lived there. He did not have any document from the school where his children attended. He was not prepared. He did not have any documents that he had been served by the Kenya Railways.

G. Re – examination of PW - 2 by Mr. Muchiri Advocate.

27. PW - 2 confirmed that they had a chief at Birikani Location.
28. On 6th October, 2022, the Plaintiff through their counsel Mr. Muchiri closed their case.

The 1st Defendant's case

29. The 1st Defendant filed their Statement of Defence on 27th July, 2018. The 1st Defendant denied the contents of Paragraph 1 of the Plaint. The 1st Defendant admitted the contents of Paragraph 2 of the Plaint insofar as the same were merely descriptive of the 1st Defendant save that its address of service for purposes of this suit is care of Messrs. Ndegwa & Sitonik Advocates, Zulfat Hatimy Complex, 2nd Floor, Dedan Kimathi Avenue, P.O. Box 87171 - 80100 Mombasa. The 1st Defendant denied the contents of Paragraphs 3, 4 and 5.
30. In further response to the contents of Paragraphs 3, 4 and 5, the 1st Defendant averred that:-
 - a. The Plaintiffs were not just squatters but impostors in the suit property.
 - b. The Plaintiffs had never been tenants of the 1st Defendant.



- c. The Plaintiffs were attempting to enter upon the property and wrestle possession of the suit property from the Defendant.
 - d. The 1st Defendant issued the notice of eviction only to their tenants whom tenancy was terminated on 1st October, 2012 and illegally continued to occupy the suit property.
31. The contents of Paragraphs 7 and 8 were denied by the 1st Defendant. In further response to Paragraphs 7 and 8 the 1st Defendant averred that the leasing of the go - downs was in accordance with its functions under the provision of Section 13 (2) (h) of the *Kenya Railways Corporation Act*. In further response to Paragraphs 7 and 8 the 1st Defendant averred that the Plaintiffs were interfering with the way - leaves and the construction works of the railway which possess a great risk to the Plaintiffs and the integrity of the railway.
32. In response to Paragraphs 9, 10 and 11 the 1st Defendant averred that there was no Landlord - Tenant relationship between the Plaintiffs and the 1st Defendant and that the Plaintiffs had no legal/equitable rights over the suit property. The contents of Paragraphs 12 to 36 were denied by the Defendant. In general response to the contents of Paragraphs 12 to 36 the 1st Defendant averred as follows;
- a. The obligations, duties and responsibilities of the 1st Defendant as a statutory body are limited to the provisions of the Kenya Railways Act.
 - b. The 1st Defendant was a public body and the owner suit property and the Plaintiffs' claim was barred by the provision of Section 4 (1) (a) of the Limitation Act, Cap. 22.
33. According to the 1st Defendant, this Court lacked jurisdiction to determine the suit because:-
- a. Section 83 (1) expressly prohibited actions or suits against the Kenya Railways Corporation done for any act pursuant to the Corporations powers under the Act.
 - b. The suit therefore arose from the Defendant's exercise of its statutory right under Section 13 (2)(a) and (h) of Kenya Railways Act to let immovable property.
 - c. The said provision of Section 83 (1) mandatorily enjoins the Plaintiff to attempt direct negotiations with the corporation and to refer the matter to a single arbitrator appointed by the Chief Justice.
 - d. That on the premise, the Honorable court has no jurisdiction to entertain a suit that is expressly barred by express statutory provisions and or to grant any injunction on such a suit.
 - e. That the suit was premature and expressly barred by Section 87 (a) of the Kenya Railways Acts which provided that legal action shall not be commenced against the Corporation for any act done in pursuance or execution, or intended execution of the Act until one month after written notice containing the particulars of the claim and of intention to commence the action of legal proceedings had been served upon the managing director.
34. The 1st Defendant put the Plaintiff on notice that it would raise a preliminary Point of law on jurisdiction at the earliest opportunity. The 1st Defendant prayed that the Plaintiff's suit be dismissed with costs.
35. On 6th October, 2022 the 1st Defendant through its advocate Mr. Ndegwa sought not to call any witness and closed their case. However, on 12th June, 2024 through their Legal Counsel Mr. Karina re - opened their case, He decided to summon one witness - DW - 1 who stated the following:-



A. Opening statement by Mr. Karina Advocate.

36. In his opening remarks, the Learned Counsel stated that the case was simple. He averred that the Plaintiff had no right to occupy the land. The land was alienated for the Kenya Railways. They were the legal owners of the suit land. There was no provisions for the reversal of this position. On the contrary, the Plaintiffs were all trespassers and they needed to give the way.

B. Examination - in - Chief of DW - 1 by Mr. Karina Advocate.

37. DW - 1 gave a sworn testimony in English language. He identified himself as JUSTINE OYAGI OMOTHE. He was a citizen of Kenya bearing all the particulars as shown in his national identity card. He told the court that he was an employee of Kenya Railways Corporation as an Assistant Manager Estate Valuation and Agency. He was transferred to Nairobi in year 2019. His last station to work was Mombasa. It was a case of 2015. On 13th June, 2023, he signed a witness statement and also filed list of three (3) documents dated 13th June, 2023. The suit land was at Changamwe. He referred Court to the Sketch Map – on page 12. He described the location. They had not leased it. The land was not available for leasing. If the court was to visit the site, it would see some semi/temporary permanent Structures erected on the railway line – see Pages 7, 8 and 9 of mud houses and sewages.
38. There were no permanent buildings on the land because the area was for railway line and hence it's not allowed. They had not been served with any injunction orders. However, they had not evicted the occupants as they had not evicted the occupants as they had given them time to vacate. They had given them notices to move out but they had declined. If they were to move out Kenya Railways would not compensate them as there was no relationship with Kenya Railways. But if there existed a relationship in form of leases, the leases would have clauses for exit and hence compensation.
39. DW - 1 told the court that he would not live there as it was dangerous. There were chances of accidents. His take was that the Plaintiffs should not be allowed to live there.

C. Cross - examination of DW - 1 by Mr. Muchiri Advocate.

40. DW - 1 told the court that he had worked for Kenya Railways for 17 years at various positions. In his current position had been 3 years. He was a holder of B.A. Land Economics from University of Nairobi and Diploma of Institution of Surveyor of Kenya. He was registered as a Land Valuer and Estate Agent. From the statement he had described the land as being unsurveyed. He did not know the exact acreage/ measurement as the land was yet to be surveyed. (Refer to paragraph 1).
41. Further, DW - 1 told the court that the boundaries were known though the land was not surveyed. If the court was to visit the land, it may not be able to identify the beacons as they may even have been removed/uprooted. As per the year 2019 there were no permanent structures. He was not aware that there were permanent structures on the land including a big warehouse.
42. Referred to Paragraph 4(a) of the Statement the witness said that he had said Plaintiffs were not squatters but imposters on the suit land meaning they had occupied the land and filed the case claiming ownership on the land. The Plaintiffs were served with notice to vacate from it. With reference to Clause 6 of the witness statements, DW - 1 confirmed that the Notices were served that they normally had legal tenants whom they issued with notices, but for the illegal occupants they normally give them notices but in this case they decided to issue them notices on humanitarian grounds.
43. According to the witness the Plaintiffs started occupying the land from year 2014 when they started erecting structures. He was not aware of any accidents having occurred there but they did occur. With



reference to the Vesting Order being “Defendant Exhibit 1 (page 6)”. He agreed it did not give the specific dimension, its large land. The Plaintiffs were in occupation on the area shown from the sketch map on Page 12. The ground report may be missing from the record.

44. With reference to the notice dated 8th February, 2023 - “Plaintiff Exhibit 2” DW - 1 told the court that it was authored by Kenya Railways by Mr. Ali – He was the Regional Security Assistant. It was addressed to the people there and not the Plaintiffs. With reference to the matter on eviction of illegal tenants in Birikani (Gang (2A) and Changamwe East, Mombasa. It related to Kenya Railways Land. The letter presupposed the land belonged to Kenya Railways. The letter never referred to the Plaintiffs.
45. Further, DW - 1 stated that to confirm that Kenya Railways owned the land was through a Vesting Order and the sketch map as proof of ownership of the land. He was not aware that the court had requested for a survey and ground report. He was not aware how much land the Kenya Railway was occupying. The land had not been surveyed. They knew all the land granted to Kenya Railways, they knew their land.

D. Re - examination of DW - 1 by Mr. Karina Advocate.

46. DW - 1 confirmed that the dispute in this case was not about ownership of the land. On being referred to the vesting order, the witness said that it was not the Kenya Railways who came to court. It’s the Plaintiffs who did. It was the Plaintiffs who had the duty to show why they were being evicted.
47. According to the witness they served been served with any court order to produce a survey report. He referred to a Letter dated 8th February, 2023 Plaintiff Exhibit – 2. They never received any reply. It was not addressed the Plaintiff. He urged the Court to dismiss the suit. If he had been the one on the land, he would not wait to be evicted from the land.
48. On 12th June, 2024 the 1st Defendant through its advocate Mr. Karina marked their case closed.

V. The 2nd Defendant’s case

49. The 2nd Defendant through their Advocate Ms. Kiti Advocate told the court that they had no intention and thus were not calling any witness. The advocate marked the close of the 2nd Defendant’s case on 6th October, 2022.

VI. Submissions

50. On 12th June, 2024 after the Plaintiff and Defendants marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that on 16th September, 2024 the Honourable court reserved a date to deliver its Judgement on 17th October, 2024. However, due to unavoidable circumstances, the Judgement was eventually delivered on 21st March, 2025.

A. The Written Submissions by the Plaintiffs.

51. The Plaintiffs through the Law firm of Messrs. Jackson Muchiri & Company Advocates filed their written submissions dated 6th March, 2025. Mr. Muchiri Advocate commenced his submissions by stating that the Plaintiffs filed this suit vide a Complaint dated 2nd November, 2020. The Plaintiffs were suing on their behalf and on behalf of the Residents of Birikani Estate Changawe. It was against the Defendants herein seeking for the above stated reliefs.
52. The brief facts of the case were that the residents of Birikani (Gang 2A), Changamwe East -Mombasa, the Plaintiffs in this case, held that they had resided on the suit property for a period of more than



40 years on average. Hitherto, they lived there peacefully, without any force or secrecy with their families and the former and current local administration including chief, sub-chief, District officer and Divisional Officer of the Provincial administration, Mombasa were well aware of this fact. It was until February 2013, when the 1st Defendant, issued a written threat/notice of eviction to some of the Plaintiffs of the imminent eviction of what they were calling 'illegal tenants' in this case referring to the Plaintiffs, copied to all the security Agents in Mombasa and the local provincial administration. The Plaintiffs averred that there were no exceptional circumstances and /or full justification for the intended eviction. There were no procedural guarantees for upholding the Plaintiff's fundamental rights.

53. The Learned Counsel submitted that after analyzing the applicable law, he would be relying on the following issue for determination before this Honorable Court. Whether the Plaintiffs were accorded adequate and reasonable time and notice, genuine consultations, or opportunities for hearing or information of the evictions or reasons for their displacement, non-compensation or relocation. The Learned Counsel referred Court to the provision of Article 20 of *the Constitution* of Kenya, 2010. It provides for the Bill of Rights that applies all laws and binds all state organs and all persons. The state and every state organ have a fundamental duty to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms as stipulated under Article 21(1). He asserted that vide the filed Complaint dated the 8th June 2015 under Paragraph 10, the Plaintiffs averred that the Defendants had not carried out any comprehensive eviction-impact assessment prior to the planned displacements. The Plaintiffs further argued that the Defendants never gave the Plaintiffs appropriate notice that eviction was being considered nor had they conducted any public hearings on the proposed plans and alternatives. It was apparent that the Defendants in this case instigated the forced eviction process without the adherence of the international covenant of economic social and cultural rights as read together with Article 2(5 &6) of *the Constitution* of Kenya, 2010.
54. To support its argument, the Learned Counsel cited the case of:- "Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security Embu Petition No. 2 of 2011 [2011] eKLR, Muchelule, J referred to the provisions of the United Nations Office of the High Commissioner for Human Rights in "The Right to Adequate Housing" Article 11.1: Forced Evictions, where it is stated:
- “Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected;(b)adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;(c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.
16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement, or access to productive land, as the case may be, is available”.



55. Similarly, the Learned Counsel relied on another case of forced eviction being “Republic v Cabinet Secretary Ministry of Transport and Infrastructure & 3 others Ex - Parte Francis N. Kiboro & 198 Others [2015] eKLR” where the Court shared the sentiments by Lenaola, J holdings in “Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others Petition 65 of 2010” where he lamented as follows:-

“Individuals should not be evicted from their homes nor have their homes demolished by public or private parties without judicial oversight. Such protection should include providing for adequate procedural safeguards as well as a proper consideration by the Courts of whether the eviction or demolition is just and equitable in the light of all relevant circumstances. Among the factors a Court should consider before authorizing forced evictions or demolitions is the impact on vulnerable and disadvantaged groups. A Court should be reluctant to grant an eviction or demolition order against relatively settled occupiers without proper consideration or the possibility of alternative accommodation being provided. Forced evictions and demolitions of people's homes should always be measures of last resort with all other reasonable alternatives being explored, including mediation between the affected community, the landowners and the relevant housing authorities.”

56. On the issue of the ownership of the land. The Learned Counsel asserted that the land in issue located at Birikani Area (Gang 2A) Changamwe East within Mombasa County and the Plaintiffs had been dwelling there for the last 40 years at the same place.
57. The Plaintiffs were proceeding on the assumption that the land was owned by Kenya Railways. However, when the Court suo moto inquired for the ownership documents for the land it is when it became apparent that the Defendants actually held no documents of title to the land they purport to own. The Defendants could not purport to exercise any rights on land that they did not own. The Defendants in this case had no better rights than the Plaintiffs and therefore no orders of eviction could issue. In fact, the Defendants never sought any Counter - Claim to evict the Plaintiffs from the land for the very same reason.
58. In conclusion, the Learned Counsel emphasized on the legal ratio from the cases of “Republic v Cabinet Secretary Ministry of Transport and Infrastructure & 3 others (Supra) while determining forced eviction procedures further reiterated the sentiments in “Satrose Ayuma (Supra)” in which the Learned Judge held:-

“It does not matter that the Applicants do not hold title to the suit premises and even if they had been occupying shunties, the 1st Respondent was duty bound to respect their right to adequate housing as well as their right to dignity. Wherever and whenever evictions occur, they are extremely traumatic. They cause physical, psychological and emotional distress and they entail losses of means of economic sustenance and increase impoverishment. In this case, I must therefore agree with the Petitioners that their eviction from the suit premises without a plan for their resettlement would increase levels of homelessness and this Court must strive to uphold the rights of the Petitioners and especially the right to be treated with dignity. In so holding I find support in the South African Constitutional Court case of Occupiers of 51 Olivia Road, Berea Township, And 197 Main Street. Johannesburg v City of Johannesburg (2008) ZACC.



59. Guided by the above provisions, he humbly requested that this Honourable Court be guided in upholding the Basic Human rights of the Plaintiffs with genuine consultation with the affected persons and Relocation Action Plan by the Defendants.

B. The Written Submissions by the 1st Defendant.

60. The 1st Defendant's final written submissions was filed by the Law firm of Messrs. Ndegwa, Sitonik & Company Advocates. It was dated 15th August, 2024. Mr. Karina Advocate commenced his submissions by providing a brief background to the case. The Learned Counsel stated that the Plaintiff's suit was instituted before this Court vide the Complaint dated 8th June, 2015. It was the 1st Defendant's case that they had proved it on a balance of probability. That the 1st Defendant was the lawful owner of the suit property known as Birikani area in Changamwe.

61. The Plaintiffs on the other hand had failed to prove on a balance of probability that they have any right to the possession and occupation of the suit property. The Plaintiffs had also failed to prove that the 1st Defendant had, unlawfully or otherwise, threatened to evict the Plaintiffs from the suit property. Thus, he urged the Court to dismiss the Plaintiffs' suit with costs.

62. To prove their case, the Learned Counsel stated that the 1st Defendant relied on the following documents.

- a. The Statement of Defence dated 27th June, 2015 and filed on 15th August, 2015.
- b. The Witness Statement by Justine Omoke dated 13th June, 2023 and filed on 7th February, 2024.
- c. The List and Bundle of Documents dated 13th July, 2024 and filed on 7th February, 2024.
- d. The List and Bundle of Authorities for the 1st Defendant.

63. According to the Learned Counsel, the Plaintiffs was as follows. the Plaintiff instituted the present suit vide a Complaint dated 8th June, 2015 and filed on 9th June, 2015. It was the Plaintiffs' case that they were squatters on the suit property and had been on the land for the past 40 years. They alleged that it was until in the year 2013, they received a notice of eviction from the 1st Defendant, threatening to evict them from the suit property. It was the Plaintiffs case that the said intended eviction was unprocedural and thus was null and void. Thus, the Plaintiffs prayed for the prayers (a) to (g) listed of the Complaint.

64. On the other hand, the 1st Defendant opposed the Plaintiff's suit vide a Statement of Defence dated 27th July, 2018 and filed on 15th August, 2015. To begin with, the Learned Counsel averred that it was the 1st Defendant's case that this Honourable Court never had jurisdiction to hear and determine this matter by dint of provision of Section 83 (1) as read together with Section 87 (a) of the Kenya Railways Act. Without prejudice to the issue of the jurisdiction of the Court, it was also the 1st Defendant's case that the Plaintiffs were neither tenants nor squatters on the suit property. On the contrary, they were imposters on the suit property. In any case, the suit before the Court was premature and ought to be dismissed with costs.

65. To support its case, the Learned Counsel critically assessed the evidence adduced by the both the Plaintiffs and the 1st Defendant herein. He averred that the Plaintiffs called two witnesses. PW – 1, Mr. Alphonse Ojera who adopted his Witness Statement signed and dated on 8th June, 2015. The Plaintiffs never filed any List and Bundle of Documents. PW – 1 only produced a set of photographs as Plaintiffs Exhibit Number 1 and the letter dated 8th February, 2013 as Plaintiff Exhibit Numbers 2. PW - 2 Mutangili MAwanthi adopted his Witness Statement signed on 9th June, 2015 as his evidence in chief.



66. On the other hand, the 1st Defendant called one witness, DW – 1, Mr. Justine Omoke. DW - 1 adopted his Witness Statement dated 13th June, 2023 as his evidence in chief. He produced the documents in the List and Bundle of Documents dated 13th July, 2024 and filed on 7th February, 2024 as Defendant Exhibit Numbers 1, 2 & 3. From the case pleaded by the parties and the evidence produced, the following five (5) issues arise for determination in this matter.
67. Firstly, whether this Honourable Court has jurisdiction to hear and determine this matter. Based on the position taken by this court in other related matters, the Learned Counsel respectfully abandon the defense that the court never had jurisdiction over the matter. Secondly, whether the suit is premature and incompetent. The Learned Counsel submitted that the suit was premature and expressly barred by the provision of Section 87 (a) of the Kenya Railways Act. The section provides that legal action shall not be commence against the corporation for any act done in pursuance or execution, or intended execution of the Act until one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings had been served upon the Managing Director. In this case the 1st Defendant in its defence denied notice of any intention to sue by the Plaintiffs. None of the Plaintiffs’ witness alleged or proved that such notice was issued. No exhibit of such notice was tendered before this court. It follows accordingly that the Plaintiffs’ never issued any notice of intention to sue on the alleged actions committed by the 1st Defendant – the Kenya Railways Corporation. In law, the suit was therefore incompetent for defying the mandatory provisions of the statute.
68. To buttress its point, he relied on the decision of the Court of Appeal in the case of “Joseph Nyamamba & 4 others v Kenya Railways Corporation [2015] eKLR” where the Court, in upholding the decision of the ELC dismissing a suit which had been filed before the issuing of the mandatory notice under the provision of Section 87 of the Kenya Railways Act held as follows:
- “.....the Plaint and application was filed in contravention or violation of an express provision of a statute which is couched in clear and mandatory terms. We see nothing impairing access to justice and it is for the parties and their advocate to know the law and its consequences.”
69. Similarly, the Court of Appeal in the case of “Michael Otieno Nyaguti & 2 others v Kenya National Highway Authority (2021) while upholding the decision of the Environment and Land Court dismissing a suit wherein the Petitioners had not adhered to the provision of Section 67 of the Kenya Roads Act, a provision of the law with identical import to the provision of Section 87 of the Kenya Railways Act, the Court held as follows:-
- “Being a mandatory provision of the law, there is no way the learned Judge can be faulted in the conclusion reached when sustaining this element/ingredient of the P.O. The trial court also rightly held a position we affirm on appeal that the P.O left no room for exercise of discretion by the trial court and now us on appeal. ” (Emphasis ours).
70. In addition, he relied on the decision of the Environment and Land Court in the case of Fredrik Chege Kinuthia v Kenya National Highways Authority (2021) eKLR” where the Court upheld a Preliminary Objection brought pursuant to the provision of Section 67 (a) of the Kenya Roads Act, a provision which was a replica of Section 87 of the Kenya Railways Act. In its decision, the Court held as follows:-
- “The Court acknowledges that there are instances in which the Courts have held that the thirty days’ notice is not mandatory. However, the Court further recognizes that these are instances where the Courts have dealt with Petitions as opposed to an ordinary Suits. The



instant case is an ordinary suit, and therefore the Court finds and holds that the written notice was therefore mandatory before the suit could be filed."

71. In the present matter before this Honourable Court was a normal civil suit and not a Constitutional Petition. The Plaintiffs were thus bound by the mandatory terms of Section 87 of the Kenya Railways Act to serve a notice containing the particulars of the claim and of intention to commence the action or legal proceedings upon the managing Director of the 1st Defendant.
72. Thirdly, on whether the Plaintiffs had established that they have any justifiable reason for entering into and remaining on the suit property. Without prejudice to the submission that suit was premature and incompetent. He submitted that the Plaintiffs had not established that they had any justifiable reason for entering into and remaining on the suit property.
73. To begin on this point, he held that the Plaintiffs never contended the fact that the suit property was owned by the 1st Respondent. The orders sought in the suit were directed to the 1st Defendant as an owner. DW - 1 gave evidence that the suit property was un-surveyed land located at the Railway Reserve. He produced as Defendant Exhibit - 3 was a copy of the sketch of the suit property. The sketch was at page 12 of the List and bundle of documents for the 1st Defendant dated 13th July, 2023 and filed on 7th February, 2024. DW-1 also testified that that the 1st Defendant was vested with the property vide the Vesting Land Order 1986. The said Order was a part of the public record. However, for ease of reference DW-1 produced the said Vesting Order as Defendant Exhibit - 1. The Vesting Order was at page 6 of the List and bundle of documents for the 1st Defendant dated 13rd July, 2023 and filed on 7th February, 2024.
74. The 1st Defendant also produced a ground report dated 18th July, 2024. The Court ordered that parties produce the said report vide the order dated 12th June, 2024. The report was already uploaded to the court portal. At page 6 of the Report, it states that:-

“ the suit property lies within Changamwe station reserve, its railway reserve and Mombasa-Nairobi main reserve....KR Changamwe station reserve, railway reserve and Mombasa-Nairobi main line reserve are railway operational areas. Part of the land was compulsorily acquired for construction of the railway line.”
75. Therefore, there was no question before this Court as to whether the 1st Defendant was the lawful proprietor of the suit property. However, should the question arise, it must be answered in the positive. Having established that the 1st Defendant was the lawful proprietor of the suit property, the question then turns to whether the Plaintiffs had established before this Court that they had any justifiable reason for entering into and remaining on the suit property. The Learned Counsel submitted that the Plaintiffs had not established before this Court that they had any justifiable reason for entering and remaining on the suit property. PW - 1 gave evidence that the Plaintiffs did not have title to the suit property or any other document giving them rights to be on the suit property. They did not have a lease or a licence or other permission from the 1st Defendant to remain on the suit property. PW - 1 also confirmed that the Plaintiffs never had authority from the 1st Defendant to enter into or remain on the suit property and that the Plaintiffs were not tenants on the suit property. The Plaintiffs claimed to be squatters on the suit property and being there for over 40 years. At paragraph 1 of the Witness Statement by Alphonse Ojera, the PW – 1 who testified on behalf of the Plaintiffs claimed that he was born in Birikani. However, during cross-examination, PW - 1 admitted that he was not born in Birikani but was in fact born in Gem, Ndere Village as shown in his Identity Card.



76. Similarly, PW - 2 in his Witness Statement claimed to have been born in Birikani in 1963. However, he admitted during the hearing of the suit that his Identity Card showed that he was born in year 1971 not year 1963. Further, he admitted that he was born in Kitui, not Birikani as alleged in his Witness Statement. The Learned Counsel urged the Court to disregard the evidence of PW - 1 and PW - 2 as they were both incredible and untruthful. It was well within PW - 1 and PW - 2's knowledge that they were not born in Bakarani as claimed in their respective Witness Statement. The only reason they alleged to have been born in Bakarani was to mislead the Court into thinking that the Plaintiffs were squatters on the suit property. To support their case, the Counsel referred Court to the case of:- the Environment and Land Court case of "Nyaga v Baimunya & another (2023) eKLR" where the Court held as follows with regards to the importance of credibility of witnesses:-

"The credibility of a witnesses goes to the root of any issue in dispute. Absent of it the truth cannot be established and injustice triumphs. Without credible evidence justice bleeds and cries from outside of the window to enter. A false witness is a worthless witness. False witnesses and their evidence are not only abhorred in the legal field but even in the spiritual arena. For the legal arena, that is why Sections 154, 155, 157 and 163 of the Evidence Act were enacted...."

77. At paragraph 3 of the Plaint, the Plaintiffs alleged that the local administration including the Chief, Sub chief, District officer and Divisional Officer of the Provincial administration, Mombasa were well aware of the fact that they had been squatters on the suit property and had been so for the past 40 years. However, the Plaintiffs never filed any statements from any of the local administrators. The Plaintiffs also never called any local administrator as witnesses to give evidence of the allegation that they were squatters on the suit property. PW - 2 admitted during the hearing of the suit that the Plaintiffs never had any documents from the local administration showing that they lived on the land. They never filed any ground report despite the orders of the court to do so. A side visit was abandoned since they did not make arrangements for security to asset the court conduct a site visit.

The Learned Counsel cited the provision of Section 109 of the Evidence Act, the law provides 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."

The Plaintiffs herein desire for the Court to believe that they had been squatters on the suit property for the past 40 years. That their occupation of the suit property had been open and known to local administration. Thus, the burden of proving the same lied with the Plaintiffs. The Learned Counsel submitted that the Plaintiffs had failed to discharge this burden. They never produced the ordinary evidence of occupation e.g. water bills, electricity bill, school reports, nearby hospitals visited, voter's registration cards or any admissible evidence of occupation. Based on the foregoing, we submit that the Plaintiffs had no justifiable reason to occupy the suit property. The Plaintiffs had admitted that they were not tenants of the 1st Defendant who was the lawful proprietor of the suit property. The Plaintiffs had also admitted that that they never had the authority of the 1st Defendant to occupy the suit property. Further, the Plaintiffs had failed to support the allegation by way of evidence. The evidence produced by PW-1 and PW-2 alleging that they were born and have lived on the suit property was incredible and untruthful. The case could not be thrown to the court to establish a right and enforce the same simultaneously.

80. Fourthly, on whether the Plaintiffs had proved on a balance of probability that the 1st Defendant threatened to evict the Plaintiffs from the suit property. The Plaintiffs had not proved that they had



any justifiable right to occupy the suit property. Accordingly, the Counsel submitted that without establishing a legal right, the Plaintiffs could not purport to enforce or at least demonstrated any threat to violation of non-existent rights.

The Plaintiffs case was hinged on the allegation that they were squatters on the suit property and that the 1st Defendant herein had threatened to evict them from the suit property. However, no admissible evidence was adduced to demonstrate this fact. None of the Plaintiffs what part or size of the suit property they occupy. The Plaintiffs had produced as Plaintiff Exhibit - 2 a copy of the Notice dated 8th February, 2013 sent by the 1st Defendant to various authorities. The notice invited the authorities to assist Kenya Railways in planning and executing the demolition of illegal temporary structures on the suit property. This notice was never issued to the Plaintiffs. PW - 1 admitted as much. PW - 1 and PW - 2 both also gave evidence that the 1st Defendant had never issued any of the Plaintiffs with an eviction notice. There was also no evidence from the Plaintiffs that the 1st Defendant orally threatened to evict the Plaintiffs from the suit property. The 1st Defendant had the legal right to evict illegal occupiers of land from its property.

81. Further, it was not unlawful for the 1st Defendant to seek assistance from other authorities on how to carry out the said evictions and the 1st Defendant could not be faulted for doing so. As it stood, the 1st Defendant had not violated any of the Plaintiffs' rights, if any, as guaranteed under *the Constitution* or any other statute. Without a notice of eviction whether written or verbal issued to the Plaintiffs by the 1st Defendant or any other person acting on behalf of the 1st Defendant, he submitted that the Plaintiffs' suit was without merit and the prayers sought ought not to be granted. Jurisprudence on this issue had already been settled both the Court of Appeal in the case of "Kimani & 20 others (On behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others [2015] eKLR which decision was affirmed by the Supreme Court in the case "Kimani & 20 others (On behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney - General & 2 others [2020] eKLR".

In the case of:- "Kimani & 20 others v Attorney - General & 2 others (Supra)". The Court of Appeal was tasked with determining whether the Appellants were entitled to declaration of rights to housing, an injunction and orders of structural interdicts based on pleadings that they were squatters and the Respondent had threatened to evict them. The High Court had already refused to grant the orders sought on the ground that the Appellants had failed to produce any evidence that the Respondent had issued them with a notice threatening to evict them or demolish their property. In agreeing with the decision of the High Court, the Court of Appeal held as such:-

"What compounds the instant matter even further is the fact that there is no evidence of any threat to evict the appellants, or to demolish their houses that accompanied this suit apart from a letter dated 6th June, 2006, addressed to Miss KOCH, ABC CHURCH and Tenants. The said letter requested the aforementioned parties to remove structures in the Chief's compound to give room for construction of the Aps houses....."

Similarly, the Supreme Court in while "Kimani & 20 others v Attorney - General & 2 others (Supra) upholding the decision of the Court of Appeal held as follows:-

"Evaluating the record, it is worth noting that at the time of filing this matter before the High Court, the Petitioners were not facing any eviction threat or order: a fact acknowledged by the two superior Courts.....As the two superior Courts found, no evidence was tendered hence the case was not proved. Consequently, this Court finds no basis upon which to



delve into the interrogation of the matter whether reliefs such as structural interdict were available”.

82. The Plaintiffs had claimed that they were entitled to the prayers sought in the claim because the 1st Defendant had threatened to evict them from the suit property but had not provided any notice of eviction issued to them by the 1st Defendant. They had also not pleaded or proved by way of evidence that the 1st Defendant had verbally threatened to evict them from the suit property. This Court was bound by the doctrine of stare decisis to follow the jurisprudence set by both the Court of Appeal and the Supreme Court in the Kimani case and dismiss the Plaintiffs’ suit.
83. Finally, on whether the Plaintiffs were entitled to prayers (b), (c), (d) and (e) in the Plaint dated 8th June, 2015. He submitted that the Plaintiffs were not entitled to the prayers prayed for in the Plaint and more particularly the prayers (b), (c), (d) and (e) for the following reasons.

Prayer (b) sought that the Defendants’ notice of eviction to the Plaintiffs be declared null and void to the extent that it was not in compliance with *the constitution* and international law. The Plaintiffs were not entitled to this prayer for the simple fact that there was no notice of eviction issued to them by the Defendants. The Plaintiffs had not produced any such notice before this Court. Indeed, PW - 1 and PW - 2 admitted that no such notice had ever been issued to the Plaintiffs by the 1st Defendant.

Prayer (c) sought for an injunction restraining the 1st Defendant from evicting the Plaintiffs from the suit property and/or interfering with the Plaintiffs’ right to peaceful and quiet enjoyment of the suit property. The 1st Defendant is the lawful proprietor of the suit property. The Plaintiffs on the other hand were neither the registered owners of the suit property nor were they tenants of the 1st Defendant. Therefore, the Plaintiffs never had any rights or interests in the suit property which this Court could protect through an injunction.

Prayer (d) sought an order compelling the Defendants to avail information relating to the suit premises to the Plaintiffs. Under the provision of Article 35 (1)(b) of *the Constitution* of Kenya, 2010, every person was entitled to:-

“information held by another person and required for the exercise or protection of any right or fundamental freedom.”

The Plaintiffs had not proved that they had any right to the suit property which required protection in order to entitle them to information from the 1st Defendant. They had no tendered evidence that they sought the alleged information and that the information was denied.

Prayer (e) prayed for a (1) year notice in writing before the Plaintiffs could be evicted from the suit property. The said period never had any basis in law. The suit property is private land, owned by the 1st Defendant and used for public purposes. In accordance with the provision of Section 152E of the *Land Act*, the 1st Defendant was thus required to serve an eviction notice of 3 months, not 1 year as pleaded by the Plaintiffs.

The Plaintiffs also sought for hearings, information, the opportunity to challenge the eviction and to obtain legal, technical and other professional advice on the Plaintiffs’ rights and interest. These prayers had no basis in law. The procedure for evicting any persons, from any land whether private or public was governed by the provision of Section 152G of the *Land Act*. The 1st Defendant through its witness DW-1 had stated before this Court that it was ready and willing to abide to these procedures. (See paragraph 12 of the Witness Statement by Justine Omoke on behalf of the 1st Defendant filed on 7th February, 2024).



86. In conclusion, the Learned Counsel urged the Court to dismiss the Plaintiffs' suit as against the 1st Defendant with costs.

VII. Analysis and Determination

87. I have keenly assessed the filed pleadings by all the Plaintiffs, the 1st and 2nd Defendants herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

88. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -

- a. Whether this Court has the jurisdiction to determine the matter?
- b. Whether the Plaintiff has any legitimate claim to the suit property?
- c. Whether the Plaintiff is entitled to the orders sought in the Plaint?
- d. Who bears the costs of the suit?

IssueNo. a). Whether this Court has the jurisdiction to determine the matter.

89. Under this sub title the Court shall discuss the jurisdiction of the Court. Although the Honourable Court has taken judicial notice that the 1st Defendant herein having raised the issue in their pleadings but later on from the submissions opted to abandon it, for good order and taking that the issue keeps on cropping up from the proceedings the Honourable Court will still deliberate on it. The 1st Defendant in its filed Statement of Defence raised the issue to the effect that Court lacked jurisdiction because:-

- a. Section 83 (1) expressly prohibited actions or suits against the Kenya Railways Corporation done for any act pursuant to the Corporations powers under the Act.
- b. The suit therefore arose from the Defendant's exercise of its statutory right under Section 13 (2) (a) and (h) of Kenya Railways Act to let immovable property.
- c. The said Section 83 (1) mandatorily enjoins the plaintiff to attempt direct negotiations with the corporation and to refer the matter to a single arbitrator appointed by the Chief Justice.
- d. That on the premise, the Honorable court has no jurisdiction to entertain a suit that is expressly barred by express statutory provisions and or to grant any injunction on such a suit.
- e. That the suit was premature and expressly barred by Section 87 (a) of the Kenya Railways Acts which provided that legal action shall not be commenced against the Corporation for any act done in pursuance or execution, or intended execution of the Act until one month after written notice containing the particulars of the claim and of intention to commence the action of legal proceedings had been served upon the Managing Director.

90. The gist of the 1st Defendant's objection is that this suit as instituted is fatal as it offends the mandatory provisions of Section 87 (a) as read together with Sections 83(1) of the *Kenya Railways Corporation Act*. Section 87 (a) of the Act provides as follows:-

“Where any action or other legal proceedings is commenced against the corporation for any act done in pursuant or execution, or intended execution, of this Act or any public duty or authority or in respect of any alleged neglect or default in execution of this Act or of any such duty or authority, the following provisions shall have effect-



- (a) the action or legal proceeding shall not be commenced against the corporation until at least one month after notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the plaintiff or his agent; and
- (b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case a continuing injury or damage, within six months next after the cessation thereof.”

91. The above section prohibits the commencement of any proceedings against the 1st Defendant unless a thirty days’ notice is issued where the cause of action leading to the filing of the suit against the 1st Defendant was an act done by the Respondent pursuant to its mandate under the Act. The 1st Defendant herein is a statutory body established under the [Kenya Railways Corporation Act](#). The dispute is with regard to the alleged eviction of the Petitioner before termination of the Lease Agreement. Under the provision of Section 13 (2) (h) of the Act, the 1st Defendant has the power to sell, let or otherwise dispose of any property, moveable or immovable, which in the opinion of the board is not necessary for the purposes of the corporation.
92. It is not disputed that and from the admission from the testimony of both the PW – 1 & PW – 2 there no notice of intention to sue was served on the 1st Defendant prior to the filing of the suit. The question that arises is whether the Petitioner’s failure to serve the aforesaid notice on the Respondent makes this Petition fatal. The court thinks not. Whereas the court appreciates the reasoning in the cases of “Everose Chemtai Obwaka v Kenya Railways Corporation [2008] eKLR” and “Jisaidie Development Network v Kenya Railways Corporation [2008] eKLR” in striking out the suits for failure to comply with the above provisions, the same would not hold up in light of the constitutionally guaranteed right to access to justice set out in [the Constitution](#) of Kenya, 2010.
93. Indeed, the Court of Appeal while considering this question in the case of “Joseph Nyamamba & 4 others (Supra) cited with approval the reasoning of Majanja J in the case of:- “Kenya Bus Services Limited and Anor v Minister of Transport & 2 Others [2012] eKLR” where he discussed the import of Section 13A of the [Government Proceedings Act](#), Cap. 40 which, much like the impugned Section 87(a), requires notice before filing of a suit against the Government vis a vis the right to access justice. Similarly, in the case of:- “Kenya Bus services case, (supra)” Majanja J posited as follows:

“By incorporating the right of access to justice, [the Constitution](#) requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism Article 48 must be located within the Constitutional imperative that recognizes as the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of [the Constitution](#) which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. Article 48 therefore invites the Court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.

Viewed against the prism of [the Constitution](#), it also becomes evident that section 13A of the GPA provides an impediment to access justice. Where the state is at the front, left and centre of the citizens life, the law should not impose hurdles on accountability of the Government through the Courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirements for notice particularly where it is strictly



enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding that section 13A of the *Government Proceedings Act* as a mandatory requirement violates the provision of the Article 48.”

94. The provision of Section 83 (1) of the Kenya Railways Act provides as follows:

- “(1) In the exercise of the powers conferred by Sections 13, 15, 16 and 17, the Corporation shall do as little damage as possible, and where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Corporation or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.
- (2) Nothing in this section shall be construed as entitling any person to compensation-
- (a) for any damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section; or (b) for any damage suffered as a result of the user of any works authorized under this Act unless such damage results from negligence in such user.”

95. It is clear that the above provision prohibits bringing of a suit or action for recovery of damages arising out of the corporation’s execution of its mandate under the provision of Sections 13, 15, 16 & 17 of the Act. Section 13 sets out the 1st Defendant’s general powers; and the provision of Sections 15, 16 & 17 deals with its powers to enter property for purposes of inter alia surveying, preventing accidents and altering pipes. According to the said section, compensation for such damage is to be agreed between the corporation and the injured and in default an arbitrator be appointed by the Chief Justice.

96. Whereas the court appreciates the doctrine of exhaustion which mandates the use of internally laid down procedures for dispute resolution before having recourse to the courts, the Honourable Court is of the strong opinion that the dispute herein being land occupation is not within the scope of matters envisioned under the impugned sections. From the filed pleadings and the proceedings herein, the main substratum of the case pertains to issues of the use, occupation and title of the suit land which fall with the scope of Article 162 (2) (b) of *the Constitution* of Kenya, 2010 and the *Environment and Land Court Act*, No. 19 of 2011. Consequently, this Honourable Court discerns that it has jurisdiction to hear and determine this matter.

IssueNo. b). Whether the Plaintiff has any legitimate claim to the suit property

97. Under this substratum, the Court shall examine the Plaintiff’s claim if any. According to the Plaintiffs, they had been living in that area subject matter for a period of more than 40 years on average hitherto, peacefully, without any force or Secrecy and the former and current local administration including Chief, Sub chief, District Officer and Divisional Officer of the Provincial administration, Mombasa were well aware of this fact. The Plaintiffs, residents of Birikani area in Changamwe have over the years established Semi-Permanent Settlements, established Social amenities which include Churches, places of worship, cemetery and Schools where their Children go to have education and other essential services.

98. It was in the year 2013, the 1st Defendant started issuing the Plaintiffs with threats of possible forceful eviction. In February 2013, the 1st Defendant, issued a written threat/notice of eviction to some of the



Plaintiffs of imminent eviction of what they were calling ‘illegal tenants’ in this case referring to the Plaintiffs, copied to all the Security Agents in Mombasa and also the local provincial administration. The Plaintiffs were very apprehensive that the 1st Defendant would make good the threat of eviction causing the Plaintiffs tremendous harm, loss and instability to them.

99. According to the Plaintiffs, the alleged reason for the intended evictions from the 1st Defendant was that they would like to lease out to a private firm the go-downs adjacent to the Plaintiffs’ houses in order to boost their income as they do not get enough allocation of finances from the Central government of Kenya to run their activities.
100. By and large, the Plaintiffs’ claim is based on proprietorship of the suit land and entitlement to the rights in respect to ownership of land. Unfortunately, as would have been expected by the provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012, the Plaintiffs failed to produce any documentation to show they have a right to the suit property. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated under the provision of Section 26 of the *Land Registration Act*, 2012.
101. Juxtapose, the 1st Defendant has averred that they are the proprietor of the suit land with all the indefeasible rights, interest and title vested in them by law. This court appreciates that at all material time the land was owned by the 1st Defendant through the Vesting Orders and the other relevant documents produced by them in Court during the hearing of this case. Pursuant to a Court order, the 1st Defendant conducted a land Surveying exercise of the suit land and prepared a ground report by the Senior Land surveyor dated 18th July, 2024. It indicated in its conclusion that there was no record indicating that the public land owned by the 1st Defendant in any way was surrendered to the Commissioner for Lands for allocation to private entities or consent by the Kenya Railways Corporation for any allocation or occupation by the Plaintiff. It is unfortunate that despite all efforts made it was never possible for the Honourable Court to conduct a site visit due to lack of logistical resources. Significantly, the Honourable Court now proceeds to reproduce the ground report herein below.

Ground Survey Report

Reference.

Letter Referenced WN/KRC/MSA/65/15 dated 14/06/2024 and court order requesting land survey report/ground report of the suit property.

Documents obtained.

1. Changamwe proposed industrial development drawing no. 50/R dated 25th April 1956.
2. Survey plan Folio Register Number 17/81 dated 25/11/1918.
3. Survey plan Folio Register Number 8/65 dated 20/07/1919.
4. Survey plan Folio Register Number 14/52 dated 5/11/1920.
5. Survey plan Folio Register Number 14/64 dated 8/2/1922.
6. Survey plan Folio Register Number 35/4 dated 13/01/1930.
7. Survey plan Folio Register Number 44/92 dated 21/04/1938.
8. Survey plan Folio Register Number 73/120 dated 10/5/1956.



9. Survey plan Folio Register Number 80/88 dated 2/03/1958.
10. Survey plan Folio Register Number 91/89 dated 1/10/1960.
11. Survey plan Folio Register Number 91/90 dated 28/12/1960.
12. Survey plan Folio Register Number 540/12 11/02/2013.
13. Survey plan Folio Register Number 202/116 dated 21/09/1990.
14. Survey of Kenya Cadastral sheet 201/1/3.
15. Changamwe part plan-realignment of main line drawing number 7226 dated 23/11/1954
16. East African Railways and Harbours main line sheet Mombasa-Voi section sheet number 2 dated 25th March 1966.
17. East African Railways Corporation railway line-sheet sheet number 4 dated December 1970
18. Changamwe proposed industrial development drawing no. 50/R dated 25th April 1956

Background

In the absence of a clear definition of the suit property by the Plaintiffs, its location is inferred from their general description, "Birikani area in Changamwe" and Corporation property in the area. This is Changamwe railway station and railway reserves in the area.

KR Changamwe Railway Station and railway reserve is defined by Changamwe part plan-realignment of main line drawing number 7226, East African Railways and Harbours main line linesheet Mombasa-Voi section sheet number 2, East African Railways Corporation railway line-sheet sheet number 4, Changamwe proposed industrial development drawing no. 50/R and survey plans folio registry numbers 17/81, 8/65, 14/52, 14/64, 44/92, 73/120, 80/88, 91/89, 91/90, 202/116 and 540/12.

Changamwe station reserve is described in survey plans 17/81, 8/65, 14/52, 14/64, 14/65, 44/92, 73/120 and 80/88. The railway line through it was realigned to the current location and the land remains railway operational land in use by the Corporation as a railway corridor and railway industrial area.

Mombasa-Nairobi highway, A109, was realigned and constructed through part of the station reserve. The station land to the East highway was later resurveyed and is referenced as Land Reference Number MN/VI/5023 measuring 0.678 Ha Approx. The parcel is described by survey plan Folio Register Number 540/12 as the area bound by beacons 2/9a, 2/9, 6/12, 5/11, 5/10, 5/910, A42, A3, C, B, A, CRE1 and the owner clearly indicated on the plan as Kenya Railway Corporation.

Railway reserves in the area are defined by East African Railways and Harbours main line linesheet Mombasa-Voi section sheet number 2, East African Railways Corporation railway line-sheet sheet number 4, East Changamwe proposed industrial development drawing no. 50/R, survey plans folio registry numbers 17/81, 8/65, 14/52, 14/64, 14/65, 35/4, 44/92, 73/120, 80/88, 91/89, 91/90, 202/116, 540/12 and cadastral sheet 201/1/3. The land is referenced as Land Reference Number MN/VI/5023, MN/V/2/1, MN/V/5/1, MN/V/15/1 and railway reserve between land parcels MN/VI/84, MN/VI/1015, MN/VI/13, MN/VI/934, MN/VI/935, MN/VI/987 and MN/V/15, MN/V/25/8, MN/V/25/5, MN/V/291/3, MN/V/292/3, MN/V/6/1, MN/V/6/2.



A section of the reserve was compulsorily acquired under Government notices no. 291 of 31/01/1956 and 743 of 18/05/1954 (copies attached) for realignment of the railway line from the old alignment, which passed through the current railway industrial area. The acquired land was surveyed as per survey plan F.R. No. 80/88 and the land is referenced as L.R. No. MN/V/2/1, MN/V/5/1 and MN/V/15/1.

Changamwe proposed industrial development drawing no. 50/R illustrates Changamwe railway station, railway line reserves, and land to be compulsorily acquired for realignment of a section of the railway line and road. It also illustrates land to be compulsorily acquired for railway industrial area and its planned development.

Changamwe part plan -realignment of main line drawing number 7226 illustrates Changamwe station, railway reserve and realignment of Mombasa-Nairobi railway line.

East African Railways and Harbours main line line-sheet Mombasa-Voi section sheet number 2 illustrates Changamwe station, railway corridor, and Mombasa-Nairobi railway reserve.

East African Railways Corporation railway line-sheet number 4 illustrates railway line reserves in the area; railway line reserve in Changamwe station and Mombasa-Nairobi railway reserve.

Survey plan Folio Register Number 8/65, 14/52, 14/64, 17/81, 73/120 illustrates Changamwe station and railway reserves.

Survey plan Folio Register Number 35/4 illustrates the railway reserve abutting L.R. Nos. MN/V/25/8, MN/V/25/5, MN/V/291/3, MN/V/292/3, MN/V/6/1, MN/V/6/2.

Survey plan Folio Register Number 44/92 illustrates Changamwe station, railway reserve and additional land acquired for the station.

Survey plan Folio Register Number 80/88 illustrates Changamwe station, railway reserves and land compulsorily acquired for road and railway realignment. The acquired land within the area is parcel L.R. No. MN/V/2/1, MN/V/5/1 and MN/V/15/1.

Survey plan Folio Register Number 91/89 & 91/90 illustrates Changamwe station, railway reserves, part realigned Mombasa-Nairobi road and railway reserve.

Survey plan Folio Register Number 540/12 illustrates parcel L.R. No. MN/VI/5023, (Changamwe station and railway corridor) on the East side the constructed existing Mombasa-Nairobi highway.

Changamwe railway station, old and current railway reserve in Birikani area is vested under Kenya Railways Corporation vide Kenya Railways Corporation (Vesting of Land) order 1986 (L/N24/1986) read together with Kenya (Vesting of Land) Regulations, 1963. The regulations prescribes all land of the East African Railways Corporation vested in that Corporation by any written law as well as any land conveyed to that Corporation or otherwise placed at that Corporation's disposal whether that land is in use or reserved for use by the Corporation and includes:

- a) Premises used for the administration and control of the services provided by the Administration
- b) Railway lines (including marshalling yards and sidings)
- c) Workshops and training schools.

Together in each case with the curtilage thereof or other land enjoyed therewith.



At the date of publication of the legal notices the land was surveyed as per Survey plans F.R. Nos. 17/81, 8/65, 14/52, 14/64, 14/65, 35/4, 44/92,73/120, 80/88, 91/89,91/90 and cadastral sheet 201/1/3 and reserved for use by Kenya Railways Corporation as portrayed by Changamwe part plan drawing no. 7226 of 23rd November 1954 and Mombasa-Voi section line sheet No. 2 of 5th March 1966.

Ground Inspection

A site inspection was carried out of the area described by the plaintiff as Birikani area and the following observations made;

- (i). Railway Gang 2A on the land is a landie within Changamwe station. There are remains of the landie and other structures in the station; a concrete short pillar, slabs and foundation.
- (ii). The suit property is partly within Changamwe station and railway line reserves.
- (iii). The station, old and current reserves have several encroaching structures on them.
- (iv). There are encroaching structures within the railway operational area, posing a safety hazard on railway operations in the main line.

Analysis

The area described by the plaintiff as the suit property was analysed against survey plans 17/81, 8/65, 14/52, 14/64, 44/92, 73/120, 80/88,

91/89,91/90,202/116, 540/12, cadastral sheet 201/1/3, layouts and line-sheets of the railway reserves.

From the analysis, the suit property lies within Changamwe station reserve, its railway reserve and Mombasa- Nairobi main line reserve. The land is defined by survey plans F/R No. 17/81, 8/65, 14/52, 14/64, 44/92, 73/120,80/88,91/89, 91/90, 202/116, 540/12 and cadastral sheet 201/1/3.

Conclusion

KR Changamwe station reserve, railway reserve and Mombasa- Nairobi main line reserve are railway operational areas. Part of the land was compulsorily acquired for construction of the railway line. The land is defined as per the plans and drawings annexed to this report.

The suit property is partly within Changamwe station reserve, old railway reserve and Mombasa-Nairobi main line reserve.

Changamwe station reserve, old railway reserve and Mombasa-Nairobi main line reserve fall within the prescription of schedule I of Kenya Railways Corporation (Vesting of Land) order 1986 (L/N24/1986) vesting all land placed at the Corporations disposal whether that land is in use or reserved for use by the Corporation.

There is no record indicating a surrender of the land to the Commissioner of lands for allocation to private entities or a consent by Kenya Railways Corporation for any allocation or occupation by the Plaintiff.

Salome Kamau

Senior Land Surveyor

Kenya Railways Corporation



102. Further, I seek refuge from the provision of Section 3 of the Government *Land Act*, Cap. 280 (Now repealed) which provides as follows:-

3. The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may— (a)* subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land; (b)* with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby; (c)† extend, except as otherwise provided, the time to the purchaser, lessee or licensee for performing the conditions contained in any agreement, lease or licence liable to revocation for such period, and upon such terms and conditions, as he may think fit, and the period so extended, and the terms and conditions so imposed, shall be deemed to be inserted in the agreement, lease or licence and shall be binding on the purchaser, lessee or licensee, and on all transferees, mortgagees, assignees and other persons claiming through him; (d)* accept the surrender of any lease or licence under this Act; (e)† accept the surrender of any certificate granted under

(e)† accept the surrender of any certificate granted under the East Africa Land Regulations, 1897, or of any lease granted under the Crown Lands Ordinance, 1902, and grant to the lessee a lease under this Act of the area the subject of the surrendered certificate or lease, provided such surrender is made within such period as the President may by notice in the Gazette direct, such period to be not less than twelve months from the commencement of this Act:

Provided that this paragraph shall not apply to land granted under the East Africa Land Regulations, 1897, or leased under the Crown Lands Ordinance, 1902, upon terms which differ from the ordinary terms in force at the time at which such land was granted or leased; and

(f) accept the surrender of any freehold conveyance under the Crown Lands Ordinance, 1902, or freehold grant under this Act.

103. Besides, the Plaintiffs never summoned any of the Provincial Administration officers such the former and current local administration including Chief, Sub chief, District Officer and Divisional Officer of the Provincial administration, Mombasa who were ostensibly well aware of this fact to testify in the matter as a justification of the occupation of the Plaintiffs on the land as alleged. The testimony by PW – 1 and 2 was not able to demonstrate how they were born and lived on the land for the alleged period of 40 years. For instance, exemplary evidence of the structures such as schools, markets, health centres or utility bills for the daily consumptions such as water, electricity and so forth.

104. Going by the above assertion, I find that the Plaintiff has not proved beneficial or legal proprietorship to the suit property. From the evidence on record there is clearly no basis for the Plaintiff's claim to the suit property. They have failed to prove how they came about the possession of the land. According to the ground report and the Vesting Order the land was still public land and had not been converted into private land. The Land was not available for alienation to private use as the Plaintiffs wishes to have the Court belief and/or endorse. Their claim must fail outrightly.

IssueNo. c). Whether the Plaintiff is entitled to the orders sought in the Plaintiff

105. Under this sub – heading, the Honourable Court shall examine the prayers sought by the Plaintiff while discussing the steps already taken by the 1st Defendant. The Plaintiff prayed for a declaration that the Plaintiffs the persons they represent and their families are entitled to the rights set out at paragraph 12 of this plaint. We have already established that the Plaintiff have no claim on a public land which infact is on the railway tracks. Therefore the prayer is unmerited.



106. The Plaintiff also prayed for a declaration that the Defendants' notice of eviction to the Plaintiffs is null and void to the extent that it does not comply with the constitutional and international standards of the right to housing and eviction procedures. The legal provision for an eviction notice from public land is provided for in the provision of Section 152C, E & G of the Land Laws Amendment Act 2016. It states that any evictees from public land should be notified in writing, by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction.
107. Be that as it may, this being a Court of Law and established under the provision of the Article 162 (2) (b) of *the Constitution* of Kenya, 2010, and also governed by several other statutes such as Sections 3 and 13 of the Environment and *Land Act*, No. 19 of 2011, Sections 101 of the *Land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act*, No. 6 of 2012, the Honorable Court is informed by the fact that *the Constitution* is a living tissue. Just like all other living tissues, it has to be fed and watered. It breathes and without oxygen and freshness it will die. With the fullness of time, I have learnt that these things are not just metaphorical. They are real. We all must know this fact. For a moment, this might sound rather academic but inevitable. The Courts of Law are guided by Jurisprudence, meaning knowledge of or skill in law, which was the first social science to be born. While making interpretation of Law, the Courts are guided by two broad philosophies. These are, firstly, "the Positivism" interpretation of Law, whereby it means that laws are mere commands of human beings with threats of force. It holds that law is valid notwithstanding its merits or demerits. In other words, law and morality are distinct. In a nutshell, positivists hold the view that it is not the business of lawyers and the Judges to say whether a law is good or bad. The business of rendering such moral verdicts is best left to Legislators, philosophers and the public. To them the works of Lawyers and Judges is to apply the Law 'as it is'. Secondly, is "the natural" interpretation of the Law. Here it holds that law and morality cannot be divorced from each other. Like the siamese twins they are inseparable and intertwined. They hold that the law is based on basic human values that are universal and standard. It is based on values of intrinsic to human nature that can be deduced and applied independently of man – made law. Such values include the universal need to preserve human life and livelihoods. It is my intuition that these are the Core Values that the makers and the legal experts of *the Constitution* of Kenya, 2010 had in mind by enacting the provisions of Articles 2 (1), (2), (3), (4), (5) and (6) on the Supremacy of *the Constitution* and the fact that any international treaty or law that Kenya has ratified shall be part of the laws of Kenya;
108. Treaties and conventions ratified in Kenya form part of Kenyan law and are therefore binding to Kenya and can be interpreted as such by Kenya Courts. The Courts have recognised the UN Covenant on Economic, Social and Cultural Rights (CESCR); UNGA, The Right to Adequate Housing which require the state to refrain from forced evictions. However, where there is unlawful occupation, forceful eviction must be carried out in a humane manner. Article 10 (2) (b) of *the Constitution* is on the Core values of human dignity, equity, social justice, equality, human rights, non – discrimination, protection of the marginised and sustainable development; Articles 43 (1) (b) is on social and Economic rights – access to and adequate housing and decent standards of livelihood; Article 48 is on access to Justice and Article 159 (2) (c) is on Alternative Judicial System (AJS) currently being strongly advocated as a policy by the Judiciary in terms of resolving disputes amicably, justly, expeditiously and cost effectively. It leaves parties as friends and ones sustaining brotherhood and good neighbourhood. This is as opposed to losing a case and followed by forceful eviction. Recently, the Judiciary adopted some guiding principles known as "The Social Transformation through Access to Justice (STAJ) blue print which are:- a). Accessibility and Efficiency; b). Transparency and Accountability; c). Inclusiveness and Shared Leadership d). Co – operative Dialogue and e). Social Justice. In thus case, the Court is influenced by the (e) aspect of STAJ.



109. While at this point, the Honorable Court wishes to rely on the case of “Constitution Petition Numbers 65 of 2010 - Satrose Ayuma & 11 Others (Supra)” where the Court adopted the General Comment No. 7 of the UN Commission on Human Rights and stated:-

“State Parties are obligated to use all appropriate means to protect the rights recognized in ICSECR and it recognizes that forced evictions of prima facie violations of the right to adequate housing, and that States should be strictly prohibited in all case, from intentionally making a person or community homeless following an eviction, whether forced or lawful. Paragraph 15 of the General Comment No. 7 also elaborates an appropriate procedural protection and due process to be in place to ensure that human rights are not violated in connection with forced evictions.” The term “Forced Eviction” was defined in the context of the definition accorded to it by the Committee on Economic, Social and Cultural Rights which defines it as:-

“The permanent removal against their will of individuals, families and/or communities from the homes which they occupy without the provisions of, and access to, appropriate forms of legal or other protection” .

The Court cited:- “The UN Basic Principles and Guidelines on Development based Eviction and Displacement [2007]” which have provided some guidelines to States on measures to adopt in order to ensure that development – based evictions, like the present one in this instant case, are not undertaken in contravention of the existing international human rights standards and violation of human rights. The Court held that:

“These guidelines provide measures to ensure that forced evictions do not generally take place and in the event that they do, then they are undertaken with the need to protect the rights to adequate housing for all those threatened with eviction, at all times. The Guidelines, inter alia, place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorized by law; carried in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law. The Guidelines also articulate the steps that States should take prior to taking any decision to initiate an eviction, that the relevant authority should demonstrate that the eviction is unavoidable and is consistent with the international human rights commitmentsthe Guidelines also provided conditions to be undertaken during the evictions as follows: that there must be mandatory presence of Government officials or their representatives on site during the eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to election, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks.....

110. In this regard, the first step in an eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the persons affected an opportunity to seek relief in Court. I strongly hold that this must have been the rationale that informed and guided the Legislature in their wisdom to have caused the



amendment into the Land Act, and inserted the provision of Section 152E of the Land (Amendment) Act, which provides:-

1. “If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on the person a notice, of not less than three months before the date of the intended eviction. is in occupation of his or her land without
 2. The notice under Sub - Section (1) shall:-
 - a. In the case of a large group of persons, be published in at least two daily newspapers of national wide circulation and be displayed in not less than five strategic locations within the occupied land.
 - b. Specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - c. Be served on the Deputy County Commissioner in Charge of the area as well as the officer Commanding the Police division of the area”.
111. Following this lengthy deliberation, I wish to apply these principles to the instant case. It is imperative to appreciate that the Plaintiffs claim to have lived and continue occupying the suit land. Thus, in order to avoid the Plaintiffs and their families becoming destitute and homeless, based on social justice principles and humanitarian consideration – on gratia basis and the right to housing and settlement as provided for under Article 43 of the Constitution of Kenya, 2010, I urge the Government of Kenya and the Defendants herein to consider compensation/re – settlement scheme etc consider based on the doctrine of Compulsory Acquisition of the suit land by purchasing the land from the Defendants for purposes of settlement of the Defendants and their properties and hence promptly, adequately, fairly and justly compensating the Plaintiff for the Compulsory acquisition of the land pursuant to the provisions of Article 40 (3) of the Constitution of Kenya, 2010; Sections 101 to 118 and 134 of the Land Act, No. 6 of 2012; and through Settlement Scheme Program and/or Fund Trustees under the principles of land policy under provision of Articles 10 and 60 (1) of the Constitution of Kenya, 2010; Sections 134 (2); 134 (5), (6); 135 (3) (a); 167 & 168 of the Land Act, No. 6 of 2012.
112. Ideally, the procedures to be followed during forced evictions include:
- a. an opportunity for genuine consultation with those affected;
 - b. adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
 - c. information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
 - d. especially where groups of people are involved, government officials or their representatives to be present during an eviction;
 - e. all persons carrying out the eviction to be properly identified;
 - f. evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
 - g. provision of legal remedies; and



- h. provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts
113. Other international treaties which Courts have relied on include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (Banjul Charter) that seek to protect the fundamental rights of persons.
114. From the foregoing and the facts of this case, the evictions have not happened yet, the 1st Defendant only sent a notice to the Plaintiff but had not yet taken up the eviction process. Further the land they claim is government land and therefore they had all right to it. I cannot adjudge that the statutory procedure on evictions was not followed because the 1st Defendant did inform them in time and that the Plaintiffs have been given sufficient notice.
115. By virtue of the above, prayers b, c, d and e are found to be devoid of merit and are hereby dismissed. In the foregoing, I reiterate that the Plaintiffs are found not to have proved their case and the same is hereby dismissed.

IssueNo. d). Who bears the costs of the suit

116. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri v Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
117. In the case of:- “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products vAlexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227” the Court held;
- “It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp v Gibbon & Co., 1913 ADD 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”
117. In the present case, for the fact that the Plaintiffs have failed to establish their case, the 1st and 2nd Defendants are entitled to have the costs of the suit.

VI. Conclusion and Disposition

118. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff has not



established their case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:

- a. That Judgment be and is hereby entered in favour of the 1st & 2nd Defendants and the claim by the Plaintiffs as in respect to the Plaint dated 8th June, 2015 by Alphonse Ojera Administrator of the Estate of Isaa Ouma Mutangili Mwanthi (Suing on their behalf and on behalf of the Residents of Birikani Estate Changamwe) be and is hereby dismissed with costs.
- b. That the 1st Defendant be and are at liberty to carry out the lawful (not forceful) eviction as per the Notice of Eviction dated 8th February, 2013 but strictly guided by the provision of Section 152C, E & G of the Land (Amended) [Act No. 6 of 2012](#).
- c. That costs of the suit is awarded to the 1st & 2nd Defendants jointly and severally to be borne by the Plaintiffs herein.

JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 21ST DAY OF MARCH 2025.

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Muchiri Advocate for the Plaintiffs.
- c. Mr. Karina Advocate for the 1st Defendant.
- d. M/s. Kiti Advocate for the 2nd Defendant.

