



REPUBLIC OF KENYA



KENYA LAW
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Ochieng & 4 others (Suing on their own behalf and behalf of their Families and all the Members of the over 2000 Residents of Mukuru Kwa Njenga Residential Area) v Nairobi Metropolitan Service & 213 others; Economic and Social Rights Centre (HAKIJAMII) & 3 others (Interested Parties) (Petition E050 & E048 of 2021 (Consolidated)) [2023] KEELC 18840 (KLR) (29 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18840 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION E050 & E048 OF 2021 (CONSOLIDATED)

JO MBOYA, J

MAY 29, 2023

IN THE MATTER OF: THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER THE BILL OF RIGHTS OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF: ARTICLES 1, 2(5)(6), 3, 10, 20, 21, 22, 23, 27(4), 28, 35, 40, 43(1)(B) 47, 48, 60, 63, 64, 159, 165, 258, AND 259 OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF: RULES 3, 4, 10, 13, 21 AND 23(1) OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE & PROCEDURE RULES, 2013.

IN THE MATTER OF: THE LAND ACT 2012 AND THE REGULATIONS MADE THEREUNDER

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015
IN THE MATTER OF: THE PHYSICAL AND LAND USE PLANNING ACT, 2019
AND THE REGULATIONS MADE THEREUNDER**

IN THE MATTER OF: THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, 1999 AND THE REGULATIONS THE REGULATIONS MADE THEREUNDER

IN THE MATTER OF: THE URBAN AREAS AND CITIES ACT

IN THE MATTER OF: THE ACCESS TO INFORMATION ACT



**IN THE MATTER OF: ARTICLE 25 OF THE UNIVERSAL DECLARATION OF
HUMAN RIGHTS (UDHR), ARTICLE 11 OF THE
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS (ICESR), ARTICLE 17 OF THE
INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS AND ARTICLE 18 OF THE AFRICAN
CHARTER OF HUMAN AND PEOPLE RIGHTS (BANJUL
CHARTER)**

**IN THE MATTER OF: THE UNREASONABLE AND UNJUSTIFIABLE
DEPRIVATION OF PROPERTY THROUGH UNJUST
EVICTIONS**

BETWEEN

**NELSON OCHIENG 1ST PETITIONER
ROSE ANYANGO 2ND PETITIONER
CHRISTOPHER OTIENO 3RD PETITIONER
JOSHUA MUTHEGI 4TH PETITIONER
MUKURU VUMILIA COMMUNITY BASED ORGANISATION 5TH
PETITIONER
SUING ON THEIR OWN BEHALF AND BEHALF OF THEIR FAMILIES AND
ALL THE MEMBERS OF THE OVER 2000 RESIDENTS OF MUKURU KWA
NJENGA RESIDENTIAL AREA**

AND

**THE NAIROBI METROPOLITAN SERVICE 1ST RESPONDENT
COUNTY GOVERNMENT OF NAIROBI CITY COUNTY ... 2ND RESPONDENT
THE MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL
GOVERNMENT 3RD RESPONDENT
KENYA URBAN ROADS AUTHORITY 4TH RESPONDENT
MINISTRY OF LANDS AND PHYSICAL PLANNING 5TH RESPONDENT
NATIONAL LAND COMMISSION 6TH RESPONDENT
THE ATTORNEY GENERAL 7TH RESPONDENT
ORBIT CHEMICAL INDUSTRIES LIMITED 8TH RESPONDENT
DOMINIC NJUGUNA NDUNG’U 9TH RESPONDENT
EDITH VUSHA USIDE 10TH RESPONDENT**



MUSYOKA MATHEKA	11 TH RESPONDENT
JOSEPHAT ANGOSE INZIRIA	12 TH RESPONDENT
HOSSANAH PROPHETIC & MIRACLE CHURCH	13 TH RESPONDENT
GOSPEL FURTHERING BIBLE CHURCH	14 TH RESPONDENT
MULI MOM	15 TH RESPONDENT
JOSEPHAT ANGOSE INZIRIA	16 TH RESPONDENT
JOHN NJUGUNA NJOKI	17 TH RESPONDENT
ALIW GOLO TACHE	18 TH RESPONDENT
WAMBUA MUTISYA	19 TH RESPONDENT
GLORIOUS GOSPEL CENTRE	20 TH RESPONDENT
TERESIA NYAGUTHIE ONYANGO	21 ST RESPONDENT
YUSUF GUYO TOLE	22 ND RESPONDENT
THOMAS OKELLO ACHOLA	23 RD RESPONDENT
STEPHEN KAMUNGE WAINAINA	24 TH RESPONDENT
BERNARD MUNGAI	25 TH RESPONDENT
LUCAS NYAMBEGERA NYANGWES	26 TH RESPONDENT
WILSON KAMAU WAMBUGU	27 TH RESPONDENT
TERESA MOKEIRA OMWOYO	28 TH RESPONDENT
JOHN NJENGA WAINAINA	29 TH RESPONDENT
ELIUD WANJOGA MUCHERU	30 TH RESPONDENT
FRANCI NGUGI MBURU	31 ST RESPONDENT
FRANCIS NGUGI MBURU	32 ND RESPONDENT
FRANCIS NYAGA CHABARI	33 RD RESPONDENT
GEORGE KIMANI KAGIA	34 TH RESPONDENT
GERISHOM D K NJOROGE	35 TH RESPONDENT
BONIFACE MWANZIA MUINDI	36 TH RESPONDENT
LEONARD NYAOKE ORIWO	37 TH RESPONDENT
JOHN NJUGUNA CHEGE	38 TH RESPONDENT
VINCENT RARIEWA	39 TH RESPONDENT
JAQUELINE GITHINJI	40 TH RESPONDENT
JUSTUS KINOTI MBIJIWE	41 ST RESPONDENT
STEPHEN WAMBWA	42 ND RESPONDENT



RICHARD NGANVI WAMRWA	43 RD RESPONDENT
EDITH NYAMBURA KAHIGA	44 TH RESPONDENT
CHARLES MWANGI MAINA	45 TH RESPONDENT
FRANCIS MWANGI MUGURO	46 TH RESPONDENT
WILSON KAMAU WAMBUGU	47 TH RESPONDENT
WILSON KAMAU WAMBUGU	48 TH RESPONDENT
CELESTINE LANGAT	49 TH RESPONDENT
JACOB MUSEE MWANZIA	50 TH RESPONDENT
MARY NJERI GATHERE	51 ST RESPONDENT
PAUL MUTUI MASAKA	52 ND RESPONDENT
JACOB MUSEE MWANZIA	53 RD RESPONDENT
TABITHA NYAKINYUA GATHERE	54 TH RESPONDENT
CAROLINE MUKWAMUGO WALLACE	55 TH RESPONDENT
JOEL LANGAT	56 TH RESPONDENT
MUCHIRI MUGO	57 TH RESPONDENT
PETER KIMANI WAIHAKA	58 TH RESPONDENT
JOHN NJENGA WAINAINA	59 TH RESPONDENT
KISINA MUTUA	60 TH RESPONDENT
LUCAS MBAE MUTHARA	61 ST RESPONDENT
GERISHOM D K NJOROGE	62 ND RESPONDENT
MARY WANJA NJOROGE	63 RD RESPONDENT
BENARD GITHINJI KARIMI	64 TH RESPONDENT
ANDREW MAKUMI KAMUYU	65 TH RESPONDENT
JOYCE WANJIRU NDIRANGU	66 TH RESPONDENT
WILFRED NDIRAGU NGUGI	67 TH RESPONDENT
GLADYS KAJUJU MWITE	68 TH RESPONDENT
GIDEON KYALO KIMULU	69 TH RESPONDENT
MICHAEL MBIRA NGIGI	70 TH RESPONDENT
JOSEPH KINYANJUI MWAURA	71 ST RESPONDENT
ALEX NGANGA KAMAU	72 ND RESPONDENT
NANCY WANJIKU KIBE	73 RD RESPONDENT
HAFSA IBRAHIM KHALIF	74 TH RESPONDENT



ROSINAH NICHOLAS NGUMBI	75 TH RESPONDENT
CHARLES MUNENE GATIMU	76 TH RESPONDENT
BEN ABENGA NYARANGO	77 TH RESPONDENT
ATHOMI SELF HELP GROUP	78 TH RESPONDENT
PETER CHERERE MUTHUI	79 TH RESPONDENT
WILSON CHEGE	80 TH RESPONDENT
DANIEL KIMUNYA MATHENGE	81 ST RESPONDENT
KENNETH KAMWERE MAINA	82 ND RESPONDENT
SAMUEL MAINA MURITHI	83 RD RESPONDENT
STEPHEN KAMUNGE WAINAINA	84 TH RESPONDENT
DANIEL GIKONYO NGORU	85 TH RESPONDENT
STEPHEN KAMUNGE WAINAINA	86 TH RESPONDENT
EMMA WAMBUI KARANJA	87 TH RESPONDENT
NZUKI NDUNDA	88 TH RESPONDENT
JOHN MWE,N.IA MI JR A GE	89 TH RESPONDENT
JOYCE WAIRIMU NJENGA	90 TH RESPONDENT
YUSUF GUYO TOLE	91 ST RESPONDENT
JAMES WANJOHI KARIUKI	92 ND RESPONDENT
JOHN NJENGA WAINAINA	93 RD RESPONDENT
HILDA MWENDE IKINGI	94 TH RESPONDENT
CHARLES ODOUR ONGONGE	95 TH RESPONDENT
EUNICE MUMBI MUSAU	96 TH RESPONDENT
CATHERINE WANGUI MBOGO	97 TH RESPONDENT
PETER CHEGE GITAU	98 TH RESPONDENT
DANIEL GIKONYO NGORU	99 TH RESPONDENT
JOSEPH MUSAU MUYANGA	100 TH RESPONDENT
JOSEPH MUSAU MUYANGA	101 ST RESPONDENT
ALICE WAITHIRA MUNGAI	102 ND RESPONDENT
WAPONYA CONSTRUCTION CO.LIMITED	103 RD RESPONDENT
MERCY MUNJIRU WAIGURU	104 TH RESPONDENT
DAVID OKECHI	105 TH RESPONDENT
DAVID OKECHI	106 TH RESPONDENT



GERISHOM D K NJOROGE	107 TH RESPONDENT
ALIO EDIN MOHAMED	108 TH RESPONDENT
WAPONYA CONSTRUCTION CO.LIMITED	109 TH RESPONDENT
DANIEL GIKONYO NGORU	110 TH RESPONDENT
SIMON NGUGI KUNGU	111 TH RESPONDENT
DAVID OKECHI	112 TH RESPONDENT
WAMBUA NGULU	113 TH RESPONDENT
ANTHONY MULI MULWA	114 TH RESPONDENT
ALIW GOLO TECHE	115 TH RESPONDENT
NICK OCHOKO OYUGI	116 TH RESPONDENT
JULIUS MULEI MAKAU	117 TH RESPONDENT
HELLENA WAMBUI MANEGENE	118 TH RESPONDENT
RACHAEL MUTHONI KAMAU	119 TH RESPONDENT
KHAMAR FARAH IBRAHIM	120 TH RESPONDENT
DAUDI HAJI ALI	121 ST RESPONDENT
EDWARD WAIGURU MUYA	122 ND RESPONDENT
BONASHA LIMITED	123 RD RESPONDENT
ADAN ALIO IBRAHIM	124 TH RESPONDENT
CHARLES GITONGA RUGOJI	125 TH RESPONDENT
TOWFIQ GENERAL TRADING LTD	126 TH RESPONDENT
DAVID KAMAU MUMO	127 TH RESPONDENT
ADAN HASSAN ISAAK	128 TH RESPONDENT
JULIUS MANEGENE NJERU	129 TH RESPONDENT
MERCY MUNJIRU WAIGURU	130 TH RESPONDENT
AHMED MOHAMED LIBAN	131 ST RESPONDENT
PHIL MUSYOKI METI	132 ND RESPONDENT
HUSEIN AHMED MOHAMED	133 RD RESPONDENT
THOMAS OLULO ACHOLA	134 TH RESPONDENT
ELIJAH MAINA NJUGUNA	135 TH RESPONDENT
JAMES WAHOME KIBICHO	136 TH RESPONDENT
JACQUES KIMEU MUTHUSI	137 TH RESPONDENT
EBBY MUSIMBI BEGISEN	138 TH RESPONDENT



MARY BWARI MOMANYI	139 TH RESPONDENT
JAMES GITAIGA	140 TH RESPONDENT
EDWARD NJOROGE	141 ST RESPONDENT
ELIZABETH WAIRIMU KIMANI	142 ND RESPONDENT
CHARLES GITONGA RUGOJI	143 RD RESPONDENT
MOSES NGUGI GITHINJI	144 TH RESPONDENT
MATHEW MUTUKU	145 TH RESPONDENT
BENSON NYAGAKA MOCHERE	146 TH RESPONDENT
TIMOTHY KARANJA NJOROGE	147 TH RESPONDENT
CHARLES GITONGA RUGOJI	148 TH RESPONDENT
FAITH WAITHERA MUTURI	149 TH RESPONDENT
SAMUEL GATHECA MURIUKI	150 TH RESPONDENT
EDEN ONSHOW MAMOW	151 ST RESPONDENT
JOSEPH WANYOIKE MUCHOKI	152 ND RESPONDENT
JOSEPHAT ANGOSE INZIRIA	153 RD RESPONDENT
MOSE KHAMATI OYATSI	154 TH RESPONDENT
STEPHEN MBE GAKURU	155 TH RESPONDENT
JOSEPH MWANZIA MUTIO	156 TH RESPONDENT
ELIZABETH KATUMBI KIMEU	157 TH RESPONDENT
ANJELINE AWINO WANGA	158 TH RESPONDENT
TABITHA NYAKINYUA GATHERE	159 TH RESPONDENT
STEPHEN KIBE GAKURU	160 TH RESPONDENT
STEPHEN NJAGI MURIITHI	161 ST RESPONDENT
CHARLES MWAI MAHUTHU	162 ND RESPONDENT
MARY NJERI GATHERE	163 RD RESPONDENT
JOHN NJUGUNA NJOKI	164 TH RESPONDENT
ELIZABETH KATUMBI KIMEU	165 TH RESPONDENT
NATHAN NZAI MUANGI	166 TH RESPONDENT
ELIZABETH WAIRIMU KIMANI	167 TH RESPONDENT
JOHN KYALO MULYUNGI	168 TH RESPONDENT
JOSEPH K GITHINJI	169 TH RESPONDENT
MUSYOKA MATHEKA	170 TH RESPONDENT



RAPHAEL KIBIRU TUTUMA	171 ST RESPONDENT
KARANJA KIHUNGU GEMA	172 ND RESPONDENT
GLADYS NDUKU KIILU	173 RD RESPONDENT
ANTHONY MULI MULWA	174 TH RESPONDENT
GLADYS NDUKI KIILU	175 TH RESPONDENT
ANTHONY MULI MULWA	176 TH RESPONDENT
PAUL ILUVYA MUTUNGA	177 TH RESPONDENT
ANTHONY MULI MULWA	178 TH RESPONDENT
ANESTINE GATAKAA JOHN	179 TH RESPONDENT
PETER NJAGI NTHIGA	180 TH RESPONDENT
JULIUS KAMAU IRUNGU	181 ST RESPONDENT
STEPHEN GITAU MWAI	182 ND RESPONDENT
JAMES MUTHUMBI GICHURI	183 RD RESPONDENT
JUDITH WAMBUI MUNENE	184 TH RESPONDENT
AMOS MWANGI CHEGE	185 TH RESPONDENT
CAROLINE NDATA KINYUA	186 TH RESPONDENT
DAVID KINYANJUI KANYUKU	187 TH RESPONDENT
MICHAEL NJOROGE KIMANI	188 TH RESPONDENT
JANE WATETU GATHINJI	189 TH RESPONDENT
PETER MUIGAI WAWERU	190 TH RESPONDENT
TUMAINI 25 SELF HELP GROUP	191 ST RESPONDENT
TERESIA NYAGUTHIE ONYANGO	192 ND RESPONDENT
BYRON KURIA MIGWE	193 RD RESPONDENT
ESTHER WAMBUI KUNGU	194 TH RESPONDENT
FAITH WAMBUI GITHUI	195 TH RESPONDENT
MULI KIOKO	196 TH RESPONDENT
JOHN PETER GATHURA	197 TH RESPONDENT
ANTHONY MWANGI MAINA	198 TH RESPONDENT
REGINA MWIKALI KITAVI	199 TH RESPONDENT
PETER KITHEKA KITILE	200 TH RESPONDENT
SHADRACK NJENGA WAWERU	201 ST RESPONDENT
KENNETH KAMWERE MAINA	202 ND RESPONDENT



SAMUEL MWANGI KIRAGU 203RD RESPONDENT
 JOYCE CONSTANCE MWENDE KITHEKA 204TH RESPONDENT
 CECILIA WANGUI MUNYI 205TH RESPONDENT
 KENYA RED CROSS SOCIETY 206TH RESPONDENT
 THE OCS. VILLA POLICE STATION EMBAKASI 207TH RESPONDENT
 THE SUBCOUNTY POLICE COMMANDER EMBAKASI . 208TH RESPONDENT
 REGIONAL POLICE COMMANDER NAIROBI REGION 209TH RESPONDENT
 THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF INTERIOR,
 MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL
 GOVERNMENT 210TH RESPONDENT
 LT. GEN MOHAMMED BADI 211TH RESPONDENT
 LYDIA KWAMBOKA 212TH RESPONDENT
 JORAM ICARANJA 213TH RESPONDENT
 IRSHAD SUMRA 214TH RESPONDENT

AND

ECONOMIC AND SOCIAL RIGHTS CENTRE (HAKIJAMII) INTERESTED
 PARTY
 KATIBA INSTITUTE INTERESTED PARTY
 LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA INTERESTED PARTY
 (PROPOSED) JANE WERU INTERESTED PARTY

RULING

Background and Introduction

1. Vide notice of motion application dated the October 13, 2022; the 8th respondent/applicant has approached the Honourable court seeking for the following Reliefs;
 - i. That the Petition dated November 22, 2022; and amended on the September 5, 2022; be struck out for being Res Judicata and an abuse of court process.
 - ii. That in view of order 1 above, this Honourable Court has no Jurisdiction to hear and determine the Petition dated November 22, 2021 and amended on September 5, 2022; and therefore downs its tools accordingly;
 - iii. That the cost of this Petition dated November 22, 2021 and amended on the September 5, 2022 and this application be borne by the petitioners and the 1st, 2nd, 3rd and 4th interested parties.
2. The instant application is premised and anchored on various grounds, which have been alluded to and enumerated at the foot thereof. Furthermore, the instant Application is supported by the affidavit of



one Sanchen Chandaria sworn on the October 13, 2022; and a Further affidavit sworn by the said Sanchen Chandaria albeit on the January 12, 2023, respectively.

3. Pursuant to and upon being served with the subject Application the petitioners/respondents responded to the subject application vide a replying affidavit sworn by the 1st petitioner/respondent on the 27th October 2022; and in respect of which the 1st petitioner/respondent has contended inter-alia that the instant application is merely intended to obstruct, delay and or defeat the Due process of the Honourable Court.
4. Be that as it may, the instant Application came up for hearing on the February 15, 2023; and on which date the advocates for the respective parties agreed to canvass and dispose of the application by way of written submissions. For good measure, Learned counsel for the 8th respondent/applicant proceeded to and filed written submissions dated the January 12, 2023; whereas the Petitioners filed written submissions dated the March 3, 2023.
5. Nevertheless, the rest of the Parties, namely, Respondents and the Interested Parties never filed any written submissions. Instructively, Learned Counsel for the Petitioners, who has also been appearing for the First and second Interested Parties, titled his written submissions as Petitioners Written Submissions and not otherwise.

Submissions By the Parties

A.Applicant's submissions:

6. The Applicant herein filed written submissions dated the 12th January 2023 (which submissions were filed earlier than the date of directions for the filing and exchange of written submissions); but which in any event have raised and highlighted two (2) salient issues for consideration by the Honourable court.
7. Firstly, Learned counsel for the Applicant has submitted that the issues raised and canvassed at the foot of the amended Petition dated the 5th September 2022, are issues which have hitherto been canvassed and ventilated before various courts of competent Jurisdictions.
8. Furthermore, Learned counsel has contended that the Petitioners herein, either by themselves or through their duly authorized Representatives have previous filed and lodged various suits against, inter-alia the 8th Respondent/Applicant herein.
9. Additionally, Learned counsel has submitted that in the various suits, which have hitherto been filed, the gravamen/substratum of the Petitioners' claim has always gravitated around the question of intended Eviction of persons resident on the suit property and otherwise comprising of Mukuru Kwa Njenga Residential Area.
10. Other than the foregoing, Learned counsel for the Applicant has ventured forward and thereafter supplied the particulars of the various cases, which are said to have been filed by and on behalf of the Petitioners herein and which cases are contended to espouse similar and/or substantially similar issues like the ones beforehand.
11. For good measure, Learned counsel has cited inter-alia ELC Petition Number E062 of 2018 (*Mukuru Kwa Njenga Slum Residents & 13 others versus Nairobi County Government & 13 Others*); Nairobi HCC Misc. JR No. 784 of 1996 (*Amina Mohamed & 6 Others versus The Chief Embakasi Location & 2 Others*); ELC NO. 7 of 2020 OS (*Zipporah Muthoni Ndungu & 5 Others versus The National Bank of Kenya & 12 Others*); Nairobi HCC No. 876 of 2004 (*Orbit Chemical Industries Limited versus The Honorable Attorney General*) and Civil Appeal No. 32 of 2014 (Honorable *Attorney General v Orbit Chemicals Ltd*), respectively.



12. In view of the foregoing, Learned counsel for the Applicant has therefore contended that the issues at the foot of the amended Petition are therefore issues which are barred by the Doctrine of Res-Judicata; insofar as same have been heard and conclusively been determined by Courts of competent Jurisdictions.
13. Arising from the foregoing, Learned counsel for the Applicant has thus submitted that on the basis of the Doctrine of Res-Judicata, this Honorable court is therefore prohibited and precluded from entertaining, adjudicating upon and/or re-engaging with the subject Dispute.
14. In support of the foregoing submissions and essentially that the issues beforehand are Res-Judicata; Learned counsel has cited and relied on various Decisions, inter-alia *John Florence Maritime Ltd & Another versus The Cabinet Secretary, Transport and Infrastructure & 3 Others* (2021) KESC 39 (KLR), *Kenya Commercial Bank Ltd versus Muiru Coffee Estate Ltd & Another* (2016)eKLR, *E.T versus The Attorney General & Another* (2012)eKLR and *Kakaa versus Kadhis Court, Nairobi & Another; Saad Interested Party* (2022)KEHC 11090 (KLR), respectively.
15. Secondly, Learned counsel for the Applicant has also contended that various issues which have been raised at the foot of the instant Petition also do not fall within the Jurisdictional mandate of the Environment and Land Court or otherwise. In this regard, Learned counsel has therefore contended that this Honorable court is therefore divested of the requisite Jurisdiction to entertain and adjudicate upon various issues, which have been highlighted and canvassed at the foot of the amended Petition.
16. To underscore the importance of Jurisdiction and the legal consequences attendant to proceedings taken without the requisite Jurisdiction, Learned counsel for the 8th respondent/applicant has cited and relied on the cases of, inter-alia, *S. K Macharia & another versus Kenya Commercial Bank Ltd* (2012)eKLR and *Owners of Moto Vessel Lilian S versus Caltex Oil (K) Ltd* (1989)eKLR, respectively.
17. Premised on the foregoing submissions, Learned counsel for the Applicant has therefore implored the Honourable court to find and hold that the amended Petition dated the 5th September 2022; is not only barred by the Doctrine of Res-Judicata; but has also been mounted by a court without the requisite Jurisdiction/competency, to entertain and/or adjudicate upon same.
18. Consequently and in view of the foregoing, Learned counsel for the Applicant has therefore sought that the entire amended Petition/ Proceedings, ought to be struck out with costs to the Applicant herein.

B.Petitioners’/ Respondents’ Submissions:

19. The Petitioners’/ Respondents’ herein filed written submissions dated the 3rd March 2023; and in respect of which Learned counsel for the Respondents has raised, highlighted and canvassed one salient issue for consideration by the Honourable court.
20. For good measure, Learned counsel for the Respondents has submitted that the various suits/proceedings which have been alluded and/or enumerated by the Applicant herein do not touch and/or concern the issues which are canvassed and highlighted at the foot of the amended Petition herein.
21. Additionally, Learned counsel for the Respondents has submitted that all the suits and/or previous proceedings which have been enumerated by the Applicant were all filed at the very latest in the year 2020 and yet the events culminating into the filing of the current Petition transpired and/or took place on or about October 2021. For coherence, Learned counsel for the Respondents has invited the Honourable court to take cognizance of the contents of paragraphs 120, 122, 123, 126, 132, 134, 136,



- 138, 139, 153 and 161, of the amended Petition which highlight the fact that the offensive demolitions complained of were commenced and carried out from the 11th October 2021 henceforth.
22. Having pointed out and underscored that the impugned activities were commenced from the 11th October 2021 and not otherwise, Learned counsel for the Respondents has therefore submitted that the suits and proceedings which were filed earlier than the said dates, cannot therefore be contended to raise and ventilate the same cause of action.
 23. Furthermore, Learned counsel for the Respondents has submitted that prior to and before invoking and relying upon the doctrine of Res-Judicata, it is incumbent upon the Applicant to demonstrate the various ingredients that inform and underpin the Doctrine of Res-Judicata.
 24. Instructively, Learned counsel for the Respondents has submitted that the Applicant herein has failed to demonstrate that indeed the cause of action which is captured at the foot of the amended Petition could have been filed/lodged in court prior to and or before its accrual and/ or occurrence, in the manner pointed out in the amended Petition.
 25. Nevertheless, Learned counsel has invited the Honourable court to find and hold that the cause of action at the foot of the amended Petition, raises a separate and distinct cause of action, which has never been canvassed nor ventilated before any court of competent Jurisdiction.
 26. In support of the forgoing submissions, Learned counsel for the Respondents has cited and relied on a number of decisions, inter-alia, *Dock Workers Union Kenya versus Kenya Ports Authority* (2021)KECA 87 (KLR); *IEBC versus Maina Kiae & 5 Others* (2018)eKLR; *Ukay Estate Ltd & Another versus Shab Hirji Maneck Ltd & 2 Others* (2006)eKLR; *Greenfiled Investment Ltd versus Baber Alibhai Mauji* (2000)eKLR and *Rashi Allarakha Jan Mohamed & Company versus Jethalal Vallabhdas & Company* (1956)EACA 255, respectively.
 27. In view of the foregoing, Learned counsel for the Respondents has submitted that the Doctrine of Res-Judicata is therefore inapplicable to and in respect of the issues that have been highlighted and canvassed at the foot of the amended Petition. In this regard, Learned counsel has thus impressed upon the court to dismiss the Application dated the 13th October 2022.

Issues For Determination

28. Having reviewed the Application herein and the Response filed thereto and upon taking into consideration the written submissions filed by and on behalf of the Parties; the following issues do arise and are thus worthy of determination;
 - i. Whether the Cause of Action highlighted at the foot of the amended Petition herein, are barred by the Doctrine of Re-Judicata.
 - ii. Whether the various Reliefs sought at the foot of the amended Petition fall within the Jurisdiction of the Environment and Land Court or otherwise.

Analysis And Determination

Issue Number 1. Whether The Cause Of Action Highlighted At The Foot Of The Amended Petition Herein, Are Barred By The Doctrine Of Res- Judicata.

29. The Applicant herein has filed and mounted the current Application and wherein same has contended that the issues highlighted and canvassed at the foot of the amended Petition dated the 5th September 2022; are barred and/or prohibited by the Doctrine of Res-Judicata.



30. Premised on the foregoing contention, Learned counsel for the Applicant has therefore implored the Honourable court to find and hold that the amended Petition is therefore premature, misconceived and otherwise Legally untenable.
31. Be that as it may and before venturing to consider whether or not the issues highlighted at the foot of the amended Petition dated the 5th September 2022; are barred by the Doctrine of Res-Judicata, it is imperative to take cognizance of the salient facts/ features that constitutes the cause of action before this Honorable court.
32. Consequently and in this respect, certain paragraphs of the amended Petition are relevant, important and thus worthy of reproduction. Invariably, it is imperative to reproduce the said paragraphs.
33. For ease of reference, the pertinent paragraphs are reproduced as hereunder;

Paragraph 120

On or about October 2021, agents, servants, employees and or anyone acting under the instruction of the 1st and 2nd Respondents came and began marking buildings located along Catherine Ndereba Road, perhaps as a means indicating that some day in the future, there would be a Road expansion.

Paragraph 122

The Respondents were aware, courtesy information received from the Deputy County Commissioner of the area that there would be a public participation session on the 21st October 2021 to discuss issues of the intended road construction. The Residents had geared up for the same with Eagerness.

Paragraph 123

Unfortunately, on the 11th day of October 2021 at around 17:30 hours, whilst Kenyans celebrated Utamaduni Day (a Public holiday), the Residents of Mukuru Kwa Njenga faced their worst fears. The infamous Sanny caterpillar Bulldozers were brought into the neighborhood flanked by a number of police officers in over 10 police vehicles drawn from various police stations around Nairobi County and the environs.

Paragraph 124

The Residents whose houses and business were marked were given 30 minutes to vacate the premises. Upon protest and demand for a written order of eviction and demolition, the residents were met with stern looking Police Officers wielding weapons.

Paragraph 125

Demolition then begun shortly afterwards without giving heed to the Human Dignity or the property worth millions which was being demolition.

Paragraph 132

Through out the month of November 2021, the Evictions in Mukuru Kwa Njenga progressed without any regard to Human dignity in spite of a wide media coverage and calls from Civil Societies to have the Evictions stopped.

Paragraph 136

However, around December 25th, 26th and 27th of November 2021; the 1st, 2nd, 7th to the 207th Respondents through their agents invaded the said Parcels of land with the intention



of installing Beacons to the said Land notwithstanding the existence of a valid court order preventing them from doing so.

Paragraph 139

As the new year came to fruition, the President ordered a stop to the Evictions and vide a press release dated January 14th 2022; titled Government strikes deal with Mukuru Land Owner; this was testament of the existing good will of the Government to resolve this unending Mukuru Land Dispute.

Paragraph 153

Further, the Petitioners were not consulted prior to the demolitions on the 11th October 2021; despite there being a Notice from the Deputy County Commissioner of a planned public participation on the 21st October 2021. Certainly, this contravened Article 10 of *the Constitution* of Kenya and all other enabling laws detailing the need of public participation.

Paragraph 161

Indeed, the Petitioners assert that Article 19 read together with Article 20 of *the Constitution* 2010; requires that any policy or action undertaken by the Respondent be guided and within the Bill of Rights framework. The Petitioners assert the failure to issue a notice as well as the failure to provide an alternative area of settlement prior to the evictions on the 20th October 2021; was a gross violation of *the Constitution*, 2010.

34. From the contents of the paragraphs which have been enumerated herein before, what is evident and apparent is that the Evictions and demolitions that are complained of are the ones that were commenced and thereafter undertaken (sic) by the Respondents with effect from the 11th October 2021 henceforth.
35. It is the impugned evictions and demolitions that are contended to have breached, violated and or infringed upon the human rights and fundamental freedoms of (sic) the Petitioners herein.
36. Having taken cognizance of the foregoing observations, it is now appropriate to revert back and to consider whether the circumstances which took place from the 11th October 2021 and the subsequent days thereafter; could have been prosecuted and or ventilated before any court of competent Jurisdiction in the year 2020 or therebefore.
37. Evidently, the substratum of the current Application is that the issues being raised by the Petitioners herein were canvassed and ventilated before various courts in terms of the suits, whose details were availed and highlighted elsewhere herein before.
38. However, I beg to point out that the suits which the Applicant has highlighted and alluded to found and underpin the basis for raising the ground of Res-Judicata, relates to events that preceded the cause of action being ventilated at the foot of the current Petition.
39. Clearly and to my mind, there is no way that the Evictions and (sic) offensive demolitions that were undertaken on the 11th October 2021, could have prophetically been litigated in the years 1996, 2014, 2014, 2018 and 2020, respectively; given that the suits alluded to were filed in the named years.
40. To my mind, the Applicant herein was endeavoring to stretch the import and tenor of the Doctrine of Res-Judicata beyond the known and conceivable limits. Nevertheless, it is appropriate to point out that the Doctrine of Res-Judicata does not prohibit and/or preclude a cause of action that would arise in future. Further and in addition, neither could the Petitioners herein have conceived of what was



going to happen in the year 2021; so as to file a suit, if at all, in that regard, earlier than the occurrence of the acts complained of.

41. Having addressed the foregoing features, it is imperative to now underscore that prior to and or before invoking the Doctrine of Res-Judicata, it behooves the Applicant to establish and demonstrate that the various ingredients espoused in Section 7 of the *Civil Procedure Act*, are discernable and evident. Nevertheless, in this case, the Applicant has failed to justify the existence of the known ingredients.
42. Be that as it may, the Doctrine of Res-Judicata was duly highlighted and succinctly elaborated upon by the Supreme Court of Kenya in the case of John Florence Maritime Services Limited & another versus Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), where the court stated and held thus;
58. This court in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata:

52. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative Jurisprudence; in the Ugandan case of Hon Norbert Mao v Attorney-General, Constitutional Petition No 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under article 137 of the Uganda Constitution, and for redress under article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them.

Unknown to the petitioner, another action had already been filed under article 50, seeking similar relief; and Judgment had been given in Hon Ronald Reagan Okumu v Attorney-General, Misc Application No0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.

53. In *Silas Make Otuke v Attorney-General & 3 others*, [2014] eKLR, the High Court of Kenya agreed with the Privy Council decision in *Thomas v The AG of Trinidad and Tobago* (1991) LRC (Const) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata".
54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of



suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

55. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.⁵⁶The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded.

Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

57. The essence of the res judicata doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” [emphasis supplied].
58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case^{3/4}to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v*



James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads:

- (i) the matter in issue is identical in both suits;
- (ii) the parties in the suit are the same;
- (iii) sameness of the title/claim;
- (iv) concurrence of jurisdiction; and
- (v) finality of the previous decision.

59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others*, (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J, in the case of *Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991* (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a) There is a former Judgment or order which was final; b) The Judgment or order was on merit; c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and d) There must be between the first and the second action identical parties, subject matter and cause of action. (See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011* (2013) eKLR)
43. Having reviewed the pleadings in respect of the various suits, which were cited and referred to by the Applicant herein and upon juxtaposing same as against the cause of action highlighted and canvassed at the foot of the amended Petition; I come to the inevitable and inescapable conclusion that the Doctrine of Res-Judicata it is not only irrelevant but also inapplicable to the obtaining circumstances.
44. In a nutshell, the limb of the instant Application propagating the claim of Res-Judicata is therefore dismissed.



Issue Number 2. Whether The Various Reliefs Sought At The Foot Of The Amended Petition Fall Within The Jurisdiction Of The Environment And Land Court Or Otherwise.

45. Other than the question of Res-Judicata, there is an aspect of the amended Petition that touches on certain claims/reliefs, which are worthy of consideration so as to determine whether same falls within the scope and Jurisdictional limit of the Environment and Land Court.
46. Nevertheless, before venturing to consider the Jurisdictional question, it is imperative to reproduce certain reliefs which are critical in determining whether or not same fall within the purview of the Environment and Land Court, as established vide the Provisions of Article 162(2)(b) of the Constitution, 2010.
47. For ease of reference, prayer (a) states as hereunder;
- a. A declaration that the actual and intended construction and improvement of roads within Mukuru Kwa Njenga Area along Catherine Ndereba Road and within the special planning area established pursuant to gazette notice number 3433 of 2020 (volume CXXII-No. 84) is unlawful and contravened Articles 10, 26, 27, 28, 32, 40, 43, 47, 53, 54, 55, 56 and 67 of the Constitution and Section 152(c), (f) and (g) of the Land Act 2012; and Regulation 63, 66, 67 and 70 of The Land Regulations (Legal Notice No. 280 of 2017).
- Prayer c. A declaration that the 1st and 2nd Respondents have violated Article 232 of the Constitution and Sections 3 and 5(2) of the Public Service (Values & Principles) Act.
- Prayer f. A declaration that the 1st Respondent through their agents, servants, employees and/or any one acting under their instruction violated the Petitioners rights under the Constitution specifically; Article 28- dignity, 29 – freedom and security of the person, 32 – freedom of religion, 40 – property, 43 – the right to accessible and adequate housing and the right to education, 47 – the right to fair administrative process, 53 – the right of the child, 54 – the rights of persons with disability, 57 – the rights of older members of the society.
- Prayer g. General damages at a quantum assessed by the court in compensation for the violation of the Petitioners fundamental freedoms under articles 26, 28, 29, 43, 47, 54, 55, 56 and 57 of the Constitution and as a result of the forced evictions that led to the destruction of their properties
- Prayer j. An order that the 3rd Respondent monitors the compliance of the declarations and orders issued by this court in this cause and promptly bring to the attention of this court or any court of competent jurisdiction any noncompliance by the Respondents or any one else with the declarations and orders of this court
48. My understanding of the reliefs which have been highlighted in the preceding paragraphs drives me to the conclusion that same falls within the jurisdictional mandate of the High Court pursuant to and by dint of article 165(3) of the Constitution, 2010; and not the Environment and Land Court. For good measure, the Articles of the Constitution which have been cited and highlighted in the body of the reliefs pointed out are substantially outside the mandate of this Honorable court.
49. Instructively, there is no gainsaying that courts derive Jurisdiction directly from the Constitution or statute or both. In this respect, if the Environment and Land Court had the requisite Jurisdiction to entertain and adjudicate upon the highlighted reliefs then same would have been expressly stipulated and provided for. Further and in addition, it is common ground that a court of law can neither expand nor enhance its Jurisdiction, by way of innovation or otherwise. Invariably, a court of law must operate within the Jurisdictional strictures provided for and illuminated by the constitutive Charter.



50. To underscore the importance of Jurisdiction, it is appropriate to reiterate the succinct and elaborate exposition of the law by the Supreme court of Kenya [*Samuel K Macharia & Another versus Kenya Commercial Bank Ltd & Another*](#) (eKLR), where the court stated and held thus;

(68) A Court's jurisdiction flows from either [*the Constitution*](#) or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by [*the constitution*](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where [*the Constitution*](#) exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by [*the Constitution*](#). Where [*the Constitution*](#) confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

51. Additionally, it is also imperative to underscore that where a court is divested of Jurisdiction then the court must not undertake any further proceedings over and in respect of the impugned matter. For good measure, any proceedings taken by a court without Jurisdiction are a nullity and amounts to nothing.

52. In this respect, it is instructive to highlight and underscore the ratio decidendi in the case of [*Phoenix of E.A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service*](#) [2019] eKLR, where the court succinctly held thus;

1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

53. Duly nourished by the succinct exposition of the law, I come to the conclusion that this Honorable court is devoid and bereft of Jurisdiction to engage with prayers (a), (c), (f), (g) and (j) of the amended Petition dated the 5th September 2022. Consequently and in this regard, the said prayers be and are hereby struck out.

54. To the contrary, the only prayers that shall remain alive for purposes of ventilation before this Honorable court shall be prayers (b), (d), (e), (h), (i) and (k), respectively.



Final Disposition

55. Having reviewed the two issues which were enumerated in the body of the Ruling and upon consideration of the various provisions of *the Constitution*; it is evident that the Application dated 13th October 2022; is partially meritorious.
56. Consequently and in the premises, the Application under reference is hereby allowed to the extent that prayers (a), (c), (f), (g) and (j) of the amended Petition dated the 5th September 2022 be and are hereby struck out. However and for completeness, the limb of the Application touching on the Doctrine Res-Judicata is hereby dismissed.
57. Given the nature of suits/proceedings before the Honourable court, I direct that costs of the Application shall abide the outcome of the Petition.
58. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MAY 2023.

OGUTTU MBOYA

JUDGE

