



Pearl Homes Management Ltd v Patterson Investments Limited & 3 others (Environment & Land Petition E020 of 2022) [2023] KEELC 17863 (KLR) (29 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17863 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E020 OF 2022**

**JA MOGENI, J
MAY 29, 2023**

BETWEEN

PEARL HOMES MANAGEMENT LTD PETITIONER

AND

PATTERSON INVESTMENTS LIMITED 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

NAIROBI CITY COUNTY 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

RULING

A. Background

1. The Petitioners filed a Petition dated 20/05/2022 seeking for the following: -
 - a. A Declaration that the allocation and amalgamation of the public access road separating the Petitioner's LR No. 1870/V/84 and the 1st Respondent's LR. No. 1870/v/249 and LR No. 1870/V/250 is illegal, null and void and the same be and is hereby cancelled.
 - b. An Order be and is hereby issued directing the Respondents to remove, destroy and/or demolish all the illegal boundary walls and/or fence erected on the public access road separating the Petitioner's LR NO. 1870/V/84 and the 1st Respondent's LR No. 1870/V/249 and LR No. 1870/V/250 that are blocking access to the public road
 - c. A Declaration that the Respondents herein breached Articles 1, 10, 22, 40, 42, 43, 47, 48, 60, 62 (1) (h), (3), (4) and 70 of *the Constitution* of Kenya 2010 in respect to the Petitioner.
 - d. The Petitioner be awarded damages as against the Respondents on account of their violation of the Petitioner's right to property, access to property and expedient administrative action, as



guaranteed by Articles 40, 48 and 47 respectively, of the Constitution of Kenya, 2010 and all other enabling provisions of Law.

- e. General damages of Ksh 10,000,000/= for violation of Constitutional rights.
 - f. Costs of this Petition be borne by the Respondents; and
 - g. Any other and further orders the Court may deem fit and just to award.
2. The 1st Respondent filed a Cross-Petition and also filed a Notice of Motion dated 1/02/2023 filed under Section 3 and 19(2) of the Environment and Land Court, Section 15, 16 and 18 of the Land Registration Act, Section 1A, 1B, 3A of the Civil Procedure Rules and all enabling provisions of the Law. The Cross-Petitioners are seeking for the following prayers in the Notice of Motion: -
- i. Spent
 - ii. The Petition filed herein dated 20/05/2022 (“the Original Petition”) be struck out.
 - iii. In the alternative to Prayer 2 above, this Honorable Court be pleased to Order that the Petitioner in the Petition filed and dated 20th May 2022 (“the Original Petition”) provide security for the whole of the costs to be borne by the Applicant by way of a deposit of at least Ksh 20,000,000/= into an interest earning account in the joint names of the Advocates for the Parties herein within such time as this Honorable Court shall direct failing which the Petition dated 20th May 2022 (“the Original Petition”) be dismissed.
 - iv. This Honorable Court be pleased to grant any other Orders it deems fit and just.
3. The 1st Respondent also filed a cross-petition dated 1/02/2023 and sought the following prayers:
- a. A declaration that the claims by the Respondents in the Cross-Petition in so far as they impugn the amalgamation leading to the creation of LR No. 1870V/266 are time barred
 - b. A declaration that Patterson Investments Limited acquired and continues to hold indefeasible title to the land comprised in LR 1870V/266
 - c. A declaration that the Respondents in the Cross-Petition have breached Patterson Investment Limited’s Constitutional Rights under Article 27 (1) and Article 40 of the Constitution of Kenya and have caused loss and damage Patterson as pleaded in the Cross-Petition
 - d. A permanent injunction do issue directed at the Respondents in the Cross-Petition restraining them, whether by themselves, their agents, employee and or agents from interfering in any manner whatsoever with Patterson Investment Limited’s occupation, use and enjoyment of the property comprised in L.R 1870V/266
 - e. An order for General Damages in the sum assessed by this Court in favour of Patterson Investment Limited against the Respondents in the Cross-Petition jointly and severally
 - f. An order for Aggravated Damages in the sum assessed by this Court in favour of Patterson Investment Limited against the Respondents in the Cross-Petition jointly and severally
 - g. An order for Exemplary Damages in the sum assessed by this Court in favor of Patterson Investment Limited against the Respondents in the Cross-Petition jointly and severally.
 - h. The costs of this Cross-Petition
 - i. Interest on 5,6,7 and 8 until payment in full



4. In addition to the Cross-petition the 1st Respondent also filed a Notice of Preliminary Objection alongside the Notice of Motion Application dated 1/02/2023 challenging the jurisdiction of this court. I will therefore deal with the preliminary objection first and upon determination of the same, if I find this court has jurisdiction, I shall deal with the Notice of Motion but should I find otherwise I will have no alternative but to down my tools.
5. The preliminary objection raises four points of law being thus:-
 - a. Pursuant to Section 7 of *Limitation of Actions Act* the claim over the amalgamation of LR No. 1870/v/1249 and LR No. 1870v/1250 into LR No. 1870/V/266 is time barred
 - b. Pursuant to Sections 15, 16 and 18 of the *Land Registration Act*, this Court does not have jurisdiction over the matters raised by the Petitioner in the Original-Petition and its jurisdiction has been wrongly invoked as the Petitioner in the Original Claim did not avail itself of the remedies under the said *Land Registration Act*.
 - c. Pearl Homes Management Limited does not have locus standi to bring the Original Petition before this Honorable Court
 - d. The proceedings before this Honorable Court are otherwise an abuse of court process and ought to be struck out in entirety,
6. The Honorable Court directed that the Notice of Preliminary Objection and the Notice of Motion to be canvassed by way of written submissions. Since the Petition had been scheduled for hearing on 27/02/2023 the court vacated this date to allow parties time to canvass the two applications and the court to deliver its ruling which was scheduled for 29/05/2023.
7. The Notice of Preliminary objection dated 1/2/2023 seeks striking out of the Petition on the ground that the Petition “is time barred under sections 7 of the provisions of *Limitation of Actions Act*, Cap 22, Laws of Kenya.” The Preliminary Objection Application did not have a supporting affidavit. The Notice of Motion Application of the even date is the one that was supported by an affidavit sworn by Amip Patel, a director of 1st Respondent. He deposed that the instant suit relates to a boundary dispute between properties though it is disguised as a constitutional petition. It is premature and wrongly invokes the court’s jurisdiction.
8. He avers that the Court has no jurisdiction and the underlying dispute should be referred to the relevant surveyor. Further that the amalgamation of LR 1870/V/249, LR 1870/V/250 and LR 1870/V/266 was done in July 2006 over 16 years prior to filing the original Petition.
9. That an action in respect of a claim affecting land issues should be brought within a period of 12 years. Therefore, he deposed that the Original Petition is time-barred further that the party bringing the petition has no locus standi .
10. It was his contention that Pearl Homes Management does not own any of the land subject to the present Petition and has therefore no basis upon which it can sustain a petition and that its claim is not proprietary.
11. That Patterson, the 1st Respondent has to bear great cost due to the damning allegations since it was to break ground for a housing project that was costing Kesh 1,7000,000 as set out in the cross-petition which was now going to experience great delay due to the petition.
12. That the claims in the Original Petition are unmerited and are an attempt to subjugate Patterson’s constitutionally protected right to ownership and quiet enjoyment of property.



13. Further that the court should direct Pearl Homes Management to deposit security for costs of Kesh 20,000,000 since the Respondent believes that it may not be able to make good the costs of the suit should it be unsuccessful.
14. The preliminary objection seeks striking out of the Petition on the ground that it is barred under section 7 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya. Of significance is that section 7 concerns title to land. The section provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.
15. The law relating to preliminary objections is settled. A preliminary objection is a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*.
16. The preliminary objection herein was filed on 01/02/2023. The Original Petition is dated 20/05/2022. A perusal of the petition shows that the Petitioner contends that there are three parcels of land LR 1870/V/84 which arose out of sub-division of LR 1870/V/21 into two (LR No. 1870/v/84 & 85) the survey was approved in 1955 as depicted on FR 71/131.
17. Further that according to Registry Index Map (R.I.M) the properties on Nairobi Block 4 (Church Road) underwent a conversion from LR No. to Block No. and therefore the Petitioner’s parcel was converted from LR No. 1870/V/84 to Nairobi/Block 4/64 which is separated from the 1st Respondent’s property by a road measuring 36.5 meters wide.
18. According to the Petitioner, prior to the 1st Respondent’s LR No. 1870/V/249 and LR No. 1870/V/250 being allocated their numbers, they were originally known as LR Nos 1870/V/53 and LR No. 1870/V/54.
19. Further that t LR No. 1870/V/249 and LR No. 1870/V/250 arose after the purported amalgamation of the public access road with the 1st Respondent’s LR No. 1870/V/53 and LR 1870/V/54 and that is the action that has given rise to this Petition.
20. In the new system of referencing, the Petitioner’s property avers that its property is referenced as Nairobi/Block 4/64 while the 1st Respondent’s property is referenced as Nairobi/Block/4/596. That the Registry Index Map (R. I. M) shows a clear road between the two parcels which the Petition states to be the public access road that the 1st and 4th Respondent have illegally and fraudulently grabbed to amalgamate with the 1st Respondent’s parcel thus denying the Petitioner and its members the right to use the public access road.

The matters for determination.

- i. Whether the Preliminary Objection raised is sustainable.
 - ii. Whether the said Petitioner lacks locus standi
21. Now, the leading authority on what constitutes a preliminary objection is the case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696* where their Lordships observed that:

“----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose



of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

22. In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

23. Further, the Applicant has stated that the Petitioner invoked the jurisdiction of this court wrongly the dispute being a boundary matter and he has referred to sections 15, 16 and 18 of the [Land Registration Act](#). Section 13 of the [Environment and Land Court Act](#) provides for the jurisdiction of this Court. Section 13 (2) provides that:

13. Jurisdiction of the Court

- (1) ...
- (2) In exercise of its jurisdiction under Article 162(2)(b) of [the Constitution](#), the Court shall have power to hear and determine disputes—
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.

24. The Court in Hon. Henry Kosgey v Brian Cuthbert & Another (2019) eKLR stated that the jurisdiction of the Court in determining boundary disputes should be considered in view of section 18 of the [Land Registration Act](#) which provides;

18. Boundaries

1. Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.



2. The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
 3. Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:
Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*, (Cap. 299).
25. The Court in the above case further stated that unless a boundary is determined by the land registrar, it is premature for a party to come to this Court to ascertain its rights to the land. Similarly, the Court in *William Opondo Omalla v Gabriel Ochong Oriwo & another* [2019] eKLR found that it had jurisdiction to hear and determine the suit as the Land Registrar's office had already made its determination on the boundary.
 26. In the said case the 1st defendant had raised a preliminary objection on the basis of article 165 of *the Constitution* and Section 19 of the *Land Registration Act* and stated that the application before Court ought to be struck out as the Land Registrar is the one empowered to define the position of the boundary under Section 19 of the *Land Registration Act*; that the boundary dispute should be resolved by Land Tribunal and a survey done to clearly mark the boundaries in the presence of the parties. The preliminary objection was dismissed.
 27. In *Thika Environment & Land Court Case No. ELC 602 of 2017-Fredrick Nganga v Prof. Peter Mungai Njuho* the Court was clear that the registrar would have jurisdiction where the boundaries have not been fixed and where the boundaries have been fixed, the Court will have jurisdiction to hear and determine the matter.
 28. With regard to the instant petition the Petitioner has identified the suit properties as being LR 1870/V/249, LR 1870/V/250 and LR 1870/V/266 and he alleges that public road separating the Petitioner's suit property LR 1870/V/249 and the 1st Respondent's suit properties LR 1870/V/250 and LR 1870/V/266 has been fenced off. The petition goes ahead to provide clear coordinates of the said public road which has been fenced off. The Petitioner in the petition states that the parcels share a common boundary that allows them to access the public road. The fact that the two parcels seem to border a public road this points to a shared common boundary that demarcates the said road which is an indication to me that the boundaries were already fixed.
 29. The Petitioner has averred at paragraph 12 of the Petition that;

‘The Petitioner states that according to survey plans F/R Nos 36/4, 48/242, 73/54, 108/61, 146/121, 354/107 and 458/107 for neighboring plots shows clearly the road separating the Petitioner's property and he 1st Respondent's property.’
 30. This clearly discloses that the boundaries of the two parcels have already been determined in accordance with the *Land Registration Act*. As such, I opine that the suit is not in contravention of section 18(2) of the *Land Registration Act*.
 31. Further 1st Respondent states that the Petitioner has no locus standi to bring the petition before this court.



32. The 1st Respondent has submitted that due to the lack of the said capacity, the suit is incompetent and should be struck out. In the case of Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the Court held that ;-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others ..Vs.. City Council of Nairobi (1982) KAR 229, the Court also held that;-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

33. Locus standi is defined by the Black’s Law Dictionary, 9th Edition as; “The right to bring an action or to be heard in a given forum.”

34. The court in the case of Alfred Njau & others v City Council of Nairobi (1982) KAR 229, defined locus standi thus;“The term locus standi means a right to appear in court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such proceedings.”

35. It is trite that the lack of the requisite capacity to bring a suit goes to the root of the case, and without locus standi, the suit cannot stand. This was aptly expressed by the court in the case of Priscilla Jesang Koech V Rebecca Koech & 3 others [2018] eKLR as follows:“Locus standi is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of BV Law society of Kenya v Commissioner of Lands & others, Nakuru High Court, Civil Case No 464 of 2000. It was held that: If a party has no locus standi, then the said party cannot bring a suit to court. The issue of locus standi goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily.”

36. The law on locus standi in constitutional petitions is envisaged under article 22 and 258 of *the Constitution*. Article 22 of *the Constitution* provides that:“22.Enforcement of Bill of Rights(1)Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.(2)In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-a) a person acting on behalf of another person who cannot act in their own name; b) a person acting as a member of, or in the interest of, a group or class of persons; c)a person acting in the public interest; or d) an association acting in the interest of one or more of its members.”

37. Whereas article 258 of *the Constitution* provides as follows:“(1)Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.(2)In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—(a) a person acting on behalf of another person who cannot act in their own name;(b) a person acting as a member of, or in the interest of, a group or class of persons;(c)a person acting in the public interest; or (d)an association acting in the interest of one or more of its members.”

38. Speaking to the law on locus standi, the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR stated thus;

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi



that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in article 258 of *the Constitution*, which provides that: 258.(1) “Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention(2) in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by - ... (c) a person acting in the public interest...”

39. Similarly, in the case of *Sollo Nzuki v Salaries and Remuneration Commission & 2 others* [2019] eKLR, a member of the public filed a petition on behalf of High Court judges and judges of courts of equal status. The court, while placing reliance on several decisions, held thus:-

“It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case *the Constitution* has opened the doors of the courts very wide to welcome any person who has bona fide grounds that *the Constitution* has been or is threatened with contravention to approach the court for an appropriate relief. In fact, since article 3(1) of *the Constitution* places an obligation on every person to respect, uphold and defend *the Constitution*, the invitation to approach the court for redress as long as the person holds bona fide grounds for believing that *the Constitution* is under threat ought to be welcome....In this case the petitioner not only contends that there is not only a threat to the violation of *the Constitution* but that *the Constitution* has in fact been violated by the respondents. In light of such allegations I cannot fault the petitioner for instituting these proceedings and I hold that he was within his right to commence these proceedings. As to whether his case is merited is another matter. Locus standi is a totally different thing from the merits of the petitioner’s case.”

40. In the present circumstances, Undoubtedly, the petition is premised upon articles 22 and 258 of *the Constitution* which grant every person the right to institute court proceedings claiming that a fundamental freedom in the Bill of Rights has been denied, violated or threatened. Whereas not expressly stated, the issue at hand is clearly within the ambit of public interest whose essence was expounded on by the Supreme Court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR as follows: “Public Interest Litigation plays a transformational role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was *the Constitution*’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. The discretion is drawn from the command of article 259(1) to interpret *the Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance.”

41. While the Court has already held and found that the issue of locus standi is a Preliminary Objection rightly raised, in this instant suit, the 1st Respondent has averred that the Petitioner having filed this



Petition has no interest whatsoever over the suit property as it has not produced any documentation that shows any interest they may have over the suit property and have not shown any reason why the owner of the suit property could not file the suit by themselves.

42. However, this Court notes that the Petitioner is claiming beneficial interest over the suit property which they allege was amalgamated with the 1st Respondent's land thus denying the Petitioner and others a right of access to the road which is the suit property. In view of the foregoing, and to the extent that the petitioner is questioning the legality of alienation of the suit property, which is public land, there can be no doubt that the petitioner has the requisite locus standi to move this court in the manner that it has done.
43. That means therefore that the issue as to whether or not the Petitioner has any proprietary interest over the suit property has to be ascertained through evidence. The Court would be required to interrogate evidence produced before it and ascertain the facts in order to come into that conclusion. See the case of Presbyterian Foundation & Another ...Vs...East Africa Partnership Ltd & Another [2012]eKLR

“The fourth issue is that the 2nd Plaintiff has no proprietary interests in the subject properties and is hence not entitled to the orders under Order 40 of the Civil Procedure Rules. That may be so. However, that determination can only be made at the hearing of the application as it goes to the merit of the application itself. Since I cannot make any conclusive findings with respect to the 2nd Plaintiff's position vis-à-vis the 1st plaintiff, I cannot say that the 1st Plaintiff's suit is non-existent. It is further submitted that since the Church has registered officials and the 1st defendant has directors, a suit on their behalf can only be brought by the said agents. That submission is largely correct since a suit which is brought without the blessing of the said entities is a non-starter. Whereas the Church is not a party to this suit and therefore the issue of its filing suit does not arise, with respect to the 1st plaintiff, whether or not it sanctioned the filing of the suit is a matter of evidence. If the suit was filed without the 1st plaintiff's authorization, that would be something else. However, that is not an issue that, properly speaking, can be the subject of a preliminary objection.

Had this objection been raised by way of a formal application supported by an affidavit, that would have been a different story since the plaintiff would have had an opportunity to explain the discrepancies raised whose failure would have possibly led to a finding in favour of the defendants. In the result it is my view and I so hold that the issues raised in the notice of preliminary objection dated 28th June 2012 do not meet the threshold for

Preliminary Objections. The same are accordingly dismissed with costs to the Plaintiffs.”

44. Taking into account the above findings of the court, this Court finds that since the Petition is based on beneficial interest over the suit property, making a determination as to whether or not the Petitioner has no locus standi at this stage will be draconian as the Petition would have been determined via a Preliminary Objection and it would mean that the Court would not have had an opportunity to ventilate on the issues that would have been raised by the Petitioner. Further it is the Court's holding that the instant issue while it goes to the Jurisdiction of this Court, certain facts must be ascertained and therefore the issue at hand cannot be determined via a Preliminary Objection, as the Court will have to take evidence to determine the same. See the case of Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta



& Patrick Mbinga ...Vs...Eliud Timothy Mwamunga & Sagalla Ranchers Limited [2017] eKLR, where the Court held that:-

“Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application.

Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”.

45. Consequently, the Court finds and holds that at this juncture, it would be imprudent to dismiss the Petition it ought to be heard and facts ascertained to arrive at a just determination.

46. On whether the petition is statutorily time barred, it has been submitted by the 1st Respondent that the petitioner did not take any action on this matter since 2006 when the amalgamation was done and it is now 16 years and it is clear that from the foregoing Section 7 of the Limitations Act has kicked in. This leads me to the following question, does the Constitutional Claim founded on Bill of Rights have a time limit? .

47. There are divergent views relating to time limit on constitutional matters. In the case of Peter M. Kariuki v Attorney General (2014) eKLR, C.A at Nairobi Civil Appeal No. 79 OF 2012, the learned judge, Kiage, M’Inoti, & J. Mohammed JJ.A observed as follows;

“We have already adverted to the fact that the appellant filed his constitutional petition some twenty-three [23] years after his conviction by the court martial. We agree with the trial court that his claim was not time barred. However, the consequence of the appellant’s delay in lodging his claim was some level of prejudice to the respondent who contended that the matters complained of by the appellant had taken place a while back and many of the actors were no longer available as witnesses. We have already emphasized that the right to a fair trial must be accorded to both the appellant and the respondent.

48. In Kamlesh Mansuklal Damji Pattni & Another V Republic (supra),

“The High Court noted that *the Constitution* did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, the court added that, like all other processes of the court, it is in public interest that such applications be brought promptly or within a reasonable time, otherwise they may be considered an abuse of the process of the court. We respectfully share that view, with the rider that where there has been delay which is likely to prejudice a respondent, the applicant should account for the delay”.

49. In the case of Peter Ngari Kagume & 7 Others v Attorney General (2016) eKLR, H.C at Nairobi, Constitutional Application 128 of 2006 stated as follows;

“It is correct that section 84(1) of *the constitution* does not contain any time limit for filing constitutional applications such as the petition herein but a closer scrutiny of the way the section is couched grants the Petitioners the right to seek redress in the High Court. The



Petitioners' rights are captured by the words "... person (or that other person) may apply to the High Court for redress." Whenever, there is no time limit stipulated for doing a certain legitimate act, the court should be able to examine whether the party insisting on taking the action is within a reasonable time otherwise confusion and uncertainty will clog good administrative policies intended for good governance and public interest.

Going by the above, assuming that the Petitioners' rights and freedoms were violated in August 1982 to March 1983, would it be reasonable for the Petitioners to file their claim in court about twenty-four (24) years thereafter simply because there is no time limitation in section 84 of *the Constitution*? The foregoing question is germane and it determines this petition to a great extent.

According to the Petitioners, there is nothing wrong with the Petition having been filed about 24 years after the cause of action arose as there is no express limitation of the period within which to file the constitutional application. The Petitioners relied on the decision in a case decided at Trinidad and Tobago a Commonwealth jurisdiction, *Durity V Attorney General* [2002] UKPC 20. In the said case it was held inter alia:-

"The inherent jurisdiction of the High Court to prevent abuse of its process applied as much to constitutional proceedings as it did to other proceedings. The grant or refusal of a remedy in a constitutional proceeding was a matter in respect of which the court had judicial discretion. *The constitution* contained no express limitation period for the commencement of constitutional proceedings. The court should therefore be very slow to hold that by that limitation of constitutional proceedings was subject to a rigid and short bar - the very clearest language was needed before a court could properly so conclude."

50. And in the case of *David Gitau Njau & 9 others vs Attorney General* (2013) eKLR, H.C at Nairobi, Petition No.340 OF 2012, the court stated as follows;

"Despite my position on this issue as can be seen above, I strongly believe that I must hereby state that I am not persuaded by the authority of *Peter Ngari Kagume & Others v Attorney General* (supra) cited by the Respondent where the Applicant had filed his Petition 24 years late. I note that the judge in that case did not expressly hold that there were limitations imposed for filing of proceedings to enforce constitutional rights as enshrined under the Bill of Rights. The judge simply in my view did not find a justification as to why the suit had been commenced 24 years later. I must also state that I agree with the Respondents that it is ideally prudent to institute proceedings as early as possible from the time the alleged breaches occur but for obvious reasons, I am clear in my mind that there is no limitation period imposed by the Repealed Constitution and the rules made thereunder under Section 84 for seeking redress for violation of fundamental rights and freedoms and in the particular circumstances of this case".

51. I am also persuaded by the Court's finding in the case of *Re-Estate of Thomas Kipkosgei Yator & Another (Deceased)* (2016) eKLR, where it was held that;

"It is my considered view that bearing the nature of the claim herein and the period of delay, approximately 30 years and the circumstances surrounding the petition and the persons alleged to have been behind the process and the fact that there is no clear provision of the period of time for commencing such petitions the petition is not defeated by laches."



52. Given all the decisions referred and discussed above I am of the view that *the Constitution* does not provide for time limit within which to file a claim founded on violation of the constitutional rights under the Bill of Rights. Be that as it may, the length of delay in bringing such a claim is material depending on the circumstances of the case and the nature of the claim. This petition is therefore not time barred.

Notice of Motion Application Dated 1/02/2023

53. The Notice of Motion dated 1/02/2023 sought to have the Petition struck out and seeks the court's protection as provided under Article 40 of *the Constitution*. Further the Petitioner invokes this Court's Jurisdiction to hear the cross-petition as per Articles 22, 23, 40, 159, 258 and 259 on the grounds that this was a matter related a boundary dispute which should be adjudicated by County Surveyor and that the suit is time-barred.

54. The 1st Respondent seeks to have the Petitioner deposit Ksh 20,000,000 in an account jointly owned by the two advocates in the event they lost the Petition so that the cost of the 1st Respondent shall be paid.

55. It is grounded on the affidavit of Amip Patel, the nature of the case the general grounds herein and reasons to be adduced at the hearing hereof. That the dispute is a boundary related one and it needs to be adjudicated by the County Director of Survey and the court's jurisdiction has not arisen. Further that the petition is time-barred.

56. The 1st respondent averred that the petitioner – Pearl Homes is a mere ad empty shell bereft of known assets and their whole role is to undermine and defeat the intended project of the 1st respondent on the subject suit property. Further that the Petitioner cannot pay the costs or compensate the respondent for damages that they will incur in the whole litigation process. The reliefs sought shall meet ends of justice. By the time of writing this ruling there was no response filed by the Petitioner nor submissions by either party.

57. This court has carefully considered the application filed by the 1st respondent dated 1/02/2023, seeking to strike out the original petition No. E020 of 2022 on the ground mainly that the petitioner has brought the petition to the wrong forum and that the said petition is time-barred. Both issues were addressed in the preliminary objection. The first issue deals with matters of jurisdiction and the court has already pronounced itself through its findings in the preliminary objection.

58. The second issue is the one on costs. The Notice of Motion Application seeks this court to issue orders that require the petitioner to provide security for costs, in favour of the 1st respondent, for the petition. The order is sought based on the allegation by the 1st respondent that the petitioner is a mere ad empty shell bereft of any assets.

59. The issues involved in this dispute are such as required the petition to be heard the 1st respondent will not suffer any prejudice by remaining as a respondent in this petition. The petitioner may suffer prejudice if they are made to deposit money in act simply because the 1st respondent "fears" that they not well endowed with assets.



60. The Court in the case of Marco Tools & Explosives Ltd v Mamujee Brothers Ltd, [1988] KLR 730 held:

“As the cases show the Court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance from Noor Mohamed’s case is that the final result must be reasonable and modest.”

61. In the decisions in the following cases, The Official Receiver and Liquidator of Seipai Ltd. -vs- Narandas Nanji Chandrani (1961) E.A.C.A & Noor Mohamed Abdulla -vs- Ranchhodbhai J. Patel & Another (1962) E.A.C.A, the applicant argued that the purpose of an order for security for costs is merely to secure costs that may become payable, irrespective of whether the amount is in dispute. This is to ensure that frivolous, vexatious and/or unsuccessful proceedings do not prejudice defendants.

62. Similarly, in the case of Saudi Arabian Airlines Corporation v Sean Express Services Ltd [2014] eKLR the court held that;

“Yet again, the law is settled in this area that an order for security for costs is a discretionary one. Order 26 rule 1 of the Civil Procedure Rules actually confers discretion on the court, which is recognition that there may be many cases where a call for security for costs may be refused. In fact, even where a company is insolvent, the court would still refuse to order security to be lodged if circumstances do not support any lodgment of security. The discretion is, however, to be exercised reasonably and judicially by taking absolute reference to the circumstances of each case. Such matters as; absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; insolvency or inability to pay costs; the general financial standing or wellness of the Plaintiff; the bona fides of the Plaintiff’s claim; or any other relevant circumstance or conduct of the Plaintiff or the Defendant. And the list is not, and I do not pretend to make it exhaustive. In the latter category, conduct by the Plaintiff will include activities which may diminish the chances of or makes recovery of costs very difficult, for instance recent close or transfer of bank accounts, close or minimizing of operations, and disposal of assets. And the conduct of the Defendant includes, filing of application for security for costs as a way of oppressing or obstructing the Plaintiff’s claim, for instance, where the defence is mere sham, or there is an admission by the Defendant of money owing except there is deliberate refusal or delay to pay money owing or refusal to perform its part of the bargain”.

63. In the case of Abdalla vs Patel and another (1962) EA 447 the Court of Appeal for Eastern Africa, noted that:-

“It is right that a litigant however poor should be permitted to bring his proceedings without hindrance and have his case decided.”

64. It was stated in the case of Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others CA No. 38 OF 2013 [2014] eKLR that in an application for further security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he



is unsuccessful. In *Marco Tools & Explosives Ltd v Mamujee Brothers Ltd* (supra) the court further stated that;

“The onus is on the applicant to prove such inability or lack of good faith that would make an order for security reasonable”.

65. In the case of *Bamburi Cement Co Ltd vs Lawi Duda & 21 Others*, Civil Application No. Nai 6 of 2013, it was held that:

“The reasoning appears to be that a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided. The letter and spirit of our Constitution appears to support this position.

Article 48 provides that:

66. Article 48 of *the Constitution* provides that the state shall ensure access to justice for all persons and, if any fee is required it shall be reasonable and shall not impede access to justice. The Article is couched in mandatory terms. This means that the court has to be careful not to be swayed by a party crying foul even where there is not reason to. In the instant application I am not persuaded that the 1st respondent has placed any evidence before this court that would warrant the court making an order for security for costs.

67. Article 50 (1) of *the Constitution*, provides that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

68. I am therefore persuaded that a litigant is not to be shut out because of his/her impecunious position, as this may lead to discrimination based on the size of one’s pocket.

69. From the foregoing the applicant who is the 1st respondent has failed to persuade this court and/or attain or prove the legal standards and thresholds that warrant orders for the provisions of security for costs. There is no reasonable cause why the court should exercise its discretion in favour of the applicant.

70. The petitioner by bringing this petition in the court, is seeking justice in view of the offending and unlawful actions perpetrated by the respondents. It is therefore fair that in pursuance of justice a full trial of the petition be carried out. The application is not merited and is therefore dismissed.

Disposal Orders

71. Given the foregoing the court issues the following orders in relation to the Notice of Preliminary Objection and the Notice of Motion both dated 01/02/2023:

- i. The 1st Respondent’s Preliminary Objection is not merited and the same is dismissed entirely
- ii. The Notice of Motion Application is not merited and is also dismissed
- iii. The Costs shall be in the cause
- iv. The matter shall be mentioned on 06/06/2023 for further directions on disposal of the petition.

It is so ordered.



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

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MOGENI J

JUDGE

In the virtual presence of :-

Ms Atieno holding brief for Mr. Koceyo for Petitioners

Ms. Muthee holding brief for Mr.Wafula for the 3rd Respondent

Ms Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

