



Jamhuri Commercial Center Welfare Association v Njuguna & 5 others (Environment & Land Petition E008 of 2022) [2023] KEELC 17640 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E008 OF 2022**

JO MBOYA, J

MAY 11, 2023

BETWEEN

JAMHURI COMMERCIAL CENTER WELFARE ASSOCIATION . PETITIONER

AND

MORRIS MWIRIGI NJUGUNA 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

THE NATIONAL LAND COMMISSION 3RD RESPONDENT

THE CHIEF LAND REGISTRAR 4TH RESPONDENT

NAIROBI METROPOLITAN SERVICES 5TH RESPONDENT

**DIRECTOR PLANNING AND DEVELOPMENT NAIROBI
COUNTY 6TH RESPONDENT**

JUDGMENT

1. The Petitioner herein commenced the instant proceedings by way of Petition dated the 8th March 2022; and in respect of which same has sought for a plethora of reliefs. For good measure, the reliefs at the foot of the Petition are as hereunder;
 - i. A Declaration do issue that the title issued to the 1st Respondent in relation to the Property known as L.R No. Nairobi/Block 63/787; Jamhuri Phase 2, is invalid for being obtained Fraudulently.
 - ii. A Declaration do issue that the acquisition and erection of Structures on Property known as L.R No. Nairobi/Block 63/787; Jamhuri phase 2, was illegal and unlawful and violated the Petitioner's Rights to own and enjoy their respective Properties under Article 40 of *the Constitution* 2010.



- iii. A Declaration that the failure of the 3rd and 4th Respondents to Investigate the root of Title, even after their Officers testified in court over the Fraudulent acquisition of the Title and there being a decision concerning the same contravened the Petitioner's Rights to Fair Administrative Action under Article 47 of *the Constitution*.
 - iv. A Declaration that the failure by the 5th and 6th Respondents to Demolish the Structure erected on the Property known as L.R No. Nairobi/Block 63/787; Jamhuri Phase 2, without their approval violated the Petitioner's Rights under Articles 40, 42 and 43 of *the Constitution* 2010.
 - v. An Order do issue directing the 5th and 6th Respondents to Demolish the illegally erected structures on Property known as L.R No. Nairobi/Block 63/787; Jamhuri Phase 2, and restore same to its rightful use.
 - vi. An Order do issue directing the 3rd and 4th Respondents to revoke and cancel title issued to Morris Mwirigi Njuguna over property known as L.R No. Nairobi/Block 63/787; Jamhuri Phase 2.
 - vii. An Order that the Respondents do pay and Compensate the Petitioner for the breaches and any Loss that arises from the 1st Respondent's action.
 - viii. Cost of the suit/ Petition.
 - ix. Such other orders that this Honourable court may deem just to grant.
2. It is instructive to state that the Petition herein is supported by two affidavits sworn by John Mwenda Rutere and Peter Wagondu Mwangi; both of which are sworn on the 8th March 2022, respectively.
 3. In addition, the deponents have exhibited and attached assorted annexures, inter-alia, a copy of the Judgment arising out of Nairobi CMCR NO. 1517 of 2006; Judgment arising from Nairobi HCRA No. 492 of 2009 and a host of Letters relating to complaints that were escalated to the City Council of Nairobi (now defunct)/ County Government of Nairobi.
 4. Inevitably, upon being served with the Petition and the attendant documents, the 1st Respondent herein responded thereto vide a Replying affidavit sworn on the 29th September 2022; and in respect of which same has exhibited various annexures, inter-alia, a copy of Letter of allotment, Revenue receipts evidencing payment of Stand premium; and the Certificate of Lease, which was ultimately issued in respect of the suit property. Further, the 1st Respondent has also exhibited a copy of Judgment arising out of Nairobi HCRA No. 492 of 2009, wherein same was acquitted of the charge pertaining to obtaining the Title over and in respect of the suit property by fraud.
 5. On the other hand, the 2nd, 4th and 5th Respondents filed a Notice of Appointment through the office of the Honourable Attorney General and thereafter same did not file any Response at all.
 6. On the other hand, the 3rd Respondent herein also filed a Notice of Appointment and thereafter filed Grounds of Opposition dated the 19th July 2022. However, it is instructive to point out that the Grounds of Opposition were filed in respect of the Application for Conservatory Orders, which Application was canvassed and thereafter disposed of vide Ruling of the Honourable court rendered on the 21st November 2022.
 7. On behalf of the 6th Respondent, a Replying affidavit was duly filed in court and same was sworn by one, Abwao Eric Odhiambo, who stated that same is the Acting County Solicitor of (sic) the 6th Respondent. Notably, the 6th Respondent has acknowledged that same received various Complaints



from the Petitioner pertaining to and concerning the irregularity and illegality in the allocation of the suit property.

8. Moving forward, the Petition herein came up for Directions on the 9th February 2023; whereupon counsel for the Parties agreed to canvass and dispose of the Petition by way of and on the basis of Affidavit evidence. In addition, counsel also agreed to file and exchange written submissions.

Submissions by the Parties

a. Petitioner's Submissions:

9. The Petitioner filed written submissions dated the 22nd February 2023; and in respect of which same has raised, highlighted and canvassed three (3) issues for consideration and determination by the Honourable court.
10. Firstly, learned counsel for the Petitioner has submitted that the Petitioner's Rights and Fundamental Freedoms were breached, violated and infringed upon by the Respondents herein and in particular, the 4th, 5th and 6th Respondents, who allocated and alienated the suit property to and in favor of the 1st Respondent, albeit without taking into account that the suit property had hitherto been reserved as a Parking lot/bay, for and on behalf of the Petitioner and her Members.
11. Furthermore, learned counsel submitted that the Members of the Petitioner Association herein are Plot owners, who own properties adjacent to the suit property and that the Members of the Petitioner bought, acquired and developed their respective Plots, knowing that the Suit Property had been reserved and earmarked as a parking bay for their Tenants and other users of the Commercial Premises constructed on the Members Properties.
12. As a result of the irregular and illegal allocation of the suit property to and in favor of the 1st Respondent, Learned counsel for the Petitioner has submitted that the Members of the Petitioner have thus been subjected to gross violations of their Constitutional Rights, inter-alia violation of their Right to Property, Right to Clean and Healthy Environment, Right to Human Dignity; and thus the Members of the Petitioner are entitled to protection under the law.
13. Secondly, Learned counsel for the Petitioner has submitted that the allocation/alienation of the suit property to and in favor of the 1st Respondent was wrought and fraught with irregularity, illegality and fraud. In this respect, Learned Counsel has contended that the Suit Property had indeed been reserved as a Parking bay/lot for and on behalf of the members of the Petitioner; and especially for use of the various persons accessing the Properties belonging to the Members of the Petition.
14. In addition, Learned Counsel has further submitted that the Letter of allotment which was issued to and in favor of (sic) the 1st Respondent related to a Plot which was situated in Kibera and not at Jamhuri Estate Phase 2. However, learned counsel has added that the 1st Respondent herein irregularly and unlawfully procured or caused to be procured a fraudulent PDP; which altered and distorted the ground position of (sic) the Plot which had hitherto been allocated to the 1st Respondent.
15. On the other hand, Learned counsel for the Petitioner has further submitted that the Part Development Plan, (PDP) which was relied upon for purposes of generating and preparing the documentation, culminating into the issuance of the certificate of lease in favor of the 1st Respondent, was found to have been fraudulent. Consequently, learned counsel has emphasized that the root of the 1st Respondent's Certificate of Title is vitiated by irregularity, illegality and fraud.



16. Premised on the foregoing, Learned counsel for the Petition has therefore submitted that the 1st Respondent's title to and in respect of the suit property, cannot acquire constitutional protection. In any event, learned counsel has invoked and relied upon the provisions of Article 40(6) of *The Constitution* 2010, which underscores that the Constitutional Rights guaranteed under Article 40 do not extend to (sic) property that has been unlawfully acquired.
17. In support of the foregoing submissions, Learned counsel for the Petition has cited and relied on various decisions, inter-alia, William Musembi & 13 Others versus Moi Educational Center Company Ltd & 3 Others (2021)eKLR, Center for Human Rights & Democracy & Another versus The Judges & Magistrate's Vetting Board & 2 Others (2012)eKLR and Munyua Waiyaki versus Hiram Gathiha Maina (2013)eKLR, respectively.
18. Lastly, Learned counsel for the Petitioner has submitted that the Petitioner herein is duly mandated and authorized to invoke the provisions of *the Constitution*, 2010; and to mount the instant Petition for and on behalf of her members. In this respect, the Counsel invited the Honourable Court to take cognizance of the Provisions of Articles 22 and 258 of *the Constitution*, 2010.
19. Furthermore, learned counsel has submitted that the Petitioner herein has placed the Honourable Court sufficient, plausible and credible material to show that her Rights and Fundamental Freedoms have been breached, violated and infringed upon. In this regard, Learned counsel has thus invited the Honourable court to find and hold that the Petitioner has duly proved/ established her case; and thus same is entitled to the reliefs sought at the foot of the Petition.
20. Invariably, Learned Counsel for the Petitioner has contended that the Petitioner has been able to discharge the Burden of proof as pertains to the various issues articulated at the foot of the Petition. Consequently and in the premises, Learned Counsel has invited the Honourable court to proceed and award the reliefs sought.

b. - 1st Respondent's Submissions:

21. The 1st Respondent filed Written submissions dated the 21st March 2023; and in respect of which Learned Counsel has highlighted and amplified Four (4) pertinent issues for consideration and determination by the Honourable court.
22. First and foremost, Learned counsel for the 1st Respondent has submitted that the Burden of proof, as pertains to the issues raised at the foot of the Petition, laid on the shoulders of the Petitioner. In this regard, Learned counsel has cited, quoted and relied on the provisions of Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.
23. Nevertheless, Learned counsel for the 1st Respondent has submitted that despite the fact that the Petitioner was obligated to prove their claim before the Honourable court, same has failed to adduce, tender and/or avail before the Honourable court the requisite evidence to show that her Constitutional Rights and Fundamental Freedoms have been breached, violated and or infringed upon.
24. Moreover, Learned counsel for the 1st Respondent has submitted that it was not enough for the Petitioner to cite various provisions of *the Constitution* and supply particulars of (sic) the alleged violations. Instructively, counsel has pointed out that it behoved the Petitioner to provide evidence to verify and establish the particulars alluded to in the Petition.
25. Furthermore, having failed to tender and or avail to the Honourable court evidence to verify the various particulars alluded to the Petition, learned counsel for the 1st Respondent contended that the Petitioner's claim was thus not proved and hence ought to be dismissed.



26. To anchor the submissions pertaining to the Burden and Standard of proof, Learned counsel for the 1st Respondent has cited and relied on, inter-alia, Anarita Karimi Njeru versus Republic (1979)eKLR, Mumo Matemtu versus Trusted Society of Human Rights Alliance & 5 Others (2013)eKLR and Matiba versus Attorney General (1990)KLR, 666, respectively.
27. Secondly, learned counsel for the 1st Respondent has contended and submitted that the Petitioner herein is devoid and bereft of the requisite Locus standi to commence, originate and maintain the instant proceedings. In this respect, learned counsel has submitted that the Petitioner is not a body Corporate or Juristic person, imbued with the requisite capacity to commence and maintain proceedings before the Honourable court.
28. According to Learned counsel for the 1st Respondent, the proceedings which have been commenced by and on behalf of the Petitioner herein are thus a nullity ab initio and incapable of redemption, by any amount of amendment. Consequently, counsel has invited the Honourable court to proceed and strike out the entire Petition.
29. In support of the submissions that the Petitioner herein could not originate and commence the instant proceedings in her name, learned counsel for the 1st Respondent has cited and relied on the decision in the case of Housing Finance Company of Kenya Ltd v Embakasi Youth Development Project (2004)2 KLR, wherein it has been stated that the court underscored the fact that only a Juristic person is endowed with Legal Personality; and thus capable of commencing and maintaining proceedings before a court of law.
30. Thirdly, learned counsel for the 1st Respondent has submitted that the Petition by and on behalf of the Petitioner touches on and concerns a dispute over the suit property, which was allocated to and thereafter registered in the name of the 1st Respondent in the year 2001. In this regard, counsel has thus contended that the subject Petition has been mounted with inordinate delay and is thus caught up by the doctrine of Latches.
31. In respect of the submissions that the Petition is barred by the Doctrine of Latches, learned counsel for the 1st Respondent has relied on the case of Edward Akong'o Oyugi & 2 Others versus Attorney General (2019)eKLR and Welington Nzioka Kioko versus Attorney General (2018)eKLR, respectively.
32. Finally, Learned counsel for the 1st Respondent has also submitted that the entire Petition mounted by and on behalf of the Petitioner constitutes and amounts to an abuse of the due process of the Honourable court. Invariably, learned counsel has contended that the issues at the foot of the Petition have been known to the Petitioner over time, since the suit property was allocated to the 1st Respondent.
33. Furthermore, counsel has contended that the instant Petition is a disguised, albeit subtle attempt by the Petitioner to appeal against and upset the Judgment rendered by Hon. Mbogoli Msagah, Judge, (as he then was), in respect of Nairobi HCRA No. 492 of 2009, wherein the 1st Respondent was (sic) acquitted of the charge of fraudulently obtaining Certificate of lease over the suit property.
34. As pertains to and in respect of the submissions on abuse of the Due process of the Court, Learned counsel has cited and relied on the holding in the case of Muchanga Investment Ltd versus Safaris Unlimited (Africa) Ltd & 2 Others (2009)eKLR.
35. In view of the foregoing, Learned counsel for the 1st Respondent has contended that the Petitioner has failed to discharge the Burden of proof cast upon her by law. In this regard, it has been contended that the Petition thus ought to be Dismissed.



c. 6th respondent's submissions:

36. The 6th Respondent filed Written submission dated the 4th May 2023; and in respect of which Learned Counsel has highlighted and canvassed three issues for due consideration and ultimate determination by the Honourable court.
37. Firstly, Learned counsel for the 6th Respondent has submitted that the Petitioner herein has failed to particularize the violations, if any, that are contended to have been occasioned by the 6th Respondent. In this respect, Learned counsel has submitted that it was not enough for the Petitioner herein to make blanket allegation as against the 6th Respondent; and thereafter imagine that the Blanket allegation would suffice.
38. In support of the submissions that the Petitioner ought to have specifically pleaded and supplied particulars of the impugned violations, Learned counsel for the 6th Respondent has cited and relied on, inter-alia, the case of Annarita Karimi Njeru versus The Attorney General (1979)eKLR, Mumo Matemumu versus Trusted Society of Human Rights Alliance & 5 Others (2014)eKLR, Kiambu County Tenants Welfare Association versus Attorney General & Another (2017)eKLR and Cristian Juma Wabwire v Attorney General (2019)eKLR, respectively.
39. Secondly, Learned counsel for the 6th Respondent has submitted that upon receipt of the various Complaints by the Petitioner herein, pertaining to and concerning the irregular and illegal allocation of the suit property, the 6th Respondent took appropriate steps including generating a Letter dated the 20th of February 2001, wherein same impressed upon the Commissioner of Lands to revoke the impugned Letter of allotment issued in favor of the 1st Respondent.
40. Additionally, Learned counsel for the 6th Respondent has further submitted that the 6th Respondent also issued and served an Enforcement Notice upon the 1st Respondent relating to the illegal structures, which same had erected on the suit property. In any event, Learned Counsel added that the 6th Respondent ultimately moved and demolished the illegal structures that had been constructed by the 1st Respondent.
41. In the circumstances, Learned counsel for the 6th Respondent has submitted that the allegations that the 6th Respondent has not taken steps and measures against the 1st Respondent, are therefore misleading and incorrect.
42. Lastly, learned counsel for the 6th Respondent has submitted that the Petitioner herein has annexed and exhibited various Photographs, with a view to impressing upon the Honourable Court that the 6th Respondent remained inactive and insolent, despite the complaints by the Petitioner. However, Learned counsel has added that the impugned photographs, showing (sic) the illegal structures, are devoid of probative value, insofar as same have not been accompanied with the requisite Electronic Certificate, as required vide the Provisions of Section 106 B of the Evidence Act, Chapter 80, Laws of Kenya.
43. Owing to the foregoing, Learned Counsel has thus impressed upon the Honourable court to expunge and strike out the impugned Photographs. In this regard, Learned counsel has cited and elide on inter-alia Republic versus Barisa Wau Matuguda (2011)eKLR and Nonni Gathoni Njenga & Another versus Catherine Masita & Another (2014)eKLR.
44. In a nutshell, Learned counsel for the 6th Respondent has submitted that the allegations pertaining to and concerning breach, violation and infringement of the Petitioner's Constitutional Rights and Fundamental Freedoms by the 6th Respondent, have neither been established nor proved.



45. Consequently, Learned Counsel for the 6th Respondent has implored the Honourable court to find and hold that the Petition is devoid of merits and thus to dismiss the Petition as against the 6th Respondent.

Issues for Determination

46. Having reviewed and evaluated the Petition and the various Pleadings/Responses filed by the Parties; and upon taking into account the written submissions duly filed, the following issues do arise and are thus worthy of determination;
- i. Whether the Petitioner herein is seized and possessed of the requisite Locus standi to commence, mount and maintain the instant Petition.
 - ii. Whether the Petition herein contains the requisite provisions of *the constitution* and the particulars of Violations/Infringement complained of.
 - iii. Whether the Certificate of Title issued in favor of the 1st Respondent was procured and obtained irregularly, illegally and by fraud; and if so then; whether same falls within the purview of Article 40(6) of *The Constitution* 2010.
 - iv. Whether the Petitioner has demonstrated/established the breach/violation of her Constitutional Rights; and if so, what Reliefs ought to be granted.

Analysis and Determination

Issue Number 1

Whether the Petitioner herein is seized and possessed of the requisite Locus standi to commence, mount and maintain the instant Petition.

47. From the preamble and the introductory paragraphs of the petition, it has been stated that the Petitioner is a welfare organization for the residents of Jamhuri Estate Phase II Nairobi, comprising of 7 Property owners, whose details have been alluded to at the foot of paragraph 1 of the Petition. Furthermore, it has also been stated that the Petitioner herein is a duly registered Association.
48. In addition, the Petition has been supported by two affidavits sworn by, inter-alia, John Mwenda Rutere, who has stated that same is the chairperson of the Petitioner herein. Instructively, the averments pertaining to and concerning the status of the Petitioner as an Association have not been controverted and/or challenged by any affidavit.
49. Furthermore, it is not lost on this Honourable court that the proceedings before the court were commenced and originated vide Petition and wherein the Petitioner contends that the Rights and Fundamental Freedoms of her Members have been breached, violated and/or infringed upon. In addition, the Petition has thereafter adverted to the various provision of *the Constitution*, 2010; which are contended to have been breached, violated and/or infringed upon.
50. Invariably, what is before the Honorable court is not an Ordinary suit, which has been filed and or commenced by a Society/Association. For clarity, if what was before the Honourable Court was an ordinary suit, then no doubt the Association would not have been possessed of the requisite Legal Capacity to commence and mount the proceedings, insofar as an Association is not a Juristic body/entity.



51. However, as pertains to commencement and prosecution of a Constitutional Petition, the obtaining Legal terrain/regime is completely different and distinct. Instructively, the provisions of Article 22 and 258 of *the Constitution* 2010, espouses and entrenches the position that allows, inter-alia, societies, community-based organizations, (CBOs) and even Associations, the Petitioner not excepted, to sue on her behalf and on behalf of her Members, where the Rights and Fundamental Freedoms of her Members have been breached, violated, infringed upon and or threatened.
52. Furthermore, the position as pertains to the Locus standi in Constitutional matters was elaborately and eloquently discussed by the Court of Appeal in the case of Mumo Matemu versus Trusted Society Alliance of Human Rights & 5 Others (2013)eKLR, where the court stated and observed as hereunder;
- (28) It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of *the Constitution* in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest.
- Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013—which, in view of its long title, we take the liberty to baptize, the “Mutunga Rules”, to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under *the Constitution* is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of *the Constitution*.
- (29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of *the Constitution*.
53. Guided by the ratio decidendi, espoused in the decision (supra), it is difficult to understand and or appreciate the gravamen of the 1st Respondent’s submissions that the Petitioner herein is neither seized nor possessed of the requisite Locus standi to comment and mount the Petition.
54. Be that as it may, I am afraid, the submissions in this respect is not only misleading but legally untenable.
55. Lastly on this issue, it is worthy to recall that the 1st Respondent had hitherto raised and canvassed Preliminary objection dated the 4th April 2022; and in respect of which the 1st Respondent had, inter-alia, contended that the Petitioner was not seized of the requisite Locus standi to mount and maintain the instant Petition.



56. It is instructive to state that having raised the question of Locus standi vide the Notice of Preliminary objection, the Honorable court was called upon to interrogate the question of Locus standi and thereafter rendered a determination in respect thereof.
57. Suffice it to point out that this Honorable court ultimately rendered a Ruling on the 21st November 2022; wherein the Honourable court found and held that the Preliminary objection questioning the Locus standi of the Petitioner was misconceived.
58. For good measure, the Honourable court rendered itself in the following manner;

“In view of the foregoing, I come to the conclusion that indeed the Petitioner herein is seized of the requisite capacity to commence, originate and maintain the subject proceedings, for and on behalf of her members”.
59. Having come to the conclusion that the Petitioner was seized of the requisite Locus standi, the question of locus cannot be revisited by this Honorable court, either in the manner adverted to or at all. Clearly, any attempt to revisit the question of Locus standi would be tantamount to the court on sitting on Appeal on its own decision which is a legal anathema.
60. In a nutshell, it is my finding and holding that the contention premised on the question of Locus standi is indeed misconceived and otherwise legally untenable.

ISSUE NUMBER 2

Whether the Petition herein contains the requisite provisions of *the Constitution* and the Particulars of Violations/Infringement(s) complained of.

61. Both the 1st Respondent as well as the 6th Respondent have contended that the subject Petition has neither articulated the breaches, violations and/or infringements complained of; nor does the Petition contains the requisite particulars of the violations.
62. Premised on the contention that the subject Petition does not contain the requisite particulars of violations or the infringements complained of, both the 1st and 6th Respondents, have therefore impressed upon the Honourable court to find and hold that the Petition is incompetent, defective and thus incapable of anchoring the claims before the Honourable court.
63. To answer the complaints ventilated by and on behalf of the 1st and 6th Respondents, one needs to look at the Petition in its entirety. In this regard, it is imperative to state that the Petition has articulated the various provisions of *the Constitution*, 2010; which are stated to have been breached, violated and infringed upon; and furthermore, the Petition also contains succinct particulars of the breaches complained of.
64. Looking at the Petition with an objective lens and coupled with the contents of the supporting affidavits, it is difficult to comprehend the claims alluded to and canvassed by the 1st and the 6th Respondents, that the petition is devoid of specificity as pertains to the violations complained of.
65. In respect of the 1st Respondent, various breaches and violations have been alluded to inter-alia, that the allocation and ultimate issuance of the Certificate of Title in his favor has encroached upon and thereafter diminished a Road reserve leading to the Properties belonging to the Members of the Petitioner Association.
66. In addition, it has also been contended that upon the allocation and ultimate issuance of the certificate of title in favor of the 1st Respondent, same proceeded to and erected Mabati structures on the suit



- Property that adjoins the Properties belonging to the Members of the Petition; and thus depriving the Members of the Petitioner of the land which had hitherto been reserved as a car park.
67. On the other hand, the Petitioner has also supplied particulars and evidence to show that the impugned structures erected by the 1st Respondent, were so erected without the requisite approval by the 5th and 6th Respondents and that same have infringed upon her Right to Clean and Healthy Environment, which Article 42 of *the Constitution*, 2010, bestows upon the Members of the Petitioners Association.
68. On behalf of the 6th Respondent, particulars have been availed that despite her Statutory and Constitutional mandate; same did not carry out the requisite enforcement by demolishing the illegal structures which were constructed by the 1st Respondent albeit without the requisite approvals.
69. Clearly and in my humble understanding, the Petition clearly articulates the particulars of breach and infringements as against of the 1st and 6th Respondents.
70. For good measure, I beg to point out that it is imperative that every Petition must not only articulate the requisite provisions of *the Constitution* that are alleged to have been breached, violated and/or infringed upon; but same must also supply the requisite particulars pertaining to the breaches complained of. However, in demanding provision of such particulars and specificity, we must not confuse specificity with mathematical exactitude, accuracy and precision.
71. In the case of *Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 Others* (2013)eKLR, the Court of Appeal dealt with and spoke to the situation and held thus;
- (41)) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.
72. In my humble, albeit considered view, the Complaints by and on behalf of Learned counsel of 1st and 6th Respondents pertaining to lack of the requisite particulars, amounts to semantics and splitting hairs. In addition, the complaints are otherwise a red- herring.

Issue Number 3

Whether the Certificate of Title issued in favor of the 1st Respondent was procured and obtained irregularly, illegally and by fraud; and if so then; whether same falls within the purview of Article 40(6) of *The Constitution* 2010.

73. The Petitioner herein contends and avers that the suit property was reserved as a parking-bay/lot for the Members of the Petitioner and the various customers who would use the commercial premises, situated within the Jamhuri Phase II Estate. In this regard, the Petitioner advances a position that what constitutes the suit property was already reserved for Public use and thus same was not available for (sic) allocation/alienation in favor of the 1st Respondent.



74. On the other hand, the 1st Respondent contends that what constitutes the suit property was duly and lawfully allocated to his Company, namely, Rurago Enterprises vide Letter of allotment issued on the 7th February 1995; and thereafter, same proceeded to comply with the terms of the Letter of allotment, inter-alia, payment of the requisite stand premium. Furthermore, the 1st Respondent avers that upon complying with the terms of the Letter of allotment, the Commissioner of Land processed and ultimately issued the Certificate of Lease in his favor.
75. In short, it is the 1st Respondent's position that the allocation of the suit property and the consequential registration of same in his name was therefore procedural, lawful and legitimate. In addition, the 1st Respondent avers that by virtue of Certificate of Lease, same is therefore the lawful owner of the suit property and thus entitled to Constitutional and Statutory protection.
76. Other than the foregoing, the 6th Respondent avers that what comprises of the suit property was a Plot that was reserved as a Parking lot/bay and also comprises of a portion of a Service road, which was meant to serve the Commercial Plots which had been allocated to various Members.
77. Additionally, the 6th Respondent avers that the suit property was subsequently allocated to and in favor of the 1st Respondent, albeit without the knowledge and concurrence of the City Council of Nairobi. Instructively, the position of the 6th Respondent is contained and enumerated in, inter-alia, the Reprising affidavit sworn on the 7th April 2022; and the Letter dated the 20th February 2001.
78. Despite the various positions alluded to by the named Parties, it is imperative to recall that the issue pertaining to the propriety or otherwise of the Certificate of Title issued in favor of the 1st Respondent was the subject of criminal proceedings vide Nairobi CMCR No. 1517 of 2006 Between Republic v Morris Njunguna Mwirigi. For clarity, the Honourable court found the 1st Respondent herein guilty of fraudulent acquisition of the Certificate of Lease in respect of the suit property.
79. Dissatisfied with the Judgment, conviction and sentence of the Trial court, the 1st Respondent herein, (who was the accused) filed/lodged an Appeal before the High Court vide HCRA No. 492 of 2009, wherein the 1st Respondent challenged the entirety of the findings before the Honourable trial court.
80. Inevitably, the criminal appeal which was lodged by the 1st Respondent (details in terms of the preceding paragraph) was heard and determined by the High court in terms of the Judgment rendered on the 27th November 2012.
81. Suffice it to point out that the Appeal which was lodged by the 1st Respondent was allowed and the conviction and sentence were quashed and set aside. However, in the course of rendition of the Judgment, the Learned Judge made very pertinent findings/ observations pertaining to the manner in which the Certificate of title was issued in favor of the 1st Respondent.
82. In this respect, it is therefore imperative to revert to the Judgment rendered in the case of Morris Njuguna Mwirigi versus The Attorney General (2012)eKLR, where the Learned Judge observed, inter-alia, as follows;

“There is no doubt that there was an anomaly in the process that led to the issuing title to the Appellant. The survey that was carried out was premised on a wrong plan, thus the alleged variation in the land that was allocated as Plot C, a residential allocation in Kibera Nairobi, and land that was eventually registered in the name of the Appellant as Block 63/787 in Jamhuri Estate, Nairobi.

It is also apparent that the second photocopy PDP was fraudulent to the effect that, as PW3 testified “...on the photocopy, plot C was changed to another location” and during cross-



examination that, “Then Plot C was erased and surveyed elsewhere.” The evidence of the existence of the two PDPs was not rebutted by the defence.

On the basis of PW3’s testimony I therefore respectfully differ with the trial magistrate that, “There was evidence from PW3 that the original PDP approved by the Commissioner of Lands specified the plot in question to be a car park(parking bay). However, I am in agreement with regard to the finding that, “the PDP used by the accused person and his private surveyor was changed and placed plot C in a different poster.”PW3 testified that the original PDP that was approved was with respect to residential plots, one of which was Plot C that was offered to the Appellant.

83. From the analysis and explication of the totality of the facts that were placed before the Honorable Judge, there is no gainsaying that indeed the Judge found and held that there was fraud pertaining to the Part Development Plan that was used and the resultant issuance of the certificate of title. Clearly and to my mind, there is a clear finding that the 1st Respondent’s title was fraudulently procured and obtained.
 84. Nevertheless, the Honorable Judge proceeded to and discussed the question of nexus between the fraudulent title and the 1st Respondent, with a view to ascertaining whether the 1st Respondent was solely/ personally responsible for the fraudulent activities touching on the fictitious PDP, to warrant a criminal conviction.
 85. However and notably, the Learned Judge found that no evidence was placed before the Honourable Court to denote and confirm that it was the 1st Respondent who was responsible for the creation and preparation of the impugned PDP.
 86. Notwithstanding the foregoing, what is not lost on this Honorable court is the explicit finding that the Part Development Plan which used and relied upon to allocate the Property in favor of the 1st Respondent, was altered in such a manner that a Plot which was hitherto situated in Kibera, was miraculously transplanted to and plotted within Jamhuri Estate.
 87. In my humble view, there is clear, plausible and unequivocal evidence that the Certificate of title which was ultimately issued in favor of the 1st Respondent, was clearly vitiated by fraud, irregularity and illegality. Indeed and for good measure, the 1st Respondent was never allocated a Plot within Jamhuri Estate to warrant the issuance of the impugned Certificate of title.
 88. Secondly in this regard, it is imperative to recall that what comprises of the suit property had hitherto been reserved as a Parking lot/bay and Service road, respectively. Having been reserved, it is deemed that the ground that comprises the suit property stood alienated and was thus not available for (sic) allocation or further alienation, in the manner that was done on account of the impugned Letter of allotment issued in favor of the 1st Respondent.
 89. As concerns the fact that Land which has already been reserved cannot be allocated or alienated any further, it is appropriate to take cognizance of the decision in the case of Benja Properties Limited versus Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, where the Court of Appeal held as hereunder;
25. In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the



5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.

90. Additionally, the issue as to whether land which has already been reserved for Public use, is available for allocation or alienation was canvassed and addressed by the court in the case of Republic versus Land Registrar Kilifi and Ex-parte Daniel Ricci (2013)eKLR.
91. For coherence, the Honourable court stated and observed as hereunder;
1. For the court to arrive at a decision of granting the orders being sought in the current Motion, the court must be certain that indeed the Ex-parte Applicant’s title to the suit property is valid and that the land in question was not set aside for public purpose.
 1. I say so because if the suit property was indeed set aside for public purpose, then such land cannot be available for allocation.
 2. Where public land is allocated to a private person, the court has an obligation not to recognise such a title, because as it has been said time and again, public interest in a property will always outweigh an individual’s right to own the same property
92. Premised on the foregoing, I come to the inescapable conclusion that what now comprises of the suit property and which was allocated to and in favor of the 1st Respondent, was reserved land that was no longer available for allocation, either in favor of the 1st Respondent or at all.
93. In any event, it is not lost on me that I have come to the conclusion that the 1st Respondent’s Certificate of title was procured and obtained by fraud and corrupt practices, which bespeaks the manner in which the Part Development Plan was altered and thus aiding the offensive transplantation of (sic) what had been allocated from Kibera to Jamhuri Phase II Estate.
94. In my humble and considered view, once the court finds and holds that the Certificate of title, which is held by a particular person was procured and obtained irregularly and illegally, the Honourable court is called upon to impeach and invalidate such title.
95. Invariably and in any event, it is appropriate to underscore that Article 40 of *the Constitution* 2010, does not extend to guarantee property rights over and in respect of a Property that was obtained illegally and unlawfully.
96. Whilst articulating the import and tenor of Article 40(2) of *The Constitution* 2010, the Supreme Court of Kenya in the case of William Musembi & Others versus Moi Educational Center Company & 3 Others (2021)eKLR, held as hereunder;
48. These constitutional rights as guaranteed under the cited provisions are only in relation to property that has been legally acquired, and does not extend to property that has been unlawfully acquired. In that regard, Article 40(6) of *the Constitution* is instructive and provides that;

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”.
97. Furthermore, the issue as to whether a title to property, which was procured and obtained fraudulently or illegally in violation of the established provision of the law can be vindicated, was also canvassed and



addressed by the Court of Appeal in the case of Chemey Investments Ltd versus Attorney General & 2 Others (2018)eKLR, where the court stated and held thus;

“We also do not think that the learned judge can be criticised for referring in his judgment to section 40(6) of the current Constitution which expressly provides that title to property which is obtained illegally does not enjoy constitutional protection. The learned judge was very clear in the judgment that it was the former Constitution, which applied in this case, and merely referred to Article 40(6) of the current Constitution to make the point, which he was entitled to do, that henceforth by dint of express constitutional edict, those who illegally acquire property cannot take refuge under the right to property that *the Constitution* guarantees”.

98. Finally, the question as to whether land which has been reserved could be alienated was elaborately dealt with by the Supreme Court in the case of Dina Management Ltd versus The County Government of Mombasa and Others, Supreme Court Petition No. 8 (E010) OF 2021 (Unreported), where the court stated and held as hereunder;

(98) Under Section 2 of the GLA, unalienated land was defined as Government land which is not for the time being leased or which the Commissioner of Lands has not issued any letter of allotment. Under Section 3 of the GLA, the President Petition No. 8 (E010) of 2021 35 had power to, make grants or dispositions of any estates, interests or rights in or over unalienated government land, subject to any other written law. Section 9 of the GLA, empowered the Commissioner of Lands “to cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner.” Further, under Section 10 of the GLA, the Leases of town plots could only be granted for any term not exceeding one hundred years.

(99) The 1st respondent averred that a survey plan of the area drawn in the year 1971 showed that the suit property was in that year designated as an open space and not private land, and which open space was reserved for a public road. The 2nd to 6th respondents in their submissions similarly indicated that prior to the allocation of the suit property to H.E. Daniel T. Arap Moi, the suit property was an open space.

(100) From the record and submissions, we note that the land was first allocated to H.E. Daniel T. Arap Moi in 1989. The applicable law at the time was the Land Planning Act, Cap 303, which was repealed by the Physical Planning Act Cap 286 which has since been repealed by the *Physical and Land Use Planning Act* No.13 of 2019. The Land Planning Act made provision for open spaces. Regulation 11(3) of the Development and Use of Land (Planning) Regulations, 1961 made under the Land Planning Act defined “public purpose” as any non-profit making purpose declared by the Minister to be a public purpose and includes educational, medical and religious purposes, public open spaces and car parks; and Government and local government purposes. Similarly, under the Physical Planning Act, Section 29 gave the local authorities power to reserve and maintain land planned for open spaces.

(101) The suit property was at the time designated as an open space. Having been designated as such, it was rendered a public utility and could not be described as unalienated public land as urged by the appellant. It was therefore not available for alienation to H. E. Daniel T Arap Moi or for further alienation.



99. In a nutshell, the allocation and ultimate registration of the suit property, (which property had hitherto been reserved as a public utility) in favor of the 1st Respondent did not convey any legitimate interest to and in favor of the 1st Respondent whatsoever. Consequently, the Certificate of Title issued to the 1st Respondent is invalid and void ab initio.
100. Before departing from the issue beforehand, it is appropriate to take cognizance of the established and hackneyed position pertaining to the legal import and tenor of a transaction that is anchored/hinged on an illegality.
101. Instructively, the Court of Appeal rendered a succinct exposition of the law in the case of Sukhdev Singh Lali versus Philip Ojwang Kamau & 3 Others (2018)eKLR, where the court stated thus;

It was stated in the case of Macfoy vs United Africa Co. Ltd(1961) 3 All ER, 1169 that;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”

In this case, Ojwang’s Certificate of Title having been found to be invalid, illegal, null and void, we find that the Learned Judge, rightfully cancelled it, and properly declared the Jethwas to be the legal and valid titleholders of the suit property.

Issue Number 4

Whether the Petitioner has demonstrated/established breach/violation of her Constitutional Rights; and if so, what Reliefs ought to be granted

102. The Petitioner herein has sought for a plethora of reliefs at the foot of the Petition. Most importantly, the Petitioner herein has implored the Honourable court to find and hold that the Certificate of title, which was issued to and in favor of the 1st Respondent and pertaining to the suit property, was procured and issued irregularly, illegally and fraudulently.
103. Inevitably, whilst dealing with Issue number three (3) herein, the Honourable court had opportunity to interrogate the circumstances leading to the Letter of allotment and the Part Development Plan, the latter, which was relied upon in the alienation of the suit property.
104. Instructively, evidence abound that M/s Rurago Enterprises, which is an organization associated with the 1st Respondent was allocated Residential Plot C, situate within Kibera Area, within the City of Nairobi.
105. However, the surveyor who was retained by the 1st Respondent, falsified and distorted the Part Development Plan and thereafter caused the Part Development Plan to be altered in such a way that the Residential Plot Number C, situate within Kibra Area, was transplanted and relocated to Jamhuri Phases II Estate, contrary to the initial allotment.
106. Furthermore, the Honourable court found that the question of fraud was indeed ascertained and confirmed by the Honorable Judge, who entertained and adjudicated upon Nairobi HCRA No 492 of 2019. Suffice it to point out that fraud having been established, demonstrated and authenticated, there is no gainsaying that the impugned Certificate of title was therefore illegally procured.



107. Pursuant to and in view of the foregoing, this Honourable court comes to the conclusion that indeed the Certificate of title touching on and concerning the suit property; and which was issued in favor of the 1st Respondent thus warrants cancelation and/or revocation.
108. Clearly, the circumstances under which the impugned certificate of title was issued fall within the purview of the provisions of Section 26(2) of the *Land Registration Act*, 2012, which underscores and enumerates the grounds upon which a Certificate of Title can be impeached.
109. Other than the prayer for revocation and nullification of the certificate of title issued in favor of the 1st Respondent, the Petitioner had also contended that the issuance of the impugned certificate of title and the various activities that were undertaken on the suit property by the 1st Respondent breached, violated and infringed upon the Petitioners Constitutional Right and Fundamental Freedoms.
110. Invariably, the Petitioner has contended that as a result of the various structures that were erected by the 1st Respondent on the suit property, it became difficult for the Members of the Petitioner, as well as the tenants occupying the residential apartment situate on the adjoining properties, from accessing and reaching the said properties.
111. In this regard, the Petitioner has contended that the impugned activities have infringed upon her Members rights to property, as espoused and entrenched in article 40 of *the Constitution*, 2010.
112. Furthermore, it was also contended that the 1st Respondent proceeded to and indeed erected various structures on the suit property, albeit without the requisite approvals from the Planning Authority, in this case, the City Council of Nairobi (now defunct) or the County Government of Nairobi.
113. Moreover, it was further contended that as a result of the erection of the illegal structures, the Members of the Petitioner and their various tenants, were exposed to undue congestion in the neighborhood, which similarly culminated into a threat to their life and livelihood.
114. Additionally, the Petitioner also pointed out that the 1st Respondent, other than erecting the illegal structures on the suit property, had also established a Bar and Restaurant within the said Residential area, wherein loud and blaring Music is played and thus occasioning noise and sound pollution.
115. Ostensibly, the acts/activities complained of, no doubt, are responsible for violation and infringement of the Petitioner's right to a clean and healthy environment, by inter-alia, causing a Nuisance.
116. After anxiously reviewing the evidence that was placed before the Honourable court, inclusive of the Letter by the City Council of Nairobi, which pointed out that the allocation of the suit property had culminated into annexation of a substantial portion of a Service road leading the properties belonging to the members of the Petitioner, I come to the conclusion that the Petitioner has duly proved breach/violation of their right to property, as well as the right to Clean and Healthy Environment. (See Articles 40 and 42 of *the Constitution* 2010).
117. Consequently and in view of the foregoing, it is imperative to state and observe that having established and demonstrated that their rights and fundamental freedoms have been breached, violated and infringed upon, the Petitioner is no doubt, entitled to compensation and/or reparation.
118. Having resolved the question of breach, the outstanding issue therefore relates to the Quantum of damages awardable to and in favor of the Petitioner. In this regard, it is not lost on the court that the assessment of damages for breach and violation of Constitutional Rights and Fundamental Freedoms, is neither premised nor anchored on any mathematical formula.



119. For good measure, the assessment and award of such damages, is primarily an exercise of discretion of the Honourable court, albeit taking into account the gravity of the infringement complained of, the length/duration of infringement, the person responsible and whether there has been any attempt, by the culprit, to mitigate, redress/avert the infringement complained of.
120. Whilst dealing with the circumstances and factors to be taken into account whilst assessing damages on account of breach, violation and/or infringement of constitutional Rights and Fundamental Freedoms, the Court of Appeal in *Gitobu Imanyara & 2 others versus Attorney General* [2016] eKLR, stated as hereunder;
- “Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual’s right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court’s discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy”.
121. Moving forward, the next issue that merits consideration is the persons against whom an order for payment of damages for breach, violation and infringement ought to issue. In this respect, the Petitioner has sought for an order to issues against all the Respondents.
122. Nevertheless, I beg to state and underscore that the complaint against the Chief Land Registrar and the Attorney General, relates to what is termed as their failure and/or neglect to undertake investigation pertaining to the impugned Certificate of Title, even after their own officers had conceded to the existence of fraud, while testifying in the criminal case which was mounted against the 1st Respondent.
123. However, it is worthy to recall that despite the complaints mounted against the Chief Land Registrar and the Honourable Attorney General, the clear fact is that the said offices could not undertake any investigations pertaining to the Certificate of title or even to cancel the certificate of title which was issued in favor of the 1st Respondent.
124. Invariably, the power to revoke and cancel a certificate of title inheres in the Environment and Land Court, by dint of the provisions of Sections 80 and 101 of The *Land Registration Act*, 2012 and hence, the accusations against the Chief Land Registrar and the Honourable Attorney General, was misconceived.
125. Arising from the foregoing, despite the complaints that the Chief Land Registrar and the Honourable Attorney General, had breached, violated and/or infringed upon the rights of the Petitioner, I am afraid that no such rights have been established and/or proved as against same.
126. Consequently and premised on the foregoing, no award of damages can issue as against the Chief Land Registrar and the Honourable Attorney General.



127. On the other hand, the Petitioner has also laid a claim for compensation as against Nairobi Metropolitan Services (NMS). However, it is imperative to recall that the Nairobi Metropolitan Services, ceased to exist, immediately upon the conclusion of the Last General Election, which was held on the 9th August 2022.
128. To the extent that Nairobi Metropolitan Services ceased to exist, on or around August 2022, there is no gainsaying that the Honorable court cannot make any findings and/or issue any adverse orders against a non-existent entity. In this regard, the reliefs that were sought as against the 5th Respondent, became redundant and were rendered moot.
129. As against the 6th Respondent, it is imperative to state and underscore that upon discovering that the suit property, had been illegally allocated to and registered in the name of the 1st Respondent, the 6th Respondent, (which is a Department of the County Government, undertook various measures, inter-alia, issuance of an enforcement notice pursuant to the provisions of the Physical Planning Act, now repealed.
130. Additionally, it is also not lost on the Honourable court that the City Council of Nairobi, now defunct, also filed and lodged a civil suit namely, Milimani ELC No. 354 of 2012, wherein same impleaded both the 1st Respondent and the Chief Land Registrar and sought on, inter-alia, orders for cancelation of the impugned Certificate of Title.
131. Instructively, the suit vide Milimani ELC No. 354 of 2012, was ultimately dismissed for want of prosecution on the 7th July 2022. Nevertheless, the important point to take home is to the effect that the City Council of Nairobi and by extension the 6th Respondent herein, were actively engaged in concerted efforts towards vindicating the rights of the Petitioner, as far as revocation of the title of the suit property was concerned.
132. Based on the foregoing, can it now be said that the 6th Respondent has also breached, violated and infringed upon the rights of the Petitioner; and thus be exposed to condemnation and be penalized, either in the manner impleaded by the Petitioner or at all.
133. Evidently and in my humble view, the 6th Respondent has demonstrated and exhibited diligent efforts which were being undertaken by and on her behalf to remedy the complaint beforehand.
134. The bottom line of the foregoing discourse is to the effect that the complaint raised and ventilated as against the Chief Land Registrar, the Attorney General and the 6th Respondent, have not been duly established and or proved. Contrarily, evidence abound about the efforts that were undertaken by the 6th Respondent, with a view to addressing the issue beforehand.
135. Notwithstanding the foregoing, the Honourable court has found that the 1st Respondent herein was/ is culpable for breach, violation and/or infringement upon the Petitioner's rights and fundamental freedoms.
136. Instructively, the provisions of Articles 2(1), 10(1), 19(1) and 20(1) of *the Constitution*, 2010 underscore the horizontal application of *the Constitution* and essentially espouses the position that the Bill of Rights applies to all law and binds all state organs and all persons, the First Respondent, not excepted.
137. Owing to the foregoing, there is no gainsaying that even an individual, like the 1st Respondent herein, can be guilty of breach, violation and/or infringement of the Constitutional rights and Fundamental freedoms of another. Consequently, where such breach or infringement is established, then the



Honorable court is duty bound to fashion and grant appropriate, just and effective remedy in favor of the victim.

138. Speaking to the mandate and obligation of the court to fashion and grant appropriate, effective and just remedy, Rawal, J (as she then was) in the case of Republic ex parte Chudasama v The Chief Magistrate's Court, Nairobi and another Nairobi HCCC No 473 of 2006, [2008] 2 EA 311, stated and held as hereunder;

“While protecting fundamental rights, the court has power to fashion new remedies as there is no limitation on what the court can do. Any limitation of its powers can only derive from *the Constitution* itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal.”

139. As a result, I come to the conclusion that the Petitioner herein has been able to prove and establish that the 1st Respondent herein, was culpable for breach, violation and infringement of the constitutional rights and fundamental freedoms of her Members and especially the right to Property (Article 40) and the Right to Clean and Healthy Environment (Article 42).
140. Having come to the foregoing conclusion, it is now incumbent upon me to assess and award reasonable compensation on account of damages, for breach and violation of the Constitutional Rights of the members of the Petitioner. In this regard, I am mindful of the principles that were espoused by the Court of Appeal in the case of Gitobu Imanyara versus The Attorney General (2016)eKLR.
141. Based on the guidance discernable for the ratio decidendi in the foregoing decision, I am inclined to assess and award General damages for breach/violation of Constitutional Right in the sum of Kes.1, 000, 000/= only, as against the 1st Respondent.
142. To surmise, it is evident that the Petitioner herein is indeed entitled to protection and vindication under the law. In this respect, the Petitioner is entitled to various reliefs, inter-alia, payment of damages, in the quantum alluded to in the preceding paragraphs.

Final Disposition

143. From the discourse contained in the preceding paragraphs, it must have become evident and apparent that the Petition beforehand is meritorious and thus ought to be granted. Consequently, the outstanding issue relates to the nature and terms of the appropriate and effective reliefs to be fashioned and granted.
144. Nevertheless, having found that the Certificate of title which was issued in favor of the 1st Respondent is invalid, no doubt, same must be rescinded, canceled and/or nullified.
145. In short and for the sake of clarity, I am obliged to and do hereby enter Judgment in favor of the Petitioner in the followings terms;
- i. A Declaration be as hereby issued that the Certificate of title issued to the 1st Respondent in relation to the property known as L.R No. Nairobi/Block 63/787; Jamhuri phase 2, is invalid, insofar as same was obtained fraudulently.
 - ii. A Declaration be as hereby issued that the acquisition and erection of structures on property known as L.R No. Nairobi/Block 63/787; Jamhuri Phase 2, was illegal and unlawful and



violated the Petitioners rights to own and enjoy their respective Properties under Article 40 of *the Constitution* 2010.

- iii. A Declaration be and is hereby issued that the failure by the 5th and 6th Respondent to demolish the structure erected on the property known as L.R No. Nairobi/Block 63/787; Jamhuri phase 2, without their approval violated the Petitioners rights under Articles 40, 42 and 43 of *the Constitution* 2010.
- iv. An order be and is hereby issued directing the County Government of Nairobi and especially the 6th Respondent, together other such other concerned Departments; to demolish the illegally erected structures on property known as L.R No. Nairobi/Block 63/787; Jamhuri Phase 2, and restore same to its rightful use.
- v. For good measure, the demolition in terms of clause (iv) hereof to be undertaken within 60 days from the date of Judgment and thereafter the County Government to file a Report with the court relating to compliance with the terms of clause (iv) hereof.
- vi. The 1st Respondent be and is hereby ordered and directed to surrender the Certificate of Title in respect of the suit property to the 4th Respondent for cancelation and same to be surrendered within 60 days from the date hereof.
- vii. In default by the 1st Respondent to surrender the Certificate of title as pertains to the suit property, the 4th Respondent shall be at liberty to proceed and cancel/revoke the Certificate of Title in the name of the 1st Respondent.
- viii. The Suit Property shall be registered in the name of the County Government of Nairobi to hold on Trust and for the benefit of the Members of the Petitioner and the rest of the members of Jamhuri Phase II Estate. For clarity, the suit property shall not be subject to alienation by the County Government of Nairobi or otherwise.
- ix. The Petitioner herein be and is hereby awarded the sum of Kes.1, 000, 000/= only; on account of breach, violation and Infringement of the Rights and Fundamental Freedoms of her Members and more particularly, breach and violation of the right to property and to Clean and Healthy Environment, which were duly established.
- x. The awards in terms of clause (ix) shall attract Interest at court rates (14% per annum) from the date of Judgment.
- xi. The Petition as against the 5th Respondent be and is hereby struck out, albeit with no orders to cost.
- xii. Save for foregoing orders which are expressly granted, any other Relief is deemed as Dismissed/declined.
- xiii. Costs of the Petition be and are hereby awarded to the Petitioner and same to be borne by the 1st Respondent.

146. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;



Benson Court Assistant

Ms Kiendi h/b for Mr. Omemo for Petitioner

Mr. Victor Kimani for the 1st Respondent

Mr. Allan Kamau, Principal Litigation Counsel for the 2nd and 4th Respondents.

Mr. Victor Swanya for the 6th Respondent

