



Kahia Transporters Limited v Cabinet Secretary, Ministry of Lands & Physical Planning & 4 others; Lola & 1385 others (Interested Parties) (Environment & Land Petition 11 of 2022) [2023] KEELC 20418 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 11 OF 2022
LL NAIKUNI, J
SEPTEMBER 28, 2023**

BETWEEN

KAHIA TRANSPORTERS LIMITED PETITIONER

AND

CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

LAND REGISTRAR, KWALE 3RD RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .. 4TH RESPONDENT

DIRECTOR OF SURVEY KENYA 5TH RESPONDENT

AND

LOLA LUGWE LOLA INTERESTED PARTY

NDWEGWA MENZA KATEMBO & 1384 OTHERS INTERESTED PARTY

RULING

I. Introduction

1. The ruling is in relation with the Notice of Motion Application dated and filed on 10th May, 2023. It was moved by “Kahia Transporters Limited”, the Petitioner/Applicant herein. The application was instituted under the provisions of the Article 159(2)(d) of *the Constitution* of Kenya, 2010, Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules), 2013 (also referred as “The Mutunga Rules”) and all other relevant enabling provisions of the Laws of Kenya.



2. Upon effecting service, there were some replies that were filed in opposition of the orders sought from this application. The Court will deal with each of them hereinbelow.

II. The Petitioner/Applicant's case

3. The Petitioner/Applicant herein sought for the following orders:
 - a. Spent.
 - b. That the Petitioner be granted leave to amend the Petition dated 15th March 2022 as set out in the draft amended Petition herein annexed.
 - c. That the costs of this Application be in the cause.
4. The said application is based on the grounds adduced thereof, the testimonial facts and the averments contained in twenty (20) Paragraphed Supporting Affidavit of the Petitioner/Applicant's Director, OSMAN AHMED KAHIA (hereinafter known as 'the Deponent'), sworn and filed on 21st June 2022 and the five (5) annexures marked as "OAK – 1 - 5" attached thereof. He averred that the Petitioner/Applicant is the registered proprietor of L.R. No.32095 measuring 446.2 Hectares and L.R. No. 37122 measuring 404.7 Hectares having acquired the same for valuable consideration in May 2019. (Annexed and marked 'OAK- 1' is a copy of the Petition dated 15th March 2022 in the affidavit.)
5. In the said affidavit, the deponent averred that the Petitioner/Applicant approached this Honourable Court vide Petition dated 15th March 2022 seeking redress for the violation of its right to property arising out of the Respondent's collective decision and action to issue titles overlapping its titles L.R. No. 32095 and L.R. No. 37122. The crux of their claim is that the Respondents created the Maji ya Chumvi Settlement Scheme and issued titles overlapping with the titles of the Petitioner/Applicant thus resulting into a double allocation of land contrary to the provision of the Land Registration Act, No. 3 of 2012, the Land Act, No. 6 of 2012 and the Constitution of Kenya, 2010.
6. Based on the evidence provided in the Supporting Affidavit, he averred that simultaneous with the filing of the aforesaid Petition, the Petitioner also filed a Notice of Motion Application seeking interim orders to restrain the Respondents from any dealings, surveying and issuing of new Titles to any third party. Subsequently, this Honourable Court issued orders restraining the 2nd and 3rd Respondents from issuing Titles in respect of Maji ya Chumvi Adjudication Section. Annexed to the affidavit and marked 'OAK- 2' is a copy of the Notice of Motion dated 15th March 2022).
7. Additionally, he deponed that the said Orders were still in force to date as they have not been set aside by this Honourable Court or any Superior Court. Annexed in the affidavit and marked 'OAK – 3' is a copy of the Order dated 16th March 2022).
8. He deponed that despite the pendency of this Honourable Court's orders, the Respondents went ahead to disobey the said orders and issued titles overlapping with the Petitioner's title to the Interested Parties in a flamboyant and utter show of impunity. The Interested Parties, in an Affidavit dated 17th March 2022 sworn by one Duncan Mdzomba Nyawa, confirmed at paragraph thereof that titles had already been issued to them and further deponed that the Court could not undo what had already been done. Annexed in the affidavit and marked 'OAK – 4' is a copy of the said Affidavit).
9. He further deponed that as a result of the issuance of the said Titles, the Interested Parties invaded and had taken possession of our properties. They were presently living in various parts of the properties that were once the Petitioner's private property. The invasion had rendered the parcels of land untenable for our use in any manner or form. The suit properties were presently beyond salvage and it is unlikely to



reverse the extent of occupation by the Interested Parties. The Petition before this Honourable Court was framed around the restraining of the issuance of titles to the Interested-which event had already taken place and thus rendering the Petition redundant and merely academic.

10. He further averred that the facts that transpired after the issuance of the titles and the subsequent invasion and occupation of the properties by the Respondents and the Interested Parties needed to be placed before this Court through pleadings. Therefore, there was need to amend the Petition so as to bring the proper dispute as it had metamorphosized. Annexed in the affidavit and marked as 'OAK - 5' is a copy of the draft Amended Petition. The Petition also needed to be amended so as to include the value of the compensation sought under prayer No. F thereof. The Petitioner had been forced to conduct a valuation of the two subject properties so as to present before this Court the actual monetary compensation it was seeking from the Respondents on account of the constructive compulsory acquisition of its properties.
11. He told the court that through the present application they sought from the Honourable Court a grant of leave to amend their Petition dated 15th March 2022 so as to bring out further facts that would enable this Honourable Court reach a just and fair conclusion based on a wholistic set of facts. The amendment was necessary for the full and substantive determination of the matter at hand since the matter would be addressed more comprehensively with respect to the market value of the subject property, the real issue in controversy and the applicable law. For the purpose of determining the question in controversy between the parties herein, this Application for leave to amend the Petition was necessary. The instant Application for amendment never introduced any new fact and was purely technical in nature. This Application ought to be allowed to assist the Court to determine effectively the issues surrounding this suit on its true substantive merit.
12. He deponed that the Respondents would not suffer prejudice if the orders issued are granted and it was therefore just and fair that the orders sought in the Application filed herewith were granted so as to avert a miscarriage of justice upon us because rights of the Petitioner/Applicant had been violated and continued to be violated by the Respondents.
13. In conclusion, the Deponent averred that unless the orders sought herein were granted as prayed, the Petitioner/Applicant would suffer irreparable prejudice. It was in the interest of justice that the prayers sought herein be granted as prayed.

III. The Respondent's responses

14. In response to application, the Respondents through a Replying Affidavit sworn by Purity Wanjiru Mwangi, the Assistant Director of Land Adjudication and Settlement dated 19th June, 2023, where she averred: -
 - a. As an introduction on the history and creation of Maji Ya Chumvi Adjudication Section, were founded and well captured in the case of "Mombasa ELC No. 46 of 2019; Lalo Lugwe Lalo Lugwe & 227 Others – Versus - Farida Koroney & Others which was a matter filed in this Court herein over the same suit property and in which both parties herein are aware of;
 - b. Further, Maji Ya Chumvi was declared an Adjudication section on 24th September, 2014 in accordance with the provision of Section 5 of the Land Adjudication Act, Cap. 284. During a Public Baraza held on the same date, a Land Adjudication Committee comprising of 13 persons who were residents of the Section were appointed in consultation with the Office of the Deputy County Commissioner Kinango sub- County who was also present in person.



- c. The Section's perimeter was also described as in attached with a Declaration Notice and later plotted on a topo Sheet. The Adjudication program of the area was done after a clearance was sought from the Senior Planning Records Office in Nairobi where the whole extent of Land was still indicated as Trust Land area free from encroachment. They were therefore not aware of any double allocations as alleged in the Petition.
- d. The process of demarcation, Survey and recording of rights started thereafter and a total of 431 parcels were realized. After completion of register, notice of Completion was published on 20th July, 2018 and the same Notice invited persons affected by the Land Adjudication process to inspect the register at Mwangoloto Jua Kali Shade.
- e. A total number of 137 objections were received at the end of the sixty (60) days period of Inspection and filing objections. The Petitioner/Applicant was not among those that presented the objections to the register. After the Closure of the Objection Register, the Office of the Director of Land Adjudication and Settlement (DLASO) checked the records and after finding them fit forwarded them to the Land Registrar for registration.
- f. At the time of checking only parcels with strictly no objections were forwarded for titling. The Objection were heard by the Office of the Sub-County Land Adjudication and Settlement Officer and the Parcels which were cleared then sent to the Land Registry Kwale for Registration sometime in May 2022. The Respondents were in opposition of the application and the orders sought.

IV. The Interested Parties' case

15. In response to application, the Respondents through a Replying Affidavit sworn by Duncan Mdzomba Nyawa, the 53rd Interested Party herein on 19th May, 2023, where he averred: -
 - a. Maji ya Chumvi Adjudication Section was not at any time unalienated Government land. The then Minister for Lands by Legal Notice No. 170 of 1972, applied the [Land Adjudication Act](#) to the Trust Land situated within the Central and Hinterland divisions of the then Kwale Administrative District now known as the County of Kwale. The whole of Maji ya Chumvi Sub - location and Adjudication Section falls within that Trust Land. The land in question was not therefore unalienated Government land from the year 1972. Any allocation of any land in Maji ya Chumvi to the persons who purported to sell it to the Petitioner was null and void.
 - b. In its Ruling delivered in this Petition on 18th July, 2022 this Court:-
 - i. Declared that it had no jurisdiction on the Land Adjudication process of Maji ya Chumvi Adjudication Section. That remained the position to date.
 - ii. The Adjudication process for Maji ya Chumvi had already been completed and the Title Deeds issued before the Petition was filed and thus the Court orders given on 15th March, 2022 were overtaken by events. Our Titles were the end product of that Adjudication process.
 - c. The claims by the Petitioner/Applicant herein was that they acquired the two large properties from Khamis Bakari, Nashee Nane, Patrick Ndune, Abdihakim Adam, Saleh Wazir and Gamar Swaleh in the year 2019, some 9 years after the new Constitution came into force. The purported lease was dated 5th February, 2019 and was signed by one F.N. Oraro for the Chief Land Registrar.



- d. They maintained that the property was not Government land. Should the Court rule to the contrary they ask the Court to hold that public land whether vested in the National Government or in the County Government is administered by the National Land Commission under Article 62(2) of *the Constitution*. The attempt by the Chief Land Registrar to grant a lease to the persons who purported to sell and transfer non-existent parcels of land to the Petitioner/Applicant was therefore null and void meaning that the grants held by the Petitioner/Applicant and upon which the Petition was filed were themselves null and void.
- e. Under the provision of Section 12 of the *Land Act* 2012 the National Land Commission may, on behalf of the National or County Government allocate public land by way of public auction to the highest bidder at prevailing market value subject to a reserved price; by way of applications confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position; by way of public notice of tenders as it may prescribe; by way of public drawing of lots as may be prescribed; by way of public request for proposals as may be prescribed or by way of public exchanges of equal value as may be prescribed.
- f. Khamis Bakari, Nashee Nane, Patrick Ndune, Abdihakim Adam, Saleh Wazir and Gamar Swaleh, the persons who allegedly acquired the property from the Chief Land Registrar in 2019 did not acquire it in the manner prescribed in *the Constitution* and under Section 12 of the *Land Act*, 2012.
- g. Their Advocate Mr. Kinyua Kamundi has read and explained to the Deponent the provision of Section 23 (2) of the *Land Act*, 2012 that to the effect that a grant of public land shall be made in the name of the National Land Commission on behalf of the National or County Government as the case may be and shall be sealed. The grant the Petitioner/Applicant relies upon was made on behalf of Chief Land Registrar and was not sealed by the National Land Commission. It is a nullity.
- h. The Petition cannot be amended to as to require the people of Kenya through the Government to pay over a sum of Kenya Shillings Twenty One Billion (Kshs. 21, 000, 000, 000.00/=) to compensate the Petitioner/Applicant for land it never owned.
- i. Under the provision of Article 40 (6) of *the Constitution, the Constitution* does not protect any property that has been found to have been unlawfully acquired. The property the Petitioner/Applicant sought to protect was private land and that acquisition was through the Chief Land Registrar who had no authority to administer or dispose of any land.
- j. The Petitioner/Applicant was very much mistaken and was confusing settlement schemes with adjudication sections. There was no settlement scheme within Maji ya Chumvi Sub - location.
- k. The whole of Maji ya Chumvi Adjudication Section/Sub - location is surrounded by group ranches. It was not therefore possible that the Government would have grabbed parts of group ranches, allocated those ranches to individuals who sold to the Petitioner/Applicant. It was also not possible that any part of group ranches extended to Maji ya Chumvi Adjudication Section.
- l. The Petitioner/Applicant had filed an objection to the Adjudication but that objection was dismissed. He did not appeal or exhaust the process of appeals in the *Land Adjudication Act*.
- m. There were no Letters of Allotments in adjudication sections because the owners of trust land could not be allotted or allocated land they already own.
- n. There was no contravention of the provision of Article 47 of *the Constitution*. The Petitioner claims to derive title from persons who had no title to begin with. This Court has already



determined ownership of the land in question when it concluded Petition No.46 of 2019 between Lalo Lugwe Lalo & 227 Others on the one hand and Farida Karoney and 7 Others.

- o. It was not true that any part of Maji ya Chumvi adjudication section was private land prior to the commencement and completion of the adjudication process. The land was Trust Land and not private land. Under the provision of Article 63 of *the Constitution*, land that was Trust Land under the previous Constitution which was community land. At the conclusion of the adjudication process that community land was now private land owned by himself and the group of persons enumerated as 1st Interested Parties.
- p. They consider it their duty to prevent the attempt by the Petitioner/Applicant to obtain money from the Government for compensation of property it never owned. The persons comprised in the 1st Interested Parties, himself included were not squatters on the Government land. The land never belonged to the Government. It was trust land and was now private land.
- q. The affidavit was in opposition of the Notice of Motion application dated 10th May, 2023.

V. The Submissions

- 16. On 14th June, 2023, the matter came up for hearing of the Petitioner/Applicant's application. Parties were directed to file written Submissions. Pursuant to this they all complied accordingly. On 11th July 2023, the Counsels were accorded an opportunity to briefly highlight their submissions orally and the Court reserved time to deliver its ruling on notice.
- 17. However, the parties opted to forego the highlighting and rely on the filed submissions which they felt were detailed and comprehensive enough to guide the Court while penning down its Ruling.

A. The Written and oral Submissions by the Petitioner/ Applicant.

- 18. The Petitioner/Applicant through the Law firm of Messrs. Ahmed Nassir Abdullahi Advocates LLP filed their written Submissions dated 17th July, 2023. M/s. Asli Advocate commenced the submissions by stating that the submissions were in respect of the Petitioner/Applicant's Application dated 10th May 2023 wherein the Petitioner is seeking to Amend the Petition dated 15th March 2022 to seek for compensation for interference with its private properties being L.R. No. 32095 measuring 446.2 Hectares and L. R.No.37122 measuring 404.7 Hectares.The amendment was opposed by the Respondents and the 2nd to 208th Interested Parties on the grounds cited in their respective Replying Affidavits dated 19th June 2023 and dated 19th May 2023.
- 19. The Learned Counsel led the Honourable Court through the background of the suit stating that the Petitioner is the Bona fide owner of all that Parcel of Land known as L. R. No. 32095 and L.R. No.37122 having acquired it through a lawful process. Over time, the Respondent's without any recourse decided to issue other titles overlapping with its titles in the guise of a purported adjudication process and it necessitated the Petitioner/Applicant to approach this Honourable Court vide the Petition dated 15th March 2022 seeking redress for violation of its rights to property.
- 20. The Petitioner/Applicant also filed a Notice of Motion Application seeking interim orders to restrain the Respondents from any dealings, surveying and issuance of new Titles to any person in respect of its lawfully owned property. This Honourable Court issued orders restraining the issuance of the said Titles dated 15th March 2022 and the said Orders were still in force to date.Despite the pendency of this Honourable Court's Orders, the Respondents went ahead to issue titles overlapping with the Petitioner/Applicant's title to the Interested Parties in a flamboyant and utter show of impunity.As a result of the issuance of the said Titles, the Interested Parties invaded and had taken possession of



the Petitioner/Applicant's properties. They were presently living in various parts of the properties that were once the private property of the Petitioner. The invasion had rendered the parcels of land untenable for the Petitioner/Applicant's use in any manner or form. The suit properties were presently beyond salvage and the extent of occupation by the Interested Parties was unlikely to be reversed.

21. The Learned Counsel argued that owing to the constructive compulsory acquisition, the Petitioner/Applicant filed the Application dated 10th May 2023 seeking to amend the Petition dated 15th March 2022 so as to introduce the above facts that arose during the pendency of the Petition. The Amendment was therefore necessary to relay to court the real situation on ground since facts have metamorphosized. The issuance of the Titles in contravention of this Court's express orders changed the bearing of the suit and issues for determination in the suit to one of constructive compulsory acquisition of the Petitioner's private property without following laid down procedure for compulsory acquisition. The Petitioner/Applicant had done recent valuations on its affected private property being L. R. No. 32095 measuring 446.2 Hectares and L. R. No. 37122 measuring 404.7 Hectares valued at a sum of Kenya Shillings Eleven Billion Five Twenty Million (Kshs. 11,520,000,000/-) and a sum of Kenya Shillings Ten Billion (Kshs. 10,000,000,000/-) respectively. Since Certificate of Titles have already been issued overlapping with the Petitioner's subject properties, it is only fair that Amendment of the Petition be allowed to encompass how compensation will be obtained from relevant authorities.
22. The Learned Counsel submitted that the Application was opposed by the 53rd Interested Party who filed a Replying Affidavit dated 19th May 2023 sworn by Duncan Mdzomba Nyawa and by the 4th Respondent through its Replying Affidavit sworn by Purity Wanjiru Mwangi dated 19th June 2023. The entirety of the 4th Respondent's Replying Affidavit is dedicated to the merits of the substantive suit. The said deponent alleges that the subject properties fall within the Maji ya Chumvi Adjudication Section. This is an issue to be determined at the hearing of this suit after the evidence have been called. The 53rd Interested Party is jumping the gun by tabling matters meant for the full trial in an application to amend pleadings. The issues raised in the aforesaid Affidavit are issues that would constitute a defence once the Petition is amended. None of the lengthy arguments set out there bear any issue against the Amendment.
23. The Learned Counsel told the Court that there was only one issue for it to determine and it was whether the Application seeking to amend the Petition ought to be granted. The Learned Counsel further went ahead to state that amendment of proceedings is underpinned under Rule 18 of [The Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which states that;

“A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.”

24. The Learned Counsel argued that the Honourable Court has power to determine real questions in controversy between parties by allowing correction of any defects in the pleadings through amendment. The 'threshold' attendant to allowing amendment was set in the case of “Gladys Nduku Nthuki vs Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [Supra]” where the learned Judge while allowing amendment applied for, at paragraph 63 stated that;

“In *Tidelsay vs. Harpic* [1878] 10 CH.D.393 at 396 the court opined that the practice has always been to give leave to amend unless the court is satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise.



Further, in *British India General Insurance Co. Ltd vs. G.M. Parmar* [1966] EA 172 the court held that the general rule is that “amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs.”

25. The Learned Counsel sought to anchor their position in the case of “*Channah Singh Santa Singh vs Agricultural Finance Corp* [2006] eKLR” where the Court had this to say;

“After hearing both sides, this court is of the view that the leave sought to amend the plaint be and is hereby granted..... The court is satisfied that pleadings may be amended at any stage, even during trial but before judgment, so long as the amendments are necessary for due determination of issues in controversy.”

26. The Learned Counsel submitted that it is also important to note that the Applicant has done nothing mala fide or has preferred the proposed amendments in bad faith. The metamorphosis in the suit occurred not because of blunder of the Applicant but because of the blunder of the 2nd Defendant. The said action of the 2nd Defendant of issuing Certificate of Titles overlapping with the Applicant’s Certificate of Titles have shifted the factual matrix of the case and thus the need to amend the Petition to align with the current situation. The Respondent has not established any malice or bad faith in the Applicant’s proposed amendments. They sought to anchor our position in the case of “*Channah Singh Santa Singh Case* [Supra]” where the Court continued to state that;

“....Indeed it was not demonstrated that any bad faith attended the application to amend....”

27. The Learned Counsel submitted that in these circumstances, no action of the Applicant has caused any injury on the opposing parties that warrants payment of any costs, neither does the application to amend if allowed will change the substratum of the suit. The sentiments of the 53rd Interested Parties at Paragraph 3 in his Replying Affidavit dated 19th May 2023 scores a different point not relevant to proposed amendments. The Ruling dated 18th July 2022 came after the Order dated 15th March 2022 that barred issuance of Titles. Worth noting is that these particular Ruling and Order dated 15th March 2022 were issued by Court of concurrent jurisdiction. Of utmost importance is that the Ruling referred to did not vacate the Order dated 15th March 2022. How then can Orders that have not been vacated be overtaken by events? Rather is the 53rd Interested Parties sanitizing the glaring contravention of court orders?

28. With the matter of contravention of Court orders aside, an order of Court in any form remains binding unless overturned, vacated or varied by a higher Court. They placed reliance in the case of “*Florence Nyaboke Machani – Versus - Mogere Amosi Ombui & 2 others Civil Appeal 184 of 2011* [2014] eKLR” where the Court had this to say;

“.....It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding....”

29. What the 53rd Interested Party is insinuating is that Orders of Court dated 15th March 2022 are non-consequential despite the fact that they have never been vacated or varied by a higher Court. In the current legal dispensation, the said argument is otiose and against the well laid principle in the case of “*Fred Matiang’i, The Cabinet Secretary, Ministry of Interior and Co-ordination of National*



Government -vs- Miguna Miguna & 4 Others [2018] eKLR”, stated the following with regard to Orders of the court: -

“...When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts will deal firmly and decisively with any party who deigns to disobey Court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law and the upholding of the rule of law are not mere platitudes but present realities....”

30. The 53rd Interested Party’s bad faith is clear and does not need a magnifying glass to discern. Turning to the issues raised from Paragraphs 4 -15, and 17-19 we submit that these issues can only be decided in the main suit and do not fall within the purview of the Application to amend because they will need calling of evidence that can only be done during trial. Similarly, the 4th Respondent in their Replying Affidavit dated 19th June 2023 intimates at paragraphs 3 to 9 that Maji ya Chumvi is a trust land and was subjected to adjudication process that resulted in titling. This is a competing account from the Petitioner’s Account and so as establish what really is the case, then the Court ought to call for evidence and can best be done in the hearing of the main suit.
31. The Learned Counsel submitted that the 4th Respondent is jumping the gun because the issues raised in its Replying Affidavit dated 19th June 2023 do not concern the Application to amend the Petition but it concerns the main suit. Further, the 4th Respondent exclaims at paragraphs 10-12 of the Replying Affidavit that the Petitioner is wrong to seek for compensation before justifying how its Title over the suit property was acquired and continues to ask Court to dismiss the matter because the adjudication process was done using the right procedure.
32. The Learned Counsel submitted that the issues raised do not concern the Petitioner’s Application because the Court cannot once more ascertain the issues raised unless it calls evidence from parties involved herein so that the truth can come to light. It is only fair and in the interest of justice that matters that go to the root of the suit precisely those that will need evidence to be called and interrogated by court ought to be heard in the hearing of the main suit. They sought to anchor our position in the case of “Eunice Wambui Nganga – Versus - Teresia Wanjiku Wainaina [2017] eKLR” where the Honourable Court at held that;

“It is therefore evident that these two parcels of land have two sets of title deeds held by two different persons. The first set of title deeds are held by the Plaintiff/Applicant herein and the second set by the Defendant. Of course, ordinarily, there would be no parcel of land with more than one title deed and the said title deed held by different people. However, we have such a scenario in this matter and it is probable that only one set of title deeds is legally held and the other set could either have been issued irregularly, illegally or by mistake. The Court needs to determine which of the two sets of title deeds is genuine. However, it cannot determine that through affidavits evidence at this interlocutory stage. That determination would await the calling of evidence in the main trial.”
33. Essentially, the dispute herein is one of double allocation and as such competing Titles have already been issued. For Court to rule on which of them is authentic it will definitely need to call evidence from parties. This will be impractical at this interlocutory stage because proving which Title is authentic is a



novel and weighty issue. They drew reliance in the case of “Eunice Wambui Nganga – Versus - Teresia Wanjiku Wainaina [Supra]” where the Court had this to say;

“At this interlocutory stage, the Court cannot ascertain the authenticity or correctness of the said letter. See the case of Ramji Jethabhai – Versus - Mrs CE Fisher, Civil Appeal No.5 of 1980, where the Court held that:-

“Where weighty issues are raised, it is better to subject them to the salutary test of cross – examination”.

34. The Learned Counsel submitted that it is only prudent to dispense with the Petitioner’s Application to amend before delving into the substratum of the suit and/or issues that transcend to the main suit. Therefore, all sentiments by opposing parties touching on issues that will need calling of evidence and cross examination ought to be flagged off and rendered otiose. In respect of the issue raised at paragraph 16 of the 53rd Interested Party’s Replying Affidavit and the 4th Respondent in its Replying Affidavit dated 19th June 2023 at paragraph 3 concerning the Ruling dated 19th January 2022 in Petition No.46 of 2019; Lalo Lugwe Lalo & 227 Others, they wished to state with constrain that the said Ruling was made per in curium without accord to fair hearing. Noteworthy is that the said suit was withdrawn and therefore all proceedings therein serve no legal consequence to the Petitioner.

35. The Black’s Law Dictionary 10th Edition defines per in curium as:

“Of a judicial decision, wrongly decided, because the judge or judges were ill informed about the applicable Law.”

36. In the said Suit, a Consent dated 21st July 2021 was recorded by the law firm of Kinyua Muyaa Advocates representing Petitioners and Nguyo Wachira representing the Attorney General for the Respondents. The dynamics of the suit will shock this Honourable Court. After entering into a consent on 21st July 2021, the Court adopted it on 23rd July 2021 as an order of Court. Within a short period of time and before execution/ enforcement of the said Order, over One Thousand One Hundred and Eighty-Five persons (1,185) made an Application dated 16th September 2021 seeking stay of execution or enforcement and setting aside or discharge of Consent Order dated 21st July 2021.

37. The Learned Counsel submitted that the said persons posted weighty grounds as to irregularity of the Consent dated 21st July 2021 for it lacked consent of the 1st Petitioner, 8th Respondent, the interested parties named in the petition and worst of all the said Consent was obtained void leave of Court. They also enumerated the potential threat posed by the Consent Order to their alleged property rights. It is trite that a Consent Order as established in the case of “Kenya Commercial Bank Ltd – Versus - Specialised Engineering Co. Ltd [1982] KLR 485”, as cited with approval in the case of “Salim Peter Murithi – Versus - Kasiwa Gona Kirao [2021] eKLR” can be set aside for an array of reasons viz;

“...
1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement...”



38. Elsewhere, the case of “Samson Munikah practicing as Munikah & Company Advocates – Versus - Wedube Estates Limited Nairobi Civil Appeal No. 126 of 2005” enumerates situations when a Consent Order can be set aside:

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.”

39. The Learned Counsel submitted that the Ruling dated 19th January 2022 in “Petition No.46 of 2019; Lalo Lugwe Lalo & 227 Others, establishes on the face of it that there was no consensus from all necessary parties to the suit and hence the Consent Order was a blanket Order that did not represent the agreement of all parties to the suit. After the Ruling was made and just before its execution, over One Thousand One Hundred and Eighty-Five persons (1,185) applied to be joined in the suit, establishing that they were currently occupying the land but the Court turn its back on them stating that it was not their case and they could as well file their own matter. This was done to the detriment of fair hearing assured under Article 50 and Article 25 of *the Constitution* which elevates right to fair hearing as a non-derogable right. They sought to place reliance in the case of “Shollei – Versus - Judicial Service Commission & another (Petition 34 of 2014) [2022] KESC 5 (KLR) (17 February 2022)” where the Honourable Court at paragraphs 19, 20 and 21 had this to say;

“19. Article 50(1) of *the Constitution* referred to the right to a fair hearing for all persons, while article 50(2) accorded all accused persons the right to a fair trial. Article 25(c) of *the Constitution* listed the right to a fair trial as a non-derogable fundamental right and freedom that could not be limited. Often the terms fair hearing and fair trial were used interchangeably, sometimes to define the same concept, and other times to connote a minor difference.

20. Although the right to a fair trial was encompassed in the right to a fair hearing in *the Constitution*, a literal construction of article 50(1) and 50(2) of *the Constitution* could be misconstrued in some quarters to mean that article 50(1) dealt with the right to fair hearing in any disputes including those of a civil, criminal or quasi criminal nature whereas article 50(2) was limited to accused persons thereby arguing that the protection of such right only related to criminal matters. That was not an acceptable interpretation or construction which called for an expansive and inclusive construction to give a right its full effect.

21. Fair hearing in principle incorporated the rules of natural justice, which included the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo iudex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias.....”

40. This Court ought not to rely on a ruling that was made per in curium without accord to fair hearing to determine whether to grant leave for amendment of the Petition dated 15th March 2022. The decision of Court to adopt a Consent and leave out the grievances of more than One Thousand One Hundred and Eighty-Five persons (1,185) reeks malice and ought to be called out. The Court even went on to say that a different suit can be initiated by the intending Respondents; That would occasion waste of Court's time and resources of both Court and the intending Respondents. The intending



Respondents were necessary parties and the Court ought not to have allowed a Consent Order to stand without listening to all parties. It is trite that new parties can be joined to the suit at any stage of the proceedings as mandated by Order 1 Rule 10(2) of the Civil Procedure Rules which provides that:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

41. Furthermore, the said Ruling violated the right to fair hearing of the intending Respondents. Which other way would the court discern whether a consent would not affect rights of the intending parties if it did not hear them?
42. In conclusion, the Learned Counsel for the Petitioner/Applicant submitted that it can be stated without fear of contradiction that the Petitioner's Application to amend is not mala fide and if granted will not injure the Respondents' or the interested Parties' in a manner not compensable by costs. The evident Metamorphosis was not caused by the Applicant's blunder but rather that of the Respondents and it is therefore necessary to relay to court the real situation on ground. It is apparent that if the amendment is allowed as sought by the Applicant, it will not change the subject matter of the suit at all, save for changing the bearing in respect issues for determination from one of stopping issuance of overlapping titles to one of compensating the Applicant for the constructive compulsory acquisition that was undertaken with blatant flamboyancy and impunity contrary to the Applicant's express rights to property.

B. The Written Submissions by the Interested Parties/ Respondents

43. The Interested Parties/Respondents through the Law firm of Messrs. Kinyua Muyaa & Co. Advocates filed their written submissions dated 12th July 2023, in opposition to the Petitioner/Applicant's application. The Learned Counsel submitted that the Honourable Court has already held, in its Ruling of the 18th July, 2022, that the Court has no jurisdiction to hear and determine any issue on the Land Adjudication Process in Maji ya Chumvi Adjudication Section. The Survey Report relied upon by the Petitioner itself place the land inside Maji ya Chumvi Adjudication Section. This is not therefore an issue for trial because the Petitioner will not run away from its own evidence. If the Court has no jurisdiction to hear the Petition in so far as it touches on Maji ya Chumvi Adjudication Section then it has no jurisdiction to allow any amendments to the Petition. It is the same land. The proposed amendments will not relocate the land from Maji ya Chumvi Adjudication Section.
44. The Titles the Petitioner rely on are a total nullity. Please see the Supplementary Affidavit sworn by Osman Ahmed Kahia on 14th April, 2022 and filed on the same date and in particular paragraph 10(d) to the effect that one F. N. Oraro, Land Registrar is the one who signed the Lease in February 2019. The Petitioner runs away from that glaring illegality. We have referred Your Lordship to Article 62(2) of *the Constitution* that public land shall vests in and is held by County Governments in trust for the people resident in the County and shall be administered on their behalf by the National Land Commission. F.N. Oraro, Land Registrar was not the National Land Commission. They also referred Court to Section 12 of the *Land Act*, 2012 for the proposition that a Land Registrar has no power to allocate public land. There was no auction of the land in question to the persons from whom the Petitioner purports to have acquired the property. The Learned Counsel guided the Court to Section 23(2) of the *Land Act* 2012 to the effect that a grant to public land shall be made in the name of the National



Land Commission on behalf of the County Government and shall be sealed. A Land Registrar is not the National Land Commission.

45. No hearing is necessary to look at the purported Lease signed by F.N. Oraro for the Chief Land Registrar on 5th February, 2019. The proposed amendments to prop up a Petition based on forged documents is a waste of resources. If the Court allows the amendments and hears the Petition the Court will not change the fact that the purported Grant was not made by the National Land Commission. This answers the allegation in paragraph 3 of the Petitioner's submissions that it is the bona fide owner of the property.
46. The Learned Counsel referred the Court to Article 40(6) of *the Constitution* where the right to property does not extend to any property that has been unlawfully acquired. In my mind it is a simple issue for the Petitioner to explain to the Court the basis upon which a Land Registrar purported to dispose of alleged public land. The Petitioner cannot make any such explanation. This is a pure point of law that does not require any evidence. No evidence will change the identity of the person that signed the Lease on behalf of the Government.
47. The Petitioner is confusing the concept of land allocation (which no longer exists under the new Constitution) and the concept of land adjudication. The 228 Interested Parties did not acquire the land from the Government as they have always owned it as Trust Land. Adjudication merely demarcates boundaries and deals with the process of registration and issuance of Title Deeds to the owners. No evidence is necessary to distinguish between those two concepts.
48. The Learned Counsel argued that the duty of the Honourable Court under the overriding objective is to facilitate the just, expeditious, proportionate and affordable solution of civil disputes. In exercise of your jurisdiction and in the interpretation of any law you have a duty to give effect to the overriding objective. The overriding objective cannot be achieved by allowing the amendments so as to continue hearing a Petition that must fail.
49. The Learned Counsel referred the Honourable Court to Article 3 of *the Constitution* that every person has an obligation to respect, uphold and defend *the Constitution*. The Court is further bound by Article 10(2)(a), (b) and (c) of *the Constitution*. The National Values and Principles of Governance that should guide you in determining the application include the rule of law, equity, good governance, integrity, transparency and accountability. And so the test to apply in regard to those principles is:-
 - i. Can a Petition founded on a forged Lease be amended and if amended, will it ever succeed? The test is not whether the signature of F.N. Oraro is disputed. The question demanding an answer is whether F.N. Oraro as a Land Registrar had any power to sign that Lease. The law says he did not. As he had no power to do so the Lease is a forgery.
 - ii. Where was the integrity and transparency in the purported allocation of the land? The procedure in Section 12 of the *Land Act*, 2012 that public land shall be allocated by the National Land Commission by way of public auctions to the highest bidder or by applications confined to targeted groups of persons, or by public notice of tenders or by the drawing of lots or by way of public request for proposals or by way of public exchanges is a procedure designed with transparency and accountability in mind.
 - iii. There is a further test formulated by the Supreme Court of Kenya in Dina Management Limited Petition. The Land Registrar had no power or jurisdiction to make a grant of any land. Under that test the Petition must fail.
 - iv. The final test is whether the Government can allocate Trust Land. It cannot.



50. The Learned Counsel guided the Court into the purported lease submitting that first, the whole Petition is founded on that Lease. Secondly, there was only one Lease. There could not be one lease for two distinct and separate properties. Thirdly, there is only one Certificate of Title. Where is the Certificate of Title for the Plot as there are two plots? The short answer to the request not to look at the purported lease is that the jurisdiction of the Court to allow any amendment is an exercise of judicial authority derived from *the Constitution*. An application for amendment is not immune from Articles 3 and 10(2) of *the Constitution*. The amendments sought are laying the foundation for loss of massive public funds exceeding Kshs. 21 Billion. The Court should not be seen to have done anything to facilitate that massive fraud. The Learned Counsel submitted that *the Constitution* does not permit the Court to postpone the decision on the validity of the Titles the Petitioner relies on. The national values and principles of governance are present every time the Court makes any decision. Those principles cannot be put on hold or suspended to a future date.
51. In conclusion, the Counsel for the Interested Parties/Respondents invited the Honourable Court to respect, uphold and defend *the Constitution*, if the Court does it cannot allow the application. That duty requires the Honourable Court to strike out the Petition with costs and to nullify the purported Titles.

VI. Analysis and Determination

52. I have keenly assessed all the filed pleading, the written submissions and the cited authorities by the parties pertaining to the application dated 10th May, 2023 by the Petitioner/Applicant herein and the relevant provisions of the statutes. In order to reach a just and fair decision on the matter, the Court has sought to be guided by the following three (3) issues. These are:-
- a. Whether the Notice of Motion application dated 10th May, 2023 by instituted by the Petitioner/Applicant herein seeking for leave to amend its Petition.
 - b. Whether the parties herein are entitled to the orders sought from the filed application.
 - c. Who will bear the Costs of the application.

ISSUE No. a). Whether the Notice of Motion application dated 10th May, 2023 by instituted by the Petitioner/Applicant herein seeking for leave to amend its Petition.

53. Under this Sub – heading, the Honourable Court will exclusively deal on the main substratum of this application being amendment of pleading. The provision of Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides:

“a party who wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court.”

54. In this regard, I shall seek solace from several cases. They include the case of: “Humanity Action Knowledge Integrity in Africa Trust (Haki Africa) & 19 others – Versus - Attorney General & 3 others; Kenya National Commission on Human Rights (KNHCR) & 2 others (Interested Parties) [2020] eKLR”, the court observed:

“Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter “the Mutunga Rules”) should be the starting point for purposes of the instant application.



12. The Rule allows parties to amend their pleadings, and in particular, the Petition, with leave of the Court at any stage of the proceedings. Amendment of petitions once filed can only be done with the permission of the court. Additionally, the permission and consequent amendment may be granted and made respectively at any time or stage of the proceedings. ...
13. It is trite law that an amendment ought to be allowed as long as the same is not frivolous or occasions prejudice to the opposing Party.”
55. Further to this, I cite the case of:- “Mombasa Cement Limited – Versus - Speaker of the National Assembly & 2 others [2016] eKLR”, the court stated:
- “The general rule when it comes to amendments of pleadings is that amendments ought to be freely allowed so long as they do not occasion any prejudice to the party facing them. The test whether or not to allow amendments is now relatively clear.”
56. Additionally, the Court relies in the case of: “Geyser International Assets Limited – Versus - Attorney General & 3 Others [2019] eKLR”, the court stated:
- “..... a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits. The court then went on to state that the amendments or joinder would be allowed provided
- (i) there had been no undue delay,
 - (ii) that no vested interest or accrued right was affected and
 - (iii) no injustice or prejudice would be occasioned to the other side.....”
57. From the above decisions, it should be clear that the court can, at any stage of the proceedings, allow a party to amend its pleadings, so long as the same will not prejudice the other party. The applicant herein seeks to amend the petition. This is a remedy provided for under *the Constitution*, and is available to the Petitioner/Applicant, upon determination by court in her favour. Therefore, the application and the orders sought by the Petitioner/Applicant must succeed.

ISSUE No. b). Whether the parties herein are entitled to the orders sought from the filed application.

58. Under this sub – heading, there are certain pertinent issues for the Court to critically ponder here for its consideration. These are whether the application was timeously, in good faith and if the Respondents would suffer any prejudice if this application was allowed. The issue posed under this sub – heading is fully supported by the arguments and the legal reasoning elaborately set out above. The Court discerns that from the filed grounds of opposition, the written and oral submissions none has attempted to demonstrate what prejudice and how the Interested Parties/Respondent would suffer should the application be allowed. Also, I have not been convinced that the application and the relief sought by the Petitioner/Applicant lacks merit as per the laid down principles established by law and precedence.
59. Moreover, the Court strongly feels the opposition by the Interested Parties is not only pre-mature but it’s being too apprehensive. The Court states so based on two reasons. Firstly, the Petitioner, vide this Application, seeks this Honourable Court to grant it leave to Amend its Petition dated 15th March 2022 so as to bring out further facts that would enable this Honourable Court reach a just and fair conclusion based on a wholistic set of facts. Secondly, the amendment is necessary for the full and substantive determination of the matter at hand since the matter would be addressed



more comprehensively with respect to the market value (for compensation purposes) of the subject properties, the real issue in controversy and the applicable law. Thirdly, for the purpose of determining the question in controversy between the parties herein, the amendment of the Petition is necessary.

60. I take note that the Interested Parties are opposing this application for amendment bringing in the issue of the Consent order which may not hold any waters for an application to amend. The said argument does not change the claim made out under the filed Petition by the Petitioner/Applicant herein.
61. Hence, in a nutshell, the application has merit and needs to be allowed. Furthermore, in order to balance the scale of Justice and in all fairness, the Interested Parties/Respondents will also be accorded an opportunity to file amendment to their pleadings thereof. The amendment does not, in any way, alter the cause of action as submitted by the Respondents.
62. It is now a tradition of law and practice that amendments to pleadings should not be unduly denied unless the proposed amendment is so frivolous and would not help the court to arrive at a proper determination of the suit. It is also trite law now that to avoid a multiplicity of suits applications to amend pleadings should be granted so that all the issues pertaining to similar transactions may be resolved in one suit. In this matter, the Counsel for the Interested Parties has submitted that the application is frivolous and an abuse of the process of the court. That submission may be correct. However, the frivolity of a suit goes to its merits, and it can best be determined on evidence adduced. That cannot happen until the Applicant is allowed to amend pleadings and then tender evidence in court.
63. It is my humble view that the prayer for amendment of the petition is made in good faith, and that allowing the application will assist the court to conclusively deal with all matters in controversy. The proposed amendment will not in any way prejudice the respondent; instead, it will ensure that the ends of justice are met, as the Petitioner will be able to put across her whole case, and the respondents will be given an opportunity to defend themselves.

ISSUE No. c). Who will bear the costs of the application.

64. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted at the conclusion of any legal action, process and proceedings in any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the event. By event here, it means the results emanating from the legal action, process and proceedings.
65. In the instant case, although the Petitioner/Applicant has succeeded in prosecuting their application dated 10th May, 2023, taking that the matter still to go through the entire motion of hearing and final determination, it's just, fair and reasonable that each party bear their own costs.

VII. Conclusion & Disposition

66. In the long run, having conducted an elaborate analysis of the framed issues herein, the Honorable Court is fully satisfied that the leave and proposed amendment sought by the Petitioner/Applicant to amend the Petition is justifiable, Hence, the Court proceeds to specifically grant the following Orders:-
 - a. That the Notice of Motion Application dated 10th May, 2023 and the amendment its Petition be and is hereby allowed.
 - b. That an order be and is hereby made for the Petitioner/Applicant shall file and serve the amended petition on the Respondents and Interested Parties upon payment of requisite court fees within the next Seven (7) days from the date of the delivery of this Ruling.



- c. That upon service, corresponding leave be and is hereby granted to the Respondents and Interested Parties to file and serve Amended Responses to the Petition within 14 days.
- d. That the Amended Petition be fixed for hearing on 6th March, 2024 through adducing of Viva Voce evidence and a mention on 17th January, 2024 for purposes of confirming full compliance and adherence of these orders and Pre – Trial details and taking other directions on this matter to ensure smooth hearing process herein
- e. That each party to bear their own costs

It is ordered accordingly

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT MOMBASA

The Ruling was delivered in the presence of:-

Mr. Towett Advocate holding brief for M/s. Asli Advocate for the Petitioner/Applicant.

M/s. Waswa Advocate for the Respondents.

M/s. Muyaa Advocate for the 208 Interested Parties.

No appearance for the other Interested Parties.

