REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.592 OF 2013

BETWEEN

SALOME MWIHAKI NJENGA, DAVID MWATHI KIBE AND JOHN KIBARU MWAI (Suing as Chairlady, Treasurer and Secretary of TWIGA ESTATE SQUATTERS SOCIETY) on behalf of 4000 SOCIETY MEMBERS EVICTEES FROM TWIGA ESTATE L.R NO 9312, 9313, 3760 AND 252……..PETITIONERS

AND

HON. ATTORNEY GENERAL OF KENYA ……..……..…….. 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE……..…… 2ND RESPONDENT

RUIRU MUNICIPAL COUNCIL……..…. 3RD RESPONDENT

MBO-I-KAMITI FARMERS CO. LTD ……...……. 4TH RESPONDENT

RULING ON A PRELIMINARY OBJECTION

1. This Ruling relates to a Notice of Preliminary Objection filed by the 3rd Respondent, Ruiru Municipal Council in which it seeks to have the present Petition struck out. The Petitioners had filed the Petition dated 17th October, 2013 alleging violation of various constitutional rights and state that their main complaint is in regard to the events that occurred on 20th December, 2012 when the O.C.P.D Ruiru, one David Kirui, and O.C.P.D Gatundu, one Mr. Peter Katamu, leading a contingent of more than 1000 armed policemen, and four pick-ups carrying municipal askaris from the Municipal Council of Ruiru and in the company of officials and youth employed by the Mbo-I-Kamiti Farmers Co. Ltd, entered their land and barbarically evicted them. That during the eviction, the police fired live ammunition on the squatters causing the death of one Mr. Zachariah Gakuro and another Mr. Mwangi Kibe and further, causing injuries to others. They contend that the police also used bulldozers and a helicopter from which they fired incendiary objects, set ablaze and demolished more than 200 structures, looted and demolished shops and commercial premises and destroyed their farms.

2. The Petitioners are therefore aggrieved by the manner in which the demolitions were conducted *inter alia* and they allege that the eviction rendered them internally displaced, homeless and without basic shelter, food, medicine or education. The Petitioners therefore seek various remedies as a result of the alleged violation of their rights as a result of the evictions.

3. However, prior to the full hearing of the Petition, the 3rd Respondent filed the Notice of Preliminary Objection dated 1st December, 2014 in which it objected to the Petition on the grounds that:

1. ***The matters impleaded by the Petitioners are res judicata and this Court has no jurisdiction to try them the same having been directly and substantially in issue in High Court Petition No. 144 of 2012, David Mwathe Kibe, John Kibiru Mwai and Salome Mwihaki Njenga (Suing as the Treasurer, Secretary and Chairlady of Twiga Estate Squatters Society) vs Municipal Council of Ruiru and in ELC No. 487 of 2010, William Chege, Joseph Weru Nganga, George Mwangi Irungu vs Mbo-I-Kamiti Farmers Company Ltd.***

2. ***The suit is an abuse of the process of Court as the Petitioner is already party to High Court ELC No. 57 of 2012, Municipal Council of Ruiru vs Mbo-I-Kamiti Farmers Company Limited, William Chege, Joseph Weru Nganga, George Mwangi Irungu, Simon Charagu Kimani, Joseph Muthigani Kariuki, Jackson Wilfred Maingi and John Kinge, which is pending for hearing and determination. This Court consequently has no jurisdiction to proceed any further with the present suit while the first filed suit is pending in Court.***

3. ***The consent order recorded in ELC No. 57 of 2012 that set the eviction of the Petitioners from the suit property in motion was adopted as an order of the Court. Allowing this Petition would amount to a collateral attack on an order of a Court of competent jurisdiction.***

4. ***The Petition is frivolous, scandalous, mischievous and an abuse of the Court process.***

4. In its Written Submissions dated 5th January, 2016, the 3rd Respondent contended that the matters in the Petition are *res judicata* as outlined in **Section 7** of the **Civil Procedure Act** and as was held in the case of **James Katabazi and 21 Others vs The Attorney General of the Republic of Uganda, EACJ Reference No. 1 of 2007**. In the 3rd Respondent's view, the matters at hand have also been litigated upon in the above mentioned suits and that the gravamen of the Petition is that the Petitioners' eviction was as a result of a consent order that was entered in ELC No. 57 of 2012 and that the Defendants therein were not in actual occupation of the suit and as such, the consent order was fraudulent. In that regard, the 3rd Respondent further argued that the Petitioners are attempting to distance themselves from the Defendants who recorded the consent order in that suit in a bid to give life to an otherwise spent claim.

5. In that context, according to the 3rd Respondent, prior to the institution of the present Petition, the Petitioners had sought to be enjoined in ELC No. 57 of 2012 as Interested Parties vide a Notice of Motion Application dated 20th September, 2013 on grounds *inter alia* that the Municipal Council of Ruiru and the Defendants therein had conspired to file a friendly suit between themselves and later fraudulently obtained a consent order compromising it, and that action forms the basis for the present Petition. In that regard, the 3rd Respondent argued that Mutungi J. on 21st November 2014, rendered a decision on the same and dismissed the Application and thereby affirming the status of the impugned consent order and as such, the validity or otherwise of the consent order entered between the Parties in ELC No. 57 of 2012, cannot be reopened by this Court as the same is barred by the principle of *res judicata*.

6. Further, that in the said ELC suit, the parties were the same as the 3rd Respondent was the Plaintiff, the Petitioners were the Applicants, and the 4th Respondent herein was the 1st Defendant and as stated above, the issue therein was the validity or otherwise of the consent order and the same was tried and finally decided by a Court of competent jurisdiction and therefore, the basis of the present Petition is a matter that falls squarely within the bar of the doctrine of *res judicata*.

7. Finally, the 3rd Respondent relied on the decision in **E.T vs Attorney General and Another [2012] eKLR** to submit that the Petitioners cannot evade the doctrine of *res judicata* by adding new parties and introducing new causes of action to a determined issue, and it was its other submission that the Petitioners are flagrantly abusing the processes of this Court by ignoring the orders in Petition No. 144 of 2012 where the Court made it clear that if any relief is to be sought in regard to the present dispute, the same

ought to be sought in ELC No. 57 of 2012. It was the 3rd Respondent's submission therefore that the Petition at hand amounts to a collateral attack on an order of a Court of competent jurisdiction as was properly held in Petition No. 144 of 2012.

8. For the foregoing reasons, the 3rd Respondent urged the Court to uphold the Preliminary Objection and strike out the Petition with costs.

9. The Petitioners opposed the Preliminary Objection and interestingly filed an Affidavit in response sworn on their behalf by their Chairlady, Salome Mwihaki Njenga on 7th April, 2015 and later filed Written Submissions dated 15th February 2016. It was their contention that the 3rd Respondent has introduced evidence in support of the Preliminary Objection and in that regard, they objected to the said introduction and argued that Preliminary Objections can only be permitted in clear matters arising from the pleadings without having to go out of the said pleadings to discover extraneous evidence.

10. The Petitioners' position was also that their organization, Twiga Estate Squatters Society is registered under the Societies Act and is completely different from Twiga Estate Squatters (CBO) which is a community based organization registered by the Ministry of Gender, Children and Social Development, and has since been de-registered and the certificate of registration cancelled by the Government after it was discovered that the registration had been fraudulently obtained. That the latter is also an extension of Mbo-I-Kamiti Farmers Co. Ltd and deceptively uses a similar name as theirs with the intention of abusing the Court process by filing suits which they proceed to deliberately lose or compromise.

11. That Twiga Estate Squatters (CBO) and another group known as Twiga Men and Women Group are fraudulent organizations created by the Mbo-I-Kamiti Farmers Co. Ltd as their alter ego composed of its employees through which they file fraudulent suits between themselves, and entering fraudulent consent orders among themselves in an attempt to hoodwink the Court that it is the Petitioner's organization that has filed such suits.

12. It was the Petitioners' other argument that the Respondents herein have completely robbed them of justice and uncouthly obtained fraudulent orders through abuse of the Court process which has resulted in their immense suffering and deprivation. Additionally, that H. C. Civil Suit No. 171 of 2005 is another suit filed to manipulate the Court process as well as HCCC No. 170 of 2010 filed by Mbo-I-Kamiti Farmers Co. Ltd against the aforementioned Twiga Men and Women Group. In that regard, they argued that the Parties therein entered into a fraudulent consent order intended to be executed against them but when the fraud was discovered, they applied to the Court to be enjoined in the said suit successfully and the Court enjoined them and stayed the said orders.

13. Further, according to the Petitioners, the 3rd Respondent had sued seven members of the Twiga Squatters (CBO), now renamed Twiga Men and Women Group, together with Mbo-I-Kamiti in HCCC No. 57 of 2012 and they all conspired to callously enter a consent Judgment in their absence which resulted in the demolition of the developments on the suit land in dispute. That the alleged fraudulent consent order was executed against them and the 2nd Respondent wrote to support the eviction, as the Chairman of Twiga Farm Squatters.

14. The Petitioners in addition stated that they sought to be enjoined in the suit which is still pending but the Judge declined to grant their application and they consequently filed an appeal to the Court of Appeal which is still awaiting hearing. That, Nyeri Criminal Case No. 662 of 2010, is the only matter where Mbo-I-Kamiti took the Petitioners' genuine officials to Court and they therefore maintained that there was no suit filed in the High Court known as HCCC No. 781 of 2004 and that they are not the said Twiga Men and Women Group, who in any event, are identified by their names in HCCC No. 57 of 2012. In addition, that Petition No. 144 of 2012 and HC ELC No. 20 of 2010 (O.S) have no relevance to the present Petition because the latter was filed against a wrong defendant, who was later struck out, while in the former, the Petitioner therein was seeking an order of certiorari against a demolition order that had been issued by the Municipal Council of Ruiru and as such, the issues at hand in the present matter involve their eviction on 20th December, 2012, which according to them, has not been determined by any

Court.

15. In their Written Submissions, the Petitioners relied on the decisions in **Mukhisa Biscuit Manufacturers Co. Ltd vs West End Distributors [1969] 1 EA 696** and **Lotay vs Starlit Insurance Brokers Ltd (2003) EA 551 (CCK)** and contended that the Preliminary Objection herein is improper as it is based on disputed facts which require further investigation by the Court and more so, the Court needs to examine whether indeed Mbo-I-Kamiti Farmers Co. Ltd has been engaging in fraudulent practices using the Court process. Relying further on **HC ELC Milimani Civil Suit No. 149 of 2011 (OS), David Mwathe Kibe and 2 Others (Suing as the Treasurer, Secretary and Chairlady of Twiga Estate Squarters Society) vs Mbo-I-Kamiti Farmers Co. Ltd** they argued that this Court has the solemn judicial duty to protect the integrity of its processes and is meant to do justice to all Parties irrespective of status.

16. The Petitioners finally submitted that their Petition was filed as a result of the events that occurred on 20th December, 2012 and the substantive prayers therein have never been sought in any suit previously and in any event, that this Court has previously rendered the position that matters concerning claims on land and adverse possession shall be determined by the Environment and Land Court and proceedings before this Court shall only be confined to the said occurrences of 20th December, 2012.

17. For those reasons therefore, the Petitioners urged the Court to overrule the Preliminary Objection with costs to them.

Determination

18. From the Parties' respective pleadings and submissions, the key question that begs for an answer is whether the Preliminary Objection raised by the 3rd Respondent is merited and whether the same ought to be allowed. In that regard, the key objection to the present Petition is that the issues raised in the present Petition are *res judicata* and as such, it ought to be struck out as it is an abuse of the Court process.

19. At the onset, it must be remembered that a Preliminary Objection as was defined in case of **Mukisa Biscuit Company vs Westend Distributors Limited (supra)** must always be premised on the law hence, my statement elsewhere above that the Petitioners interestingly filed an Affidavit in response to it, an action that flies in the face of what the Court stated in the said case as follows:

> ***"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop."***

20. Further, in **Kenya Council of Employment Migration Agencies vs Nyamira County Government and 10 Others [2015] eKLR,** the Court observed that:

> ***"A close look at the authority of Mukisa Biscuits above establishes the essence of a preliminary objection. It is a point of law apparent out of the pleadings and must meet certain criteria to pass as such. It would, if appropriate and well presented come in to dispose of the suit at a preliminary stage of the proceedings. This is the more reason why its application must be rigorously thrashed to obviate situations whereby litigants would be estopped from pursuing their matters in unclear and uncertain circumstances.***
>
> ***If unappropriately applied, it can be a dangerous tool of operation. It would lock out deserving litigants out of their causes. On the other hand, it could condemn deserving respondents to undue pressure and costs in pursuing undue litigation. This is a delicate balancing act under all circumstances.***

Following the authority of Mukisa Biscuits (supra) it would appear that the preliminary objections though raising pertinent issues of law do not in the circumstances pass the test of sustainable preliminary objections against the petition. In as much as I agree that the petitioner did not substantially answer or address the issues raised by the objectors, these in themselves are unsustainable and must fail."

21. Without belabouring the point, the present Preliminary Objection is properly before this Court as it raises the question:

a. Whether the matters in the Petition have already been heard and determined by a Court of competent jurisdiction, which question if answered in the affirmative, would have the effect of terminating the present Petition; and

b. Whether, in view of the proceedings pending for determination elsewhere, the principle of *sub judice* should be invoked.

22. In that context, and on (a) above, the law on *res judicata* in civil law is outlined under **Section 7** of the **Civil Procedure Act** in the following terms:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

23. The **Civil Procedure Act** further advances explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are stated as follows:

Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

24. The principle has also been addressed in a variety of cases both in this and other jurisdictions. For instance, the Supreme Court of India, in **Swamy Atmananda vs Sri Ramakrishna Tapovanam [(2005) 10 SCC 51],** expressed the view that:

"[26] The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment. [27] The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment." (Emphasis added)

25. On the applicability of the doctrine in Petitions under the Bill of Rights, the Court in **Okiya Omtatah Okoiti and Another vs The Attorney General and Another, Petition No. 593 of 2013** pointed out that:

> ***"Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is re-litigating the same matter before the Constitutional Court and where the Court is called upon to re-determine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious."*** (Emphasis added)

I also note that in India, the position taken by the Court in Okoiti above is also upheld – See **Chaudhari & Chatuverdi's Law of Fundamental Human Rights, Delhi Law House, Page 915.**

26. From the foregoing, it follows that for a matter to be barred by *res judicata*, the parties to the suit must be the same, the issues must be the same, and the issues must have been determined on merits by a court of competent jurisdiction. Furthermore, as the authorities above suggest, the doctrine is to be invoked sparingly in rights based litigation such as in the present case.

27. Applying the above principles to the present case therefore, it has been contended that the issues raised in the present Petition were conclusively addressed in among other cases Petition No. 144 of 2012, David Mwathi Kibe and 2 Others vs Municipal Council of Ruiru and in that regard, I note that in the said case, the Petitioners were **David Mwathi Kibe, John Kibaru Mwai and Salome Mwihaki Njenga** suing as The Treasurer, Secretary and Chairlady respectively and On Behalf Of The **Twiga Estate Squatters Society and had brought the suit against the Municipal Council of Ruiru.** The dispute in question was in regard to the ownership and occupation of land parcels L.R No. 9312 (original 4728/1), L.R No. 9313 (Original 4728/2) and L.R No. 3760 which were collectively known as Twiga Estate. The Petition was triggered by a Notice issued by the Municipal Council of Ruiru dated 29th March 2012 published in the *Daily Nation* newspaper as a public notice and it stated as follows:

> *"Notice is hereby given to all developers who have erected illegal structures/buildings at L.R No. 9312, L.R 9313 and L.R No. 3760 known as Twiga Farm that you are hereby given fourteen (14) days Notice to remove the structures, failure to which the council shall remove them at your own cost."*

28. In his decision on the matter, Majanja J. partly observed as follows:

> ***"[5] It is also not in dispute that the properties comprising Twiga Estate are owned by the famous Mbo-I-Kamiti Farmers Company Ltd. Mbo-i-Kamiti Farmers Company Ltd has been involved in litigation concerning the property and persons it claims are illegally residing on the property. These suits are as follows;***
>
> a. ***ELC NO. 170 of 2010, Mbo-I-Kamiti Co. Ltd v Simon Charagu & Others (Suing as Twiga Men and Women Group). A consent order was recorded that the defendants vacate the suit premises.***
>
> b. ***ELC No. 487 of 210, William Chege, Joseph Woru Nganga, George Mwangi Irungu (Suing as Twiga Estate Squatters) v Mbo-I-Kamiti Farmers Company Ltd. This suit was dismissed on the ground that the matter was res-judicata.***
>
> **[6] *The* respondent also filed a suit against Mbo-I-Kamiti Company Ltd, being *ELC No. 57 of 2012 Municipal Council of Ruiru v Mbo-I-Kamiti Farmers Company Limited, William Chege, Joseph Woru Nganga, George Mwangi***

Irungu, Simon Charagu Kimani, Joseph Muthigani Kariuki, Jackson Wilfred Maingi and John Kinge. A consent order was recorded on 13th February 2012 to the effect that the defendants, who were in occupation of the suit property, would be barred from constructing buildings on land parcels and that the illegal structures would be removed within 21 days. The order also directed the OCS Ruiru be mandated to offer security as the execution of the orders was being carried out. The consent allowed the Municipal Council to demolish all buildings erected on Twiga Estate by the occupants in breach of the provisions of section 29 of the Physical Planning Act (Cap 286).

[7] ***It is instructive to note that the consent recorded in ELC No. 57 of 2012 was between the Municipal Council and the 2nd, 3rd and 4th defendants who described themselves as the officials of Twiga Estate Squatters Society. It is the self-same persons who filed ELC No. 487 of 2010 which the court held was res-judicata. In light of all these cases, Mr Sang, counsel for the respondent, argued that the petition is res-judicata.***

[8] ***Whether present suit is res-judicata depends on the status of the Twiga Estate Squatters Society whose suit has been dismissed as res-judicata and whose officials entered into a consent order with the Municipal Council to remove the structures built contrary to the Physical Planning Act***." (Emphasis added)

While striking out the Petition, the Learned Judge went on to state that:

"[9] ***The petitioners contend that the persons who purported to record the consent were not officials of the society. In view of the decision in ELC No. 487 of 2010, the issue whether William Chege, Joseph Chege and Joseph Weru Ng'ang'a were officials of the society cannot be re-opened. The issue of the demolition and removal of the illegal structures was covered or determined by the consent orders recorded. The logical consequence is that the present matter is now res-judicata.***

[10] ***This consent order recorded in ELC No. 57 of 2012 was adopted as an order of the court. As a result it cannot be set aside through the filing of a petition for the enforcement of fundamental rights and freedoms. Allowing the petition would amount to a collateral attack on an order of a court of competent jurisdiction.***

[11] ***The fact that this case involves enforcement of fundamental rights and freedoms does not negate the application for the doctrine of res-judicata. Whether the doctrine of res-judicata applies to matter of enforcement of fundamental rights has been settled in several cases. (See Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2011 (Unreported), Richard Nduati Kariuki v Leonard Nduati Kariuki & Another Nairobi Misc Civil Appl. No. 7 of 2006 (Unreported), Booth Irrigation v Mombasa Water Products Ltd (Booth Irrigation No. 1), Nairobi HC Misc. Appl. No. 1052 of 2004 (Unreported).***

[12] ***It is not without sympathy that I am constrained to dismiss the petitioners' claim. If indeed, relief is to be sought, then that relief must be sought in ELC No. 57 of 2012 (See Methodist Church in Kenya Trustees v Reverend Jeremiah Muku and Another Nyeri CA Civil Appeal No. 233 of 2008 (Unreported)).***

[13] ***The High Court exercising jurisdiction is entitled to enforce fundamental rights and freedom, what I am not permitted to do is to give orders which would amount to setting aside an order issued by another High Court judge (See John***

Githongo and Others v Harun Mwau and Others Nairobi Petition No. 44 of 2012 (Unreported))." (Emphasis added)

29. Reading the above findings, it is clear in my mind that Majanja J. addressed the question in regard to the consent order that had been recorded in ELC No. 57 of 2012 and declined the invitation to set the same aside vide a Petition filed for enforcement of fundamental rights and freedoms. Furthermore, in the Learned Judge's view, any remedies in regard to the said order could be properly sought in ELC No. 57 of 2012 and it is obvious that since the question of the validity or otherwise of the consent order was addressed by Majanja J., this Court cannot open any inquiry pertaining to the same. The principle of *res judicata* clearly applies and the next question is whether this Court has the jurisdiction to determine the other issues raised in the present Petition noting the existence of ELC 57 of 2012.

30. In that regard, I note that the Petitioners' key grievance is in regard to the manner in which they were evicted from the disputed land parcels and which they contend was unlawful and in violation of their rights as provided under the **Constitution** and various international law instruments to which Kenya is a signatory. They have on that basis sought for various orders pertaining to violation of their rights. I also note that in Prayer (N) of the Petition they seek an order of restitution. The said Prayer states that they are seeking:

> ***"Order of restitution and return of the Petitioners 4000 squatters to their homes or land in land parcel No. 9312, 9313, 3760 and 252 in Ruiru and further that the Respondents do pay the cost of transportation and reconstruction of homes. In the alternative to the above prayer, the Respondents do pay to the Petitioners the full value of land parcel No. 9312, 9313, 3760 and 252 in Ruiru at current market rates."***

31. Additionally, Prayer (F) of the Petition is to the effect that the Court issues a:

> ***"Declaration that the forcible, violent and brutal eviction through demolition of homes of the Petitioner and the destruction of the building materials and their household goods in the process, and without according them an opportunity to salvage any of their belongings is a violation of their fundamental right to protection of property guaranteed by Article 40 (1), (3) and (4) as read with Article 21 (3) of the Constitution."***

32. In that regard, **Article 40** of the **Constitution** thereof provides that:

> ***"(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—***
>
> ***(a) of any description; and***
>
> ***(b) in any part of Kenya.***
>
> ***(2) …***
>
> ***(3) Parliament shall not enact a law that permits the State or any person—***
>
> a. ***to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or***
>
> b. ***to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).***
>
> ***…***

(4) Provision may be made for compensation to be paid to

occupants in good faith of land acquired under clause (3) who may not hold title to the land.

5. **…"**

33. For the above orders to be granted, it means that this Court has to go into the question of ownership of the said parcels of land and to determine the rightful owner(s) therein. It is thus apparent that this Court is being called upon to determine whether there has been any violation of the Petitioner's rights in regard to their eviction and whether any of their property rights under **Article 40** have been violated. In that regard the jurisdiction of this Court is limited under **Article 165 (5) (b)** which is to the effect that:

> ***The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162 (2)***.

34. **Article 162 (2)** also provides that:

> ***Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-***
>
> a. ***Employment and labour relations; and***
>
> b. ***The environment and the use and occupation of, and title to, land***.

35. The **Environment and Land Court Act, Chapter 12A, Laws of Kenya, 2012,** was thus enacted pursuant to the above provision which Act created the Environment and Land Court whose jurisdiction is provided for under **Section 13** thereof and which provides as follows:

1. ***The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***

2. ***In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—***

    a. ***relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***
    b. ***relating to compulsory acquisition of land;***
    c. ***relating to land administration and management;***
    d. ***relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***
    e. ***any other dispute relating to environment and land***

3. ***Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.***

4. ***In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court***.

36. From the above provisions, the jurisdiction of the Environment and Land Court extends to determining the violation of rights and the making of declarations in relation to any deprivation of property and also to determine whether an order of restitution should be made. In the circumstances of this case, the Petitioners have alleged violation of their various rights as a result of the eviction in

question. The question then that I must pose is whether the Environment and Land Court has the jurisdiction to determine whether there has been any violation of the Petitioners' fundamental rights and freedoms in that context? My answer to that question is in the affirmative. I say so because the Environment and Land Court has similar powers and jurisdiction as this Court to determine whether there has been any violation of the Petitioners' rights in regard to land and environment questions.

37. I also say so because in **Daniel N. Mugendi vs Kenyatta University and 3 Others, Civil Appeal No. 6 of 2012,** while the case dealt with matters relating to labour and employment, the reasoning of the Court of Appeal therein applies to disputes relating to land which, like labour and employment disputes, are matters for the Courts created under **Article 162** of the **Constitution**. In that case, the Court of Appeal noted the position taken by Majanja J in **United States International University (USIU) vs Attorney General (2012) eKLR** in which he had stated as follows:

> ***"[41] Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court."***
>
> The Learned Judge added:
>
> ***"[43] The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters (within) its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6)***."

The Court of Appeal then went on to observe as follows:

> ***"Believing as we do that the approach taken by Majanja J is the correct one, and in endeavouring to meet the ends of justice untrammeled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5) (b). <u>And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination.</u> These three courts with similar/equal***

status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file "mixed grill" causes in any court they fancy. This will only delay dispensation of justice.

In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects." (Emphasis added)

38. The same reasoning was followed by the Court in **Jemimah Nyambura Njuguna vs Director of Public Prosecutions and 5 others, Petition No 514 of 2014, where it acknowledged the jurisdiction of the Environment and Land Court to determine questions of violation of fundamental rights whenever such a question arises in matters pertaining to a determination under Article 40.**

39. Turning back to the issue before me therefore, it is not in dispute that ELC No. 57 of 2012 is pending before the Environment and Land Court. I note in that regard, that the Petitioners herein had sought to be enjoined therein as Interested Parties but in a Ruling rendered on 24th November, 2014, Mutungi J. addressed his mind on the question of the various suits revolving around parcels of land Nos. 9312, 9313 and 3760, collectively forming the said Twiga Estate farm. The Learned Judge stated thus:

"It is unclear to the Court what the present status of HCCC No. 149 of 2011 (OS) is but it is patently clear that the same parcels of land the proposed Interested Party claims to have an interest in are the subject of a substantive suit instituted by them and that they would in that suit have sought orders of injunction and/or applied for the present suit to be consolidated with it if they considered the same issues arise.

However more significantly the Respondents aver that the issues that the proposed Interested Party raises have been adjudicated upon in previous suits notably in HCCC No. 781 of 2014, HCCC No. 487 of 2010 and HCCC No. 170 of 2010 and the issues are res judicata. I have perused the availed copies of the rulings/orders in the said suits and I am persuaded the Applicants have been parties in those suits albeit under varying names: Twiga Estate Squatters Society, which has brought the instant application was only registered in 2011 meaning its members variously belonged to other groups variously described as Twiga Men and Women group, Twiga Estate Squatters and Twiga Squatters Estate. I do not accept the groups are separate and distinct so as to have separate identities. The persons who have variously brought suits claiming adverse possession must be the same persons who claim to have occupied the land.

My view is that to allow the Applicants to be enjoined in this suit would be to sanction flagrant abuse of the court process. Indeed if I allow the present applicant there is nothing to prevent faction of the same group under any of the several names from making a similar application. I decline to allow the applicant to be joined as a Party in the proceedings and accordingly order the proposed Interested Party's Application dated 20th September 2013 dismissed with costs to the Plaintiff and 1st Respondent who opposed the Application."

40. In that case, just like the present Petition, at the core of the dispute is the question of violation of the Petitioners' rights as a result of the eviction from Twiga Estate. They have in that regard disputed having filed **HCCC No. 781 of 2004** alleging that it was not their case. However, Mutungi J. in his Ruling, referred to that issue and pointed out that:

"In HC ELC No. 20 of 2010 (OS) Twiga Estate Squarterrs through their officials

brought a suit against the 1st Defendant seeking a declaration that they have become entitled by adverse possession to all those parcels of land comprised in L.R Nos. 9312, 9313, 3760 and 252 by virtue of having been in possession for over 12 years. These are the same parcels of land that the proposed Interested Parties now claim they are entitled to in the present suit. The proposed Interested Party's suit was struck out with costs for being an abuse of the process of the court as they had filed the same while they knew a similar suit involving the same parties being No. 781 of 2004 had been brought by the proposed Interested Parties claiming the same lands against the 1st Defendant herein and another and was dismissed."

41. It is apparent therefore that the question of ownership and title to the Twiga Estate property remains in contest and the matter is further complicated by the fact that various groupings of residents of Twiga Estate have since emerged, as was pointed out by Mutungi J. In the present Petition, as I had earlier indicated, other than raising claims to the parcels of land otherwise known as Twiga Estate, the Petitioners have further alleged violation of their fundamental rights owing to the evictions conducted on 20th December, 2012. In my Ruling in this matter, delivered on 28th March, 2014, pertaining to the Application for Conservatory Orders by the Petitioners, I stated as follows:

"*[15] *Firstly, in the Petition dated 17th October 2013, what is in issue is the legality or otherwise of the eviction allegedly conducted by the Respondents on 20th December 2012. While I agree that the issue is neither pedestrian nor one to be casually dismissed, it has also come to my notice that the issue is also live and is subject of on-going proceedings in HCCC ELC No.57/2012 and it is not in dispute that the present Applicants in that suit have sought orders inter-alia stopping the 4th Respondent "from alienating, disposing of, surveying, developing, charging and/or in any manner dealing with land parcel No.9312, 9313 and 3760 otherwise known as Twiga Estate Farm" The prayers in the present Application are in substance similar and it is an abuse of Court process to seek the same orders in this Court while similar prayers are awaiting determination in another Court. Without saying more, since the Applicants failed to disclose that fact, discretion can hardly be exercised in their favour.

[16] To drive the above point home, I have read the judgment of Majanja J. delivered on 3/12/2012 in Petition No.144/2012. That Petition related to a Notice dated 29/3/2012 issued by the 3rd Respondent requiring all persons who had erected illegal structures on Twiga Farm to remove those structures within 14 days or face consequences. The present Applicants filed that Petition seeking certain orders including "a declaration that the Applicants have a right to peaceful and quiet enjoyment of the properties subject thereto"

[17] It is important to note that the notice aforesaid expired and the Applicants were evicted and it took them more than one year to lodge the present proceedings challenging the legality of that eviction."

42. I went on to state that:

"*[19] *Secondly, Mr. Njiru in his Submissions spent considerable time on the point that his clients' claim to the land is based on adverse possession and that is why the eviction was prima facie unconstitutional. He submitted authorities on the doctrine of adverse possession and my finding is that those authorities were irrelevant to the issue at hand. I have elsewhere above set out the principles to be applied when determining an application for conservatory orders. While indeed the nature of and the issues raised in a Petition are important considerations, in fact there is no prayer in the present Petition for orders of adverse possession, even if such a prayer could be made under the Constitution.

The substratum of the present Petition is in fact the legality or otherwise of the eviction conducted on 20th December 2012 and not the claim by way of adverse possession.

[20] In fact, the prayer for adverse possession is the subject of determination in ELC No. 20/2010 (O.S.) In that case, the officials of Twiga Estate Squatters initially sought and obtained orders that they were entitled to the land by adverse possession.

[21] They obtained an ex-parte judgment in that regard and later the 4th Respondent sought a review of that judgment. In his Ruling dated 30/11/2010, Muchelule J. partly stated as follows; "The ex-parte judgment entered in this case on 8th July, 2010 is reviewed and set aside. Further, the entire suit is struck out with costs for being an abuse of the process of the Court".

[22] If that suit was struck out, where then is the claim for adverse possession being pursued? I have seen a ruling by Muchele J. in ELCC.487/2010 where Twiga Estate Squatters had sued the 4th Respondent again claiming the suit land by fact of adverse possession. The learned judge struck out the suit on the ground that it was res judicata in view of previous proceedings in ELC No.20/2010 (O.S.) and HCCC.781/2004.

[23] It is obvious to me that the facts being as they are, to predicate the grant of the present Application on adverse possession is to misunderstand both the Petition as framed and previous orders of the High Court on the subject.

[24] Fourthly, it is admitted by the Applicants that they are squatters on suit land. They also admit that title is held by the 4th Respondent and that they have been dispossessed of the land upon eviction on 20th December 2012. Their claim to the land by adverse possession is still merely a claim. Rights under adverse possession only accrue upon a declaration by a competent Court under Section 37(1) of the Limitation of Actions Act, Cap.22. The Applicants are not in possession of such a declaration and they have insisted that they were "squatters" on the land and their organisation is styled "Twiga Estate Squatters Society". "Squatter" is defined in the Black's Law Dictionary, 9th Edition as; "a person who settles on property without any legal claim or title". Further, "squatter's rights" are defined thus; "The right to acquire title to real property by adverse possession ..."

[25] The definitions above are attractive to my mind because it clarifies the issue that without crystallised rights by adverse possession (and none have been shown to me), the balance of convenience must surely tilt in favour of the 4th Respondent which has title to the disputed lands and which title must be protected under Article 40 of the Constitution. It is very difficult to tilt discretion and balance of convenience to the Applicants where their approach to enforcement of rights has been confused, unstrategic and fundamentally flawed in terms of the legal process.

[26] Lastly in the Petition, two major prayers are made; that of restitution and compensation. I will say little of either at this stage but suffice it to say that if compensation is sought, it only means that if the Petition succeeds, all will not be lost for the Applicants."

43. Based on the foregoing and what I had earlier on stated, the Environment and Land Court is well suited to determine whether any of the Petitioners' constitutional rights were violated and that Court is

also well suited to determine the legality or otherwise of the evictions in question. On that basis, I am satisfied that it would not be appropriate for this Court to address its mind to the issues in the present Petition as the appropriate forum remains the Environment and Land Court and more specifically in ELC No. 57 of 2012 or any other suit pending before it on Twiga Estate. In any event, I am inclined to agree with Mutungi J. that allowing the direction taken by the Petitioners herein would be akin to opening a pandoras box of litigation whereby different groups under the Twiga Estate banner would appear with similar applications or Petitions in regard to the parcels of land comprising the Twiga Estate.

44. Having so said therefore, both on application of the principles of *res judicata* and *res sub judice*, the Preliminary Objection is merited.

Conclusion

45. From my reasoning above, the Preliminary Objection by the 3rd Respondent succeeds and the Petition herein is struck out.

46. Let each Party bear their own costs as I see no reason to tax any Party with the further burden of costs.

47. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9th DAY OF AUGUST, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Obura for 1st Respondent

Mr. Rono for 3rd Respondent

No appearance for Petitioners (but some Petitioners are present)

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE