Saleh & 2 others v National Land Commission & 3 others; Bayusuf & 4 others (Interested Parties) (Constitutional Petition 44 of 2020) [2025] KEELC 3401 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3401 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION 44 OF 2020

LL NAIKUNI, J

APRIL 25, 2025

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLES 1, 3, 10, 19, 21, 22, 23 (3), 35, 40, 42, 47, 50, 69, 70, 232, 258, CHAPTER SIX AND THIRTEEN OF THE CONSTITUTION OF KENYA

AND -

IN THE MATTER OF: ARTICLES 13 AND 24 OF THE AFRICAN CHARTER ON HUMAN RIGHTS AND PEOPLES'S RIGHTS.

AND –

IN THE MATTER OF: SECTIONS 3, 13, & 18 OF THE ENVIRONMENT AND LAND COURT ACT

BETWEEN

SWALEH HUSSEIN SALEH ..... 1ST PETITIONER

AWADH SALEH SAID ..... 2ND PETITIONER

SWALEH MOHAMMED SALEH SAID ..... 3RD PETITIONER

AND

THE NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

THE CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA ..... 4TH RESPONDENT

AND

IQBAL AHMED BAYUSUF ..... INTERESTED PARTY

ETHICS AND ANTI CORRUPTION COMMISSION ..... INTERESTED PARTY

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED PARTY

KENYA URBAN ROADS AUTHORITY ..... INTERESTED PARTY

NATIONAL CONSTRUCTION AUTHORITY ..... INTERESTED PARTY

JUDGMENT

I. Preliminaries

1. The Judgment of this Court pertains the filed Constitution Petition dated 8th December, 2020 by, Swaleh Hussein Saleh, Awadh Saleh Said and Swaleh Mohamed Saleh Said; the Petitioners herein, the National Land Commission, the Chief Land Registrar, the Attorney General and the County Government of Mombasa, the 1st to 5th Respondents herein and Iqbal Ahmed Bayusuf, Ethics and Anti-Corruption Commission, National Environment Management Authority, Kenya Urban Roads Authority and National Construction Authority, the 1st to 5th Interested Parties herein.

2. Upon service of the Petition, the 1st Interested party entered appearance through a Memorandum of Appearance dated 12th January, 2021 and filed a replying affidavit sworn on 30th December, 2021, a response dated 14th January, 2022 and Grounds of Opposition dated 17th January, 2022. The 2nd and 3rd Respondents Entered Appearance through a Memorandum of Appearance dated 25th January, 2021. The 4th Respondent responded to the Petition through a response dated 3rd March, 2022 and the Replying Affidavit sworn on 14th March, 2022.

3. It is instructive to note that upon the consensus of the parties on 17th March, 2023 a Site Visit ("Locus in Quo") was conducted in their presence. Subsequently, a report was prepared and is hereby attached in this Judgement for ease reference herein.

II. Description of parties

4. The Petitioners were described as male adults citizens of the Republic of Kenya carrying on business in Mombasa and elsewhere within the Republic of Kenya.

5. The 1st Respondent was described as an independent Government commission whose established was provided for by Article 67 of *the Constitution* of Kenya 2010 and the *National Land Commission Act*, 2012 whose mandate is to manage public land on behalf of the National and County Governments, initiate investigations into present and historical land injustices and recommend appropriate redress and monitor and have oversight responsibilities over land use planning throughout the country.

6. The 2nd Respondent was described as the Chief Land Registrar of the Republic of Kenya appointed under the provisions of the *Land Registration Act*, No. 3 of 2012 Laws of Kenya. The 3rd Respondent was described as the Principal Legal Advisor to the Government of the Republic of Kenya and issued on behalf of the Government of Kenya. The 4th Respondent described as a County Government established with functions set out at Chapter 11 of *the Constitution* of Kenya particularly Articles 186 thereof, the *County Governments Act* No. 17 of 2012 and other relevant Laws of Kenya.

7. The 1st Interested Party was described as a male adult of sound mind, residing and working for gain within the County of Mombasa and a neighbor to the Petitioner and a party in the case of "Mombasa

High Court Constitutional Petition Number 43 of 2020: MBESA Investments Limited vCounty Government of Mombasa & 2 Others".

8. The 2nd Interested Parties were described as a public body established under the provision of Section 3 (1) of the *Ethics and Anti-Corruption Commission Act*, 2011 to combat and prevent corruption, economic crime and unethical conduct in Kenya through law enforcement, prevention, public education, promotion of standards and practices of integrity, ethics and anti-corruption.

9. The 3rd Interested Party was described as a state agency and body corporate established under the Environmental Management and Management and Co-ordination Act 1999 (EMCA) and its principal objective and obligations set out in the said Act and further obligations under the provision of Articles 42 and 69 of *the Constitution* to ensure exercise general protection, conservation, supervision and co-ordination over all matters relating to sustainable development, use of environment as well as natural resources and to be the principal instrument of the Government of Kenya in the implementation of all policies relating to environment.

10. The 4th Interested Party was described as a state corporation under the ministry of transport and infrastructure established by the *Kenya Roads Act*, 2007 with the core mandate of management, development, rehabilitation and maintenance of national trunk roads and the 5th Interested Party was described as a Government organization which regulates, streamlines and builds capacity in the construction industry.

III. The Court's direction before the hearing

11. Nonetheless, on 15th October, 2024, the Honourable Court fixed with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on conducting of the pre-trial conference and set down the Petition for the delivery Judgment.

IV. The Petitioner's Case

A. Legal foundations of the Petition.

12. This Petition was founded on *the Constitution* whose supremacy is recognized under Article 2 (1) thereof which:- "...binds all persons and all State organs at both levels of government". Every person including the Respondents is under a constitutional obligation to respect, uphold and defend *the Constitution*. Instructively, any act or omission in contravention of *the Constitution* is invalid by operation of Article 2 (4) of *the Constitution*.

13. Chapter 4 of *the Constitution* contains the Bill of Rights which in the Article 20 (2) thereof permits every person to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and mandates the court to adopt an interpretation that gives the greatest efficacy to the right or fundamental freedom in question and in so doing, to adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

14. The provision of Article 258 of *the Constitution* provides that any person has a right to institute court proceedings claiming violation of *the constitution* on behalf of another person who cannot act on his own name or behalf. Article 260 of *the Constitution* defines a person to mean and include inter-alia association or other body of persons whether incorporated or unincorporated.

15. For the purposes of the Petition hereof, the Petitioners lodge this Petition on their own behalf and for the benefit of the general public and/or residents of Ziwani Lane in Tudor Estate Mombasa who are natural citizens of the Republic of Kenya to protect and uphold the rights and freedoms expressly set

out in Chapter 4 and more specifically Articles 23(3), 35, 40, 42, 47, 50, 69, 70, 232, 258, Chapter 6 and 13 of *the Constitution* of Kenya 2010.

B. Facts of the case:-

16. The 2nd Petitioner together with the fathers of the 1st and 3rd Petitioners were the registered proprietors of all that parcel of land known as Mombasa Block XVII/16 situated at Tudor along Ziwani Lane, Mombasa (Hereinafter referred to as "The Petitioner's Property"). The 1st Petitioner had been duly authorized by the 2nd Petitioner through a Power of Attorney, he also had acquired a Limited Grant to the estate of his late father Hussein Saleh Said who was also registered as a proprietor of the Petitioner's property. At the same time, he had also been authorized by the son of the late Mohamed Saleh Said who was the third registered proprietor of the Petitioner's property and finally the 1st Petitioner has over the years been the person in charge of managing the Petitioner's property. The Petitioners as registered proprietors of the Petitioners' property and/or beneficiaries of the two estates were entitled to enjoy all the rights and privileges belonging or appurtenant thereto including but not limited to the right to possession, quite enjoyment and equal access to public property adjacent to the Petitioner's property thereof without any hindrance or restriction.

17. According to the Petitioners, the property was adjacent to all that parcel of land known as Plot No. Mombasa/Block XVII/1399 (Hereinafter referred to as "The Public Access Lane"). The Petitioners averred that the Public Access Lane was set apart and/or reserved to be used as an access lane for the general public and had been over the years been used as such and as a foot pathway until recently when the 4th Respondent illegally and irregularly authorized the 1st Interested Party to develop and construct shops and/or kiosks on it.

18. The proprietors of the properties fronting Ziwani Lane and the public had over the years used the said the Lane to access the main Public Road Reserve and as a pedestrian lane/foot pathway. The aforesaid access to the main Public Road Reserve and pedestrian lane had over the years been free and unrestricted through the said the Public Access Lane. Sometime in the year 1995 the 2nd Petitioner discovered that the Public Lane had been irregularly and unlawfully leased to the 1st interested party and immediately registered a caution on the Lane claiming a license interest. The said caution had never been withdrawn as was duly registered by the 2nd Respondent.

19. Within the mandate of the 1st Respondent after it was established it discovered that the Lane had been irregularly and un lawfully leased to the 1st Interested Party and therefore it made a recommendation that the lease be revoked since the property was public land allocated to be used as an access lane by the general public. In its recommendation the 1st Respondent purportedly inadvertently indicated the plot No. as Mombasa/Block 19/315 instead of Mombasa/Block XV11/1399 with all the other details including the location, acreage, allocating authority, originalallotee, date of allocation and current owner being the same as the Public Access Lane.

20. To date the 1st Respondent's recommendations had not been implemented by the Respondents, the registered caution had been disregarded. In violation of the Petitioners', the residents of Ziwani lane, general public's constitutional rights to protection of law, protection of property, fair administrative action, clean and healthy environment and equal access to public property the 4th Respondent on or about November, 2019 purported to issue the 1st Interested party with an occupation license over said lane for a period of five (5) years from 22nd November, 2019.

21. The purported license and approvals were granted even contrary to the terms and requirements needed for such approvals to be issued. It was not clear under what circumstances under which construction permits could be issued with and outstanding rates of over a sum of Kenya Shillings Two Million (Kshs.

2,000,000.00/=) a situation which seemed to be highly irregular. On or about the 20th November, 2020 purportedly pursuant to the purported licence and approvals the 1st interested party as a purported licensee, commenced construction works on the Public Lane. The ongoing construction was blocking the Petitioners' access to their property and it had brought to halt the Petitioners' development on their property which was depended on unrestricted access to their property.

22. The ongoing construction would ultimately cause imminent danger as the public and/or pedestrians will be forced to use the public road reserve used by motor vehicles instead of Lane which was reserved as an access lane. The Constructions works had been undertaken without lawfully and procedurally obtaining the requisite licenses, approvals or sanctions from the 3rd, 4th and 5th Interested Parties. The residents of the area and the Petitioners were not consulted by the 4th Respondent before issuing the license to the 1st Interested Party that it knew would prejudice the Petitioners, the residents of the area and the general public.

23. The 4th Respondent granted a licence over a public access lane reserved for the general public to the 1st Interested Party without compliance with the elaborate provisions of the law and the mandate of the 3rd and 4th Interested Parties. The 4th Respondent acted unconstitutionally and unlawfully. Petitioners and the general public who had been enjoying unrestricted access to the Lane had now lost that advantage without due process having been followed. Since the Petitioners acquired their property the Lane was open, undisturbed and provided free access and a foot pathway to the general public and from the Petitioners' property and other properties in the area.

24. Inquiries about the on construction had revealed that the same was being put up by 1st interested party who was claimed that the Lane was private property which had been secured for development as per the purported permits and/or approvals by the 4th Respondent. Several complaints which had been lodged with the Respondents and the Interested Parties though had not elicited any action and the construction works were still continuing day and night even past curfew hours.

25. Despite a notice of discontinuance of the construction works by the 5th Interested Party in the exercise of its mandate the construction works on the Lane was still ongoing day and night. The constructions was ongoing with unlicensed/irregularly and unlawfully obtained licences and unlawful activities in a discriminative manner which unless restrained by the Court, the Petitioners, the general public and residents of Ziwani would suffer gross miscarriage of justice and irreparable loss.

C. Violation of *the Constitution* and Fundamental rights and freedoms:-

26. By leasing, granting a license and authorizing construction and development of shops and/or kiosks on a public property reserved for use by the general public as an access lane, the 4th Respondent had contravened the provision of Articles 10, 40, 47, 50 and 232 of *the Constitution* of Kenya, 2010 which related to national values and principles of governance, protection of right to property and right to fair administrative action.

27. The Respondents threatened a breach of the Petitioners rights and the rights of the people of Ziwani Lane to equality and the right to equal protection of the law under the provision of Article 27 (1) of *the Constitution*.

28. By allowing the 4th Respondent and the 1st Interested Party being its Licensee to block the Petitioners' access to its property the Respondents had violated the Petitioners' right to property as envisaged under the provision of Article 40 of *the Constitution*. Failing to ensure implementation of the 1st Respondent's recommendation of revocation of the lease and license issued to the 1st Interested Party by the 4th

Respondent the Respondents had violated the Petitioners' right to equal access and use of public property.

29. By allowing the 1st Interested Party's impugned activities that were non-compliant Environmental Management and Coordination Act (EMCA Act) and National Construction Authority the Respondents risk breach and violation of the Petitioners right guaranteed under Article 27(2) of *the Constitution* which guarantee equality in enjoyment of rights and fundamental freedoms in so far as they allowed the 1st Interested Party to exploit construction works on public property without compliance with the law but at the same restrict other Kenyans from developing public property.

30. The provision of Article 35 (1) of *the Constitution* guarantees the Petitioners a right to information that could facilitate the Petitioner to seek protection of its fundamental rights. The Respondents failure to give the Petitioners or disclose details of the 1st Interested Party application and licensing to carry out construction works through public notices, display or otherwise as required by the provision of Section 59 of the EMCA Act infringes on the Petitioners right under the provision of Article 35(1) of *the Constitution*.

31. Failure by the 3rd Interested Party to encourage public participation of the Petitioners and residents of Ziwani Lane in management and protection of the environment, ensure the 1st Interested Party compliance with Environmental Impact Assessment legal regulations and eliminate unlicensed and unregulated construction activities by the 4th Respondent and 1st Interested party infringe the Petitioners rights and freedoms guaranteed by the provision of Articles 42 and 69 of *the Constitution*.

32. The Respondents and Interested Parties jointly and severally violated the Petitioners right to administrative action that is fair lawful, efficient, lawful and reasonably fair and to be given reasons for permitting construction works and development on public property that are not licensed or compliance with the EMCA Act contrary to the provision of Article 47 of *the Constitution*.

33. The Respondents and Interested Parties had jointly and severally violated the Petitioners right under the provision of Article 50 of *the Constitution* to have a dispute on exploitation of public property reserved for public use in accordance or in compliance with the EMCA Act and County Government Act with by laws thereto. By failing to stop, discontinue and or issue Orders against the 4th Respondent and 1st Interested Party preventing the proposed unlicensed and construction on public land the Respondents and Interested Parties are in breach of the provision of Articles 42, 69 and 70 (2) of *the Constitution*.

34. The Respondents and Interested Parties had breached the legitimate expectation of the Petitioners and the general public construction or development activities would be only allowed in compliance with the EMCA Act and County Government Act and the obligation by the 1st Respondent, 3rd, 4th and 5th Interested Party to exercise their statutory powers to stop and prevent the grabbing of public property for use by private individuals to the detriment of the general public.

D. The Prayers Sought by the Petitioners:-

35. The Petitioners sought for the following orders:-

    a. A declaration that the 4th Respondent abused its office and acted illegally and unconstitutionally in leasing and issuing a license to the 1st Interested Party over all that parcel of land known as Mombasa/Block XVII/1399 which was a reserved as a public access land.

    b. A declaration that the leasing and licensing by the 4th Respondent to the 1st Interested Party of all that parcel of land known as Mombasa/Block XVII/1399 which is the Petitioners' and the

general access to the main road and Petitioners' property has violated the Petitioners' right and the residents of Ziwani Lane to own property and equal access to public property.

c. A declaration that the alienation of a reserve land by the 4th Respondent to the 1st Interested Party for private use was a violation of the Petitioners' and the residents of Ziwani Lane right to clean and healthy environment and equal access to public property.

d. A declaration that the leasing, licensing and alienation of all that parcel of land known as Mombasa/Block XVII/1399 by the Respondents to the 1st Interested party was done in beach of the rules of natural justice, procedural and administrative fairness and national values and principles of governance.

e. An order of injunction to restrain the 4th Respondent, its officers, servants licensees and/or agents from, leasing developing, putting up a wall, fence or blockage of any nature on and from having any other or further dealing with all that parcel of land known as Mombasa/Block XVII/1399.

f. A permanent injunction to restrain the 4th Respondent, its officers, servants, licensee and/or agents from blocking the Petitioners' access to its property known as Mombasa Block XVII/16 in any manner whatsoever; and

g. A mandatory injunction compelling 4th Respondent and its licensee to demolish the structures that they have been constructed on all that parcel of land known as Mombasa/Block XVII/1399.

h. An order of Judicial Review in the nature of Certiorari to bring into this Court and quash the decision of the 4th Respondent to lease, alienate, or grant a license over all that parcel of land known as Mombasa/Block XVII/1399 to the 1st Interested Party.

i. An order of Judicial Review in the nature of mandamus to compel the 2nd Respondent and/or its successors in title to cancel and or revoke the license and lease registered on all that parcel of land known as Mombasa/Block XXVII/1399.

j. Costs of and incidental to this Petition.

k. Any other or further relief this Honourable Court may deem fit or just to grant.

36. The Petition was supported by a 46 Paragraphed Supporting Affidavit sworn by Swaleh Husein Swaleh, the 2nd Petitioner herein who deposed that:-

a. He was the duly appointed Attorney of Awadh Saleh Said Sherman the 2nd Petitioner herein, and the son of the late Hussein Saleh Said with a Limited Grant to his estate, and the nephew of the late Mohamed Saleh Said who were the three registered proprietors of the parcel of land known as Mombasa Block XVII/16 (Hereinafter referred to as "The Petitioner's Property"). Annexed and marked as exhibit "SHS - 1" was a true copy of the duly registered Power of Attorney and "SHS - 2" was a true copy of the Limited grant.

b. He swore the affidavit on his own behalf and on the behalf of Awadh Saleh Said Sherman, on behalf the estate of his late father Hussein Saleh Said, on behalf of the estate of his uncle the late Mohamed Saleh Said as authorized by his son the 3rd Petitioner and on behalf of the general public and/or residents of Ziwani area who have always used all that parcel of land known as Plot No. Mombasa Mombasa/Block XVII/1399 (Hereinafter referred to as "The Public Access Lane") as an access lane and most importantly as a citizen of the Republic of Kenya and pursuant to Article 258 of *the Constitution* of Kenya 2010. Annexed and marked as

exhibit “SHS - 3” was a true copy an authority from the sons of the late Mohamed Saleh Said and as “SHS - 4” was a true copy his National Identity Card of the Petitioner.

c. Awadh Saleh said Sherman, his late father Hussein Saleh Said and his late uncle Mohamed Saleh Said are the registered proprietors of all that parcel of land known as Mombasa Block XVII/16 situated at Tudor along Ziwani Lane, Mombasa (Hereinafter referred to as “The Petitioner’s Property”). Annexed and marked as exhibit “SHS - 5” was a true copy the title to the Petitioner’s property and as “SHS - 6” was a true copy an official search dated 27th November, 2020.

d. As a duly appointed attorney of Awadh Saleh Said Sherman, the eldest son of the late Hussein Saleh Said and nephew of the late Mohamed Saleh Said he had always been in charge of the petitioner’s property.

e. As a beneficiary of the estate of the two of the registered proprietors of the Petitioners’ property my cousin the 3rd Petitioner and himself were entitled to enjoy all the rights and privileges belonging or appurtenant thereto including but not limited to the right to possession, quite enjoyment and equal access to public property adjacent to the petitioner's property thereof without any hindrance or restriction.

f. As citizens of Kenya the residents of Tudor and Ziwani Lane and all citizens of Kenya had equal constitution rights of access to public property and most importantly public road reserves and access lanes. The Petitioner’s property was at all material times with free and unrestricted access to the Public Access Lane.

g. Between the Petitioner’s property, the proprietors of the properties fronting the Ziwani lane and the main public road reserve there was a piece of land reserved for use by the public which was hereinabove had been referred to as the lane. The proprietors of the properties fronting Ziwani lane and the public had over the years used the said Lane to access the main Public Road Reserve and as a pedestrian lane/foot pathway. Access to the main Public Road Reserve and pedestrian lane had over the years been free and unrestricted through the said lane.

h. Sometimes in the year 1995 one of the 2nd Petitioner discovered that Lane had been irregularly and unlawfully leased to the 1st Interested Party and immediately registered a caution on the said Lane claiming a license interest. The said caution had never been withdrawn as was duly registered by the 2nd Respondent. Annexed and marked as exhibit “SHS - 7” a true copy an official search dated in respect of the caution registered on the said Lane.

i. Within the mandate of the 1st Respondent when it discovered that Lane had been irregularly and unlawfully leased to the 1st Interested Party it made a recommendation that the lease be revoked since the property was public land allocated to be used as an access lane by the general public. Annexed and marked as exhibit “SHS - 8” was a true copy the 1st Respondent’s recommendation.

j. To date the 1st Respondent’s recommendations had not been implemented by the Respondents, the registered caution had been disregarded. In violation of the Petitioners’, the residents of Ziwani lane, general public’s constitutional rights to protection of law, protection of property, fair administrative action, clean and healthy environment and equal access to public property the 4th Respondent on or about November, 2019 purported to issue the 1st Interested Party with an occupation license on lane for a period of five (5) years from 22nd November, 2019. Annexed and marked as exhibit “SHS 9” was a copy of letter dated

22nd November, 2019 from the 4th Respondent to the 1st Interested Party and marked as exhibit "SHS - 10" was a copy of purported approved construction permit issued by the 4th Respondent.

k. The purported license and approvals were granted even contrary to the terms and requirements needed for such approvals to be issued. Annexed and marked as Exhibit "SHS - 11" was a rates demand notice dated 1st September, 2020 and marked as exhibit "SHS - 12" was a copy a demand notice dated 27th November, 2019 in respect of said lane. He did not know the circumstances under which the construction permits could beissued without the settling all outstanding rates, a situation that he had been advised by his Advocates on record to be highly irregular.

l. On or about the 20th November, 2020 pursuant to the purported licence and approvals the 1st Interested Party as a purported licensee, commenced construction works on The Public Access Lane. Annexed and marked as exhibit "SHS - 13" were copies of a set of photographs of the ongoing construction works and how the Petitioners and the general public had been affected and marked as "SHS - 14" was a map showing the extent Lane.

m. The ongoing construction was blocking the Petitioners' access to their property, it had brought to halt the Petitioner's development on his property which was depended on unrestricted access to his property. The ongoing construction would ultimately cause imminent danger as the public and/ or pedestrian would be forced to use the public road used by motor vehicles instead of the Public Access Lane which was reversed as an access lane.

n. The constructions works were been undertaken without lawfully and procedurally obtaining the requisite licenses and approvals from the 3rd and 4th Interested Parties. The 4th Respondent never consulted the Petitioners and the residents of the area before issuing the license to the 1st Interested Party that it knew would prejudice the Petitioners, the residents of the area and the general public.

o. The 4th Respondent had no right in law to allocate a Lane reserved for the general public to the 1st Interested Party without compliance with the elaborate provisions of the law and the mandate of the 3rd and 4th Interested Parties. The 4th Respondent acted unconstitutionally and unlawfully. The Petitioner and the general public who had been enjoying unrestricted access of Lane had now lost that advantage without due process having been followed.

p. The Respondents had jointly and severally violated the Petitioner's Constitutional rights to protection of law, protection of property, fair administrative action, clean and healthy environment and equal access to public property. It was necessary that the ongoing construction be stopped so that the Petitioner and the public may have unrestricted access pending the determination of the legality of the 4th Respondents' title, the license and lease granted to the Lane.

q. Since the Petitioners acquired their property the Lane was open, undisturbed and provided free access and a foot pathway to the general public and from the Petitioners' property and other properties in the area. He did not know the circumstances under which L.R. No. MN/ I/5901(Hereinafter referred to only as "The Second Reserve Plot") changed hands from the 3rd Respondent to the 4th Respondent.

r. The deponent's inquiries about the on construction had revealed that the same was being put up by 1st Interested Party who was claiming that the Lane was private property which had being

secured for development as per the purported permits and/or approvals by the 4th Respondent. The deponent lodged complaints to the Respondents and the Interested Parties through his Advocates but the complaints had not elicited any action and the construction works were still continuing day and night even past curfew hours. Annexed and marked as exhibit "SHS - 15" were copies of several demand letters to all partiesherein.

s. Despite a notice of discontinuance of the construction works by the 5th Interested Party in the exercise of its mandate the construction works were still ongoing day and night.

t. The Public Access Lane was public land reserved for the use of the public and that the 1st Respondent had no power in law to allocate the same or any part thereof to the 1st Interested Party. The general public did not require permission, consent or authority from 4th Respondent to use public land which had been reserved for the public to use. The ongoing construction was not only blocking the access but any development put up on Lane would deny the residents of the surrounding area the right to a clean and healthy environment.

u. Without access to Lane their proposed development plan on the Petitioner's property could not proceed on the current concept and design. The Petitioner's property's economic viability had been seriously eroded in the absence of the Lane. Failure by the 4th Respondent in the circumstances to consult the residents of Ziwani Area before making the decision to alienate The Public Access Lane for private use amounted to unfair administrative action. The Public Access Lane was set apart for the use by the public.

v. The Lane having been set apart for public use, the same was not available to the 4th Respondent to lease to private individuals. The allocation of the Lane by the 4th Respondent to the 1st Interested Party was in breach of the national values and principles of Governance set out in *the Constitution* of Kenya. The said allocation was un procedural, illegal, unconstitutional, null and void.

w. It was the Deponent's prayer that this Honourable Court do intervene and safeguard their constitutional rights. It was necessary therefore that appropriate order be issued to restrain any dealing with the Lane save for its intended use.

x. The affidavit was in support of the Petition filed herein and prayed for orders to issue accordingly as prayed.

IV. The Response by the 4th Respondent

37. The 4th Respondent through PAUL MANYALA, the Chief Physical Planner of the 4th Respondent, responded to the Petition through a 22 paragraphed replying affidavit sworn on 3rd March, 2022 where he averred that:-

a. The 4th Respondent referred to Paragraphs 18 to 22 of the Petition and stated that it was not aware of the existence of any Survey Map that designated the parcel of land where Plot No Mombasa/Block XVII/1399 stood as a "Public Access Lane" as either pleaded by the Petitioners or in any other manner at all.

b. For the reasons set out at Paragraph *2* above the 4th Respondent specifically denied all of the allegations of the Petitioners contained in their Petition concerning the subject parcel of land.

c. The 4th Respondent invited the Petitioners to specifically either point out or produce before this Court the document, if any exists, that described or designated Plot No Mombasa/Block XVII/1399 as a "Public Access Lane" in the manner pleaded by the Petitioners.

d. In further response to the contents of Paragraph 22 of the Petition, the 4th Respondent observed that the allegation by the Petitioners that the alleged "Public Access Lane" (which was a term created by the Petitioners as no such Lane existed anywhere) was irregularly and unlawfully leased to the 1st Interested Party was made "in vacuo", as the Lessor of this parcel of land was not disclosed in that paragraph. Further and in the circumstances, it is not possible to adequately plead to this allegation of the Petitioners.

e. The 4th Respondent referred to the contents of Paragraphs 26, 27 and 28 of the Petition and responded thereto as follows:-

   i. At page 9 of the documents exhibited by the Petitioners, they had produced a Certificate of Search dated 2nd December 2020, which confirmed that the 1st Interested Party was the owner of Plot No Mombasa/Block XVII/1399.

   ii. At page 12 of the same documents, they had also exhibited the Green Card of the subject property, again confirming the ownership of the 1st Interested Party of this parcel of land.

   iii. In the list of documents attached to this response, the basis on which approvals for construction were granted clearly demonstrated for the Petitioners to peruse as well as for this Court to weigh.

   In the circumstances, the allegations raised by the Petitioners were all denied.

f. In the alternative and without prejudice to the foregoing, the 4th Respondent pleaded as follows:-

   i. The Physical & Land Use Planning Act (PLUPA) came into operation on the 5th August 2019.

   ii. Pursuant to the provision of Section 78 (a) of that Act, any complaints and claims that the Petitioners may have had against the approvals given by the County on 22nd November 2019, should have been referred to the County Physical & Land Use Liaison Committee for determination.

   iii. The Committee referred to in (b) above was to hear and determine the complaint within 30 days as mandated by Section 80 (2) of the Act.

g. Where the complaint was referred to this Court under the provision of Section 93 of the Act, the timelines delineated in the Act have to be followed. However, in this Petition, the Petitioners brought this Petition more than a period of one year and one month, from the date the approval complained of was granted. This effectively nullified and obliterated the competence of their complaint and the Petition generally. This clearly went against the wisdom of the legislature.

h. The 4th Respondent referred to the contents of Paragraph 30 of the Petition, which for its tenor and effect was written as follows:-

   > " 30. The ongoing construction is blocking the Petitioners' access to their property and it has brought to a halt the Petitioner' development on their property which was depended on unrestricted access to their property."

i. The Petitioners were not being candid in pleading in the manner shown at Paragraph *30* reproduced above as demonstrated hereafter.

   i. The Petitioners had embarked on developments on plot number Mombasa/Block XVII/16 without first applying for and obtaining the necessary approvals from the relevant Departments of the 4th Respondent.

   ii. In consequences of (a) above, on the 27th May 2021, the 4th Respondent issued an Enforcement Notice on the 2nd Petitioner Awadh Mohammed Saleh, being the only serving registered owner of Msa/Block XV/II/16notifying him of the "completing a development without the Approval of the County and developing kiosks (commercial use) in a residential area without a change of user on Plot No. 16/XVII/M.I" (Annexed herewith and produced as exhibit a copy of the Enforcement Notice and marked as "PM – 1").

   iii. The 4th Respondent in the same enforcement notice required the 2nd Petitioner to immediately stop/halt and desist from carrying out any operations to the development as defined in the *Physical and Land Use Planning Act* No. 13 of 2019, in or on the said land until he obtains permission from the 4th Respondent.

   iv. Nearly one year later, since that Notice was issued, the 2nd Petitioner had not taken any steps towards remedying the error and in fact has continued with the illegal development.

j. In the circumstances, and in light of the matters pleaded above, the Petitioners were the wrongdoers, who had intentionally put up shop stalls, and now want to obtain access to those illegally constructed shop stalls through plot number Msa/Block XVII/1399,which they have intentionally nicknamed a Public Access Lane.

k. The Petitioners more specifically the 2nd Petitioner was before this Honourable Court with unclean hands and should not be given audience.

l. For avoidance of doubt, the 4th Respondent stated a site visit would humbly confirm this, the 2nd Petitioner, as the only surviving registered owner of plot number Msa/Block XVII/16 had access to the said property through three various fronts of public roads that encompass his property, and did not need to go through Plot number Msa/Block XIII/1399.

m. Further to the averments at paragraph *11* above, the 4th Respondent contended that the 1st and 3rd Petitioners, who had no known interest on Msa/ Block XVII/16, registered or otherwise, were the persons who are constructing shops and stalls at the backside of plot number Mombasa/Block XVII/16, registered in the 2nd Petitioner's name. Being at the backside of this property, the 1st and 3rd Petitioners had closed their eyes to their failure to obtain development permission from the 4th Respondent for those shops and stalls. Instead, they had opted to seek for a pathway through foreign territory when they had ample access to the plot on which they were illegally developing their shops.

n. The 4th Respondent referred to the contents of Paragraph 32 of the Petition and stated that apart from failing to obtain development permission for their shops referred to above, the Petitioners had no approvals from the 3rd, 4th and 5th Interested Parties whom they make reference to in that paragraph.

o. The 4th Respondent reiterated its averments above, which were a complete answer and adequate response to the complaints by the Petitioners at Paragraphs 33 to 41 of the Petition, both paragraphs included.

p. The 1st Interested Party was not a Licensee of the 4th Respondent especially over plot number Msa/Block XVII/16. Paragraph 44 of the Petition was drawn and pleaded in error. In similar nature, the 4th Respondent denied all the allegations of the Petitioners under the sub-heading: Violation of *the Constitution* and fundamental rights.

q. The 4th Respondent referred to Prayers Numbers 1, 2, 3 and 4 in the Petition and averred that the same were based on erroneous and inaccurate facts. At no time did the 4th Respondent or its predecessor, the Municipal Council of Mombasa, Lease parcel number Mombasa/Block XVII/1399 to the 1st Interested Party.

r. Further to the averments at Paragraph *18* above, the documents produced by the Petitioners, particularly the Green Card at page 12 of their documents showed that the 1st Interested Party purchased the leasehold interest in Msa/ Block XVII/1399 from one Ismail Adhan Isaak.

s. The 4th Respondent was not developing any of the suit properties. For this reason, Prayers numbers 5, 6 and 7 in the Petition were misplaced and incapable of being granted against the 4th Respondent.

t. For these reasons, the 4th Respondent prayed that the Petition herein be dismissed with costs.

38. The 4th Respondent also responded to the Petition through a 9 Paragraphed Replying Affidavit sworn by TEDDY M. MULUSA, the Government Surveyor in the Ministry of Lands and Physical Planning on 14th March, 2022 and filed the same day, where he deponed that:-

a. As per the records held in their offices, the Survey for MOMBASA /BLOCK XVII/16 was contained in Survey Plan Folio/Register Number 29/8 duly approved by the Director of Surveys in the year 1929.

b. This survey showed that this Parcel was defined by beacons 16a (with 2 truncation beacons marked as “T1” and “T2”), 16b,16c,16d, with an approximate acreage of 0.988 Acres. The parcel was accessed by 100 ft wide road a long its Northern boundary-line (see beacons 16b, 16a) and 100ft wig its eastern boundary-line (see beacons 16a-16d). Annexed in the affidavit and marked as Exhibit “TM-1” a copy of the Survey Plan for Mombasa Block XVII/16.

c. The status of this road was confirmed by Survey Plan Folio/Register Number 56/54 which contained the surveys for parcels of land that was opposite parcel Mombasa/Block XVII/16 and also used the same road as their official access.

d. The survey for Mombasa/Block XVII/1399 was contained in Survey plan Folio/Register Number 270/61. The Plan indicated that the Survey was authenticated by the Director of Survey in the year 1994 being part of the 100ft Road reserve as per Survey plans FR No. 29/8 and 56/54.Annexed in the affidavit and marked as Exhibit “TM-2” a copy of the Survey Plan for Mombasa/Block XVII/1399.

e. This portion was defined by beacons TI (transaction beacon of 16a) 16b, SS2,SS1; with an approximate acreage of 0.0887 Ha.

f. All allegations being raised against the 7th Respondents were vehemently denied and the same lacked basis. The 7th Respondent and 2nd Interested Party pray that this Petition be dismissed with costs.

IV. Response by the 1st Interested Party

39. The 1st Interested Party, IQBAL AHMED BAYUSUF filed his 32 a Paragraphed response on 14th January, 2022 where the 1st Interested Party averred that:-

a. The 1st Interested Party was a layman at law, and could therefore not make any comments on matters pleaded concerning "legal foundations of the Petition" which were best left for Submissions to be based on proven facts.

b. The 1st Interested Party admitted that the property known as Msa/BLOCK XVII/16 was registered in names of:-

i. Awadh Saleh Said.

ii. Mohammed Saleh Said.

iii. Hussein Saleh Said.

The Certificate of Search dated 27th November 2020 at page 8 of the Petitioners own Supporting Affidavit elaborately confirmed this fact.

c. The 1st Interested Party repeated the averments at Paragraph *3* above, and in further response to Paragraph 15 of the Petition stated that the 1st and 3rd Petitioners herein were not registered as owners of any part of the property referred to at Paragraph 15 of that Petition.

d. In the circumstances, it was averred that the 1st and 3rd Petitioners can only derive rights and or exercise powers over the subject property only within the confined limits of the law, of either succession or other recognized inheritance but not simply on the mere basis that they are the sons of the registered proprietors.

e. The 1st Interested Party referred to Paragraph 16 of the Petition and responded thereto as follows:-

i. The 1st Petitioner was the holder of "Letters of Administration as Colligenda Bona". He had exhibited these letters to the Petition.

ii. The 3rd Petitioner was also a holder of "Letters of Administration, ad colligenda bona." In similitude, these letters were also exhibited.

iii. From the averments at paragraph 16 of the Petition as summarized above, it was abundantly obvious that both Mohammed Saleh Said and Hussein Saleh Said the registered owners of property Msa/Block XVII/16(with the 2nd Petitioner) and who are the fathers of the 1st and 3rd Petitioners respectively, were deceased.

iv. It was for this reason that both the 1st Petitioner and the 3rd Petitioner are holders of "Letters of Administration, ad colligenda bona."

f. In full, appropriate and adequate response to the averments of the Petitioners in the manner summarized at paragraph *6* above, the 1st Interested Party invokes in his aid the provisions of

Section 67 of the *Law of Succession Act*, actualized in Rule 36 of The Probate &Administration Rules 1980 as follows:-

> 36. Grant ad colligenda bona under section 67 of the Act
>
> (1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the Court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the Court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.
>
> There is also Sub - Section (2) which provides that:
>
> (2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.

g. The 1st Interested Party also averred that both the 1st and 3rd Petitioners had avoided to employ the provisions of Paragraph *14* to the fifth schedule of the *Law of Succession Act*, if at all any of them intended to institute proceedings for and to the benefit of the interests of their deceased fathers concerning Msa/Block XVII/16, presuming that any such Estate existed for their inheritance.The 1st Interested Party reiterated the matters set out above and stated that in the circumstances, none of the provisions of Article 22 of *the Constitution* availed itself to any of the Petitioners in this Petition.

h. The 1st Interested Party repeated the matters aforesaid, and in particular, the legal requirements of Section 45 of the *Law of Succession Act*, and therefore averred that the averments of the 1st and 3rd Petitioners at Paragraph 17 of the Petition were made erroneously and without regard to the law. In further response to Paragraph 17 of the Petition, the 1st Interested Party specifically pointed out that Section 45 of the *Law of Succession Act*, Cap. 160 prohibits in mandatory terms by stating that:

> "no person shall, for any purpose, take possession of, dispose or otherwise intermeddle with any free property of a deceased person without express authority by the Act or by any other written law."

i. In the circumstances, and without authorization by the *Law of Succession Act* or any other written law, the 1st and 3rd Petitioners were blatant in error to contend that they could enjoy all the rights and privileges belonging to their deceased fathers over Msa/Block XVII/16. This postulation of theirs at paragraph 17 of the Petition was wrong. The 1st Interested Party referred to Paragraph 18 of the Petition and responded thereto as follows:-

   i. Property Msa/Block XVII/16 and his property Msa/Block XVII/1399 were next and abut each other at some point.

   ii. Property No Msa/Block XVII/1399, was not an access lane and had never been so designated. Such designation was a creation of the Petitioners.

iii. The 1st and 3rd Respondents were not owners, whether jointly or in common with any other person, of property known as Msa/Block XVII/16.

j. For avoidance of doubt, the Land Certificate concerning plot Msa/Block XVII/16, exhibited at page 5 of their exhibits, as well as the Certificate of Official search at page 9 of the same exhibits, clearly showed that the owners of this parcel of land were:-

a. Awadh Saleh Said.

b. Mohammed Saleh Said.

c. Hussein Saleh Said.

k. There had never been any change of ownership to this property, to include either the 1st or the 3rd Petitioners as either joint or Co - Owners of this property. How these two Petitioners then lay claim to its ownership, and describe themselves as such owners had not been explained by any of them to this Court. In the alternative, and without prejudice to the preceding averments, the 1st Interested Party states as follows:-

i. The Land Certificate exhibited at page 5 of the Petitioners' documents certified the named registered owners of the subject property:

> "are now registered as the absolute proprietors, comprised in the above mentioned title.."

ii. The Certificate of Search also confirmed this fact. Inevitably, and by operation of law, these absolute proprietors were to hold this property jointly. Were this to be otherwise, then the respective share of each person could have been stated as required by law.

l. Therefore, on the death of the other two joint owners, the subject property wholly vested in the 2nd Petitioner. The 1st and 3rd Petitioners were therefore by such operation of law not beneficiaries to any part of this property as they now contend in this Petition. Therefore, they had no capacity in law to make any representations for and on behalf of themselves or other persons, whether as beneficiaries or otherwise.

m. The 1st Interested Party referred to Paragraphs 19 to 21 of the Petition and reiterated that there existed no public access lane over his property. This term was a creation of the Petitioners for their own unknown reasons. The 1st Interested Party referred to Paragraph 22 of the Petition and denied the allegation therein that there was a public access lane leased to it, by an unnamed Lessor, and denied all the allegations of the Petitioners set out in that paragraph.

n. In further reply to Paragraph *22* aforesaid, the 1st Interested Party averred that he or any other person had never been served with any Notice by the Registrar in accordance with the provisions of Section 132 (1) of the Registered *Land Act*, Cap. 300 (now repealed) notifying him of existence of any caveat over his property.

o. The Petitioners erroneously designate the property of the 1st Interested Party as public access lane. This was not right. The 1st Interested Party acquired his leasehold interest in Msa/Block XVII/1399 in this manner:-

i. The subject parcel of land was originally allocated to one Adhan Isaak, from whom the 1st Interested Party purchased the leasehold interest pursuant to a Sale Agreement dated 5th January 1995, for a consideration of a sum of Kenya Shillings Two Million

Four Hundred Thousand (Kshs. 2, 400,000.00). This sum was paid in the manner explained in the 1st Interested Party's Replying Affidavit filed in these proceedings.

ii. It was upon purchase of this parcel from the previous owner that a Transfer was registered in the name of the 1st Interested Party, and all documents relating to this parcel of land in the Lands Registry showed the name of the 1st Interested Party as such bona fide Transferee thereof.

Therefore, the allegations in the Petition that this parcel of land was irregularly and unlawfully leased to the 1st Interested Party in the year 1995 were without the correct factual basis of the transaction on the matter.

p. The contents of Paragraphs 23 and 24 of the Petition were denied, and more specifically on the following grounds:

i. There was no public access lane in existence in these proceedings. The Petitioners ought to first establish, with facts and evidence from survey Records, that there was a portion of land called "a Public Access Lane" in existence before proceeding to designate any land in this manner.

ii. The National Land Commission had no mandate, authority or other powers, to cancel, or revoke legally issued Titles of land. This much, these Courts had previously so expressed themselves, and the Petitioners were not exempted from such decisions.

iii. For avoidance of doubt, and in furtherance of the pleadings at sub-paragraph *(b)* above, the 1st Interested Party contended that this Court, had previously, held, in the decision reached in the case of "Republic-v-National Land Commission Ex - Parte Turf Developers Limited", that the National Land Commission, the 1st Respondent herein, had no mandate, authority or power to either revoke or cancel any Title to land. This similarly applied to the 1st Interested Party's Title which the Petitioners sought to impugn.

iv. The inclusion of the 1st Respondent in these proceedings for purposes of either revoking or cancelling the 1st Interested Party's lawfully issued Title did not therefore stand the test of the law.

v. There had never been made any recommendation by any commission or other investigative body by law established, that the 1st Interested Party's plot No Mombasa/ Block XVII/1399 was irregularly or unlawfully obtained, or that such lease issued over that parcel of land be revoked.

q. The 1st Interested party further referred to the contents of Paragraph 24 of the Petition and responded thereto as follows:-

i. The invitation by the Petitioners that Plot No Mombasa/ Block 19/315 whose Title was recommended for revocation should be substituted for Plot No Mombasa/ Block XVII/1399 belonging to the 1st Interested Party was a proposition that was untenable in law.

ii. The document that proposed for the revocation of Title over Plot Msa/Block19/315 existed and spoke for itself.

iii. The *Evidence Act* (cap 80) forbid the alteration of any written documents using oral evidence. Therefore, no extraneous evidence could be adduced to alter, change or amend the specific details of Plot No Msa/Block19/315 and substitute them with the introduction of the new plot that the Petitioners intend to have revoked.

r. It mattered not whether any recommendations had not been implemented. They did not touch on the 1st Interested Party's property, who had similarly never been served with existence of any caution as required by the provisions of Section 132 (1) of the Registered *Land Act*, Cap. 300 (Now Repealed) while it was still law.For these reasons, the Petitioner's complaints at Paragraph 45 of the Petition were untenable and ineffectual.

s. In further reply to Paragraph 25 of the Petition, the 1st Interested Party stated that once a caution was lodged in the year 1995, he was by law required to be served with Notice of the lodging of this Caution as mandated by Section 132 (1) of the applicable law. This was not done until the Registered *Land Act* was repealed in the year 2012. This Caution also died with the repeal of the law under which it was lodged, and the Petitioners could not therefore rely on a dead law to sustain could not therefore rely on a dead law to sustain their equally dead caution, which was now of no legal force.

t. The 1st Interested Party responded to the allegations and complaints leveled against his construction on Msa/Block XVII/1399 in the following manner: The 1st Interested Party referred to his exhibit at page 26 of his Replying Affidavit, and proceeded to explain the same, in exactly the same way as he had done in that affidavit. That was in the following sub-paragraphs:-

i. His plot number XVII/1399 was marked "A" and was shown abutting Tom Mboya road at the front.

ii. There was a neighboring plot, on the left hand side to his plot as one faces Tom Mboya Road, with its boundary wall which he had "marked B". The entire stretch of this wall is marked in "brown".

iii. The Petitioner's plot was behind his plot, he had marked it in blue and had its entrance from the point "marked C", through the road that lead to Taratibu street.

iv. It would be observed that the length of his boundary wall along Tom Mboya Road was a continuation from the boundary wall of the neighbors plot from the point "Marked B" on the map he had provided.

v. The Petitioners were in the process of putting up some commercial structures on their plot, and intend to obtain access to those development through his plot, at the point "Marked D."

vi. A cursory and visual observation of the location of his plot would show that there was no pathway, from the Petitioners property, through that of the 1st Interested Party, which was for use by residents of Ziwani Estate whom the Petitioners claim were the users of this pathway. No such pathway existed or had previously existed.

vii. One final observation was that any movement of people from the point "Marked D," along his plot, would end at the neighbor's boundary wall, at the point "Marked B". This effectively rules out the possibility of the existence of a pathway over his plot in the manner in which the Petitioners claim.

As also stated in the Replying Affidavit, the 1st Interested Party would request the Court to visit this site for a full and proper visual impact of the area.

u. The 1st Interested Party reiterated his earlier averments that the 1st and 3rd Petitioners had no known legal interest on parcel number Mombasa/Block XVII/16, which they could claim as their own as they do at Paragraph 30 of the Petition. With the death of the father of the 1st Petitioner, and that of the 3rd Petitioner, their respective interests vested in the 2nd Petitioner, to the exclusion of any claims to be made by either the 1st and 3rd Petitioners. That is the law.

v. These averments also provide a full answer to the Petitioner's allegations at Paragraphs 41, 42, 43, 44 and 46 of their Petition.The averments set out above by the 1st Interested Party were a complete answer to the complaints and allegations of the Petitioner at Paragraphs *25* through to Paragraph *41*, both Paragraphs inclusive. However, the 1st Interested Party referred to the following matters specifically, for the purpose of emphasis:-

i. The 1st Interested Party had in his possession all requisite licences for purposes of the construction he was undertaking.

ii. The Petitioners were not specific and had not given any particulars of the licences that the complain had not been issued.

iii. The generalities of the Petitioners on the various matters referred to in the various paragraphs specified above make it difficult for the 1st Interested Party to effectively and adequately plead thereto.

w. The claims made in Paragraph 47 of the Petition could best be made use of by the Petitioners if they resorted to utilize the provisions of the *Access to Information Act*. This Court was the wrong forum for these Petitioners to raise that complaint.This was at their paragraphs 48, 49 and 50 of their Petition, the Petitioners made reference to Environmental Impact Assessment, and compliance with the Environmental Management & Coordination Act (EMCA). The 1st Interested Party stated that the EMCA contained elaborate alternative dispute resolution mechanisms which the Petitioners must first exhaust before coming to this Court to invoke its Appellate jurisdiction on the matters complained of by the Petitioners. This Court has no originaljurisdiction to entertain the complaints of the Petitioners contained in those paragraphs.

x. The 1st Interested Party referred to the contents made under Paragraphs 52 and 53 of the Petition, repeated his averments at Paragraph *30* above, and similarly raised the jurisdictional issues therein raised, in addition to the other jurisdictional matters that arise in the entirety of the balance of the Petition.

y. For these reasons, the Petitioners were unmerited for the grant of any of the prayers sought. This Petition ought to be dismissed with costs.

IV. Grounds of Opposition of the Petition by the 1st Interested Party

40. The 1st Interested Party, having filed his Response to Petition, separately pleaded the following jurisdictional points, as a notification in advance to both the Court and the parties herein, that this Court or any other Court, has no jurisdiction to grant any of the Orders sought at prayers 8 and 9 of the Petition through grounds of opposition dated 7th January, 2022. The jurisdictional points were raised in this manner:-

a. The subject orders sought at prayers 8 and 9 of the Petition were Time Barred.

b. The Registered *Land Act*, Cap. 300 (now repealed) pursuant to which land parcel number Mombasa/ Block XVII/1399 is registered was repealed by the *Land Registration Act*, 2012. Section 107 of the *Land Registration Act* provides that:-

> "...any right, interest, title, power, or obligation acquired, accrued, established, coming into force, or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."

The 1st Interested Party stated that the decision of the 4th Respondent to lease property Mombasa/Block XVII/1399 to Adhan Isaak was made and concluded in the year 1995. The 1st Interested Party also purchased that interest in the same year.

c. During the year, 1995, the law then applicable on matters relating to Certiorari and Mandamus was provided for in the *Law Reform Act*, Cap. 26 which by Section 9 (2) thereof made provision that:-

> ".....application for an Order of Mandamus, prohibition or Certiorari shall in specified proceedings, be made within six months, or such shorter periods as may be prescribed after the Act or omission to which the application for leave relates."

This Petition, had been brought exactly twenty five (26) years (a quarter a century later) since the date of the act now complained of.

d. Again and in furtherance of Paragraph *3* above, the applicable law then in operation required the obtaining of leave first before commencing any proceedings on the matter. That had also not been done in this litigation.

e. The sum total of the foregoing was that this Court was now not vested with any jurisdiction to grant either the Orders of Certiorari or Mandamus sought by the Petitioners. The jurisdiction that existed for any Court to grant the same lapsed and was wholly extinguished at the lapse of six months from the date when the decision complained of was made and concluded in the year 1995.

f. No Court could extend time or enlarge such time for the doing of any act, unless specifically authorized to do so by either *the Constitution* or Statute. No such provision existed that would enable the Petitioners to seek for prayers numbers 8 and 9 set out in their Petition. Again, and for this further reason, this Court lacked jurisdiction to grant those Orders.

g. *The Constitution* of Kenya 2010 was forward looking. It was never meant to operate retroactively or retrospectively. The plethora of decisions from the Supreme Court on this point sharply attested to this undoubted truism.

h. Therefore, and in the circumstances, the Petitioners could not retrospectively invoke the provisions of Article 47 of *the Constitution* to found their claim for the impugned remedies that they now seek from this Court.

i. The 1st Interested Party therefore notified the Petitioners of the jurisdictional shortcomings attendant to the subject prayers.

IV. The Replying Affidavit by the 1st Interested Party

41. The 1st Interested Party, IQBAL AHMED BAYUSUF, also filed a 42 paragraphed filed on 17th January, 2022 dated 30th December, 2021 where the Deponent averred that:-

    a. The deponent was the registered proprietor of property known as Mombasa/Block XVII/1399 which he held as lessor for a term of 99 years, from 1st August, 1994. The Certificate of Lease to that effect, was issued to him, and was dated 1st February, 1995. The deponent exhibited a copy of that certificate of lease in the affidavit at pages 1 to 4. The fact of his registration as such lessor was aptly and clearly recognized by the Petitioners, who had exhibited at page 12 of their exhibits in this Petition, copy of a Green card, the official version of the records held by the Lands Registry, which showed that he was duly registered as such lessee on the 11th February, 1995. For ease of refence, the Deponent exhibited in the affidavit at page 5, a copy of this Green card.

    b. The deponent now embarked on explaining to this Court, the matter in which he came to be registered as lessee, as already established in the foregoing paragraphs. The allegations by the Petitioners that this property was irregularly and unlawfully leased to him was not correct. It was wrong, incorrect, and had no proper foundation on which to be grounded.

    c. The property, Mombasa/XVII/1399 was initially allocated to one Adhan Isaak who was registered as lessee and later sold the same to him pursuant to an agreement entered into him between him and himself on 5th January, 1995. From that agreement, it was evident that the sale price was a sum of Kenya Shillings Two Million Four Hundred Thousand (Kshs. 2,400,000/-) which he paid to the said Adhan Isaak by way of installments. The payments so received by him were evidenced by signatures appended by him to the respective vouchers which he exhibited, and were at pages 7 to 21 of his exhibits herein.

    d. The total sum paid to Mr. Adhan Isaak was Kenya Shillings One Million Five Eighty Nine Thousand Four Hundred (Kshs.1,589,400/-) as shown by the vouchers at Paragraph *8* above. After this payment had been made, the seller died, before he could pay the outstanding balance of a sum of Kenya Shillings Eight Sixteen Thousand Six Hundred (Kshs. 816,600/-), but which sum he later paid over to his brother, Haj Hassan, who was in charge of the affairs of the deceased on the 8th December 2016. This fact was evidenced by a voucher of that date which was exhibited at page 22 of his exhibit herein.

    e. From the above narrative, it was clear and obvious that he was not the original allotee of this parcel of land. The Deponent was the purchaser of this lease, for sums of money that he paid out to the seller, in the manner that he had fully disclosed above. It was in these circumstances that he fully refuted the contentions of the Petitioners that the subject property was irregularly and unlawfully leased to him.

    f. The Deponent responded to the averments made out at Paragraphs 19 to 22 of the Petition, in which the Petitioners claim that his property was on a public access lane, and secondly, that the 2nd Petitioner placed a caution in the year 1995, claiming a licensee's interest. He had stated above, he purchased the lease interest in this property from the initial allotee.

    g. According to the Deponent it would be seen from the Green Card exhibits at page 5 in the affidavit, that the caution entered against this property was claiming an interest of a License. It was only now that the Petitioners were alleging that his property comprised of a public path for the people of Ziwani estate, which was not one of the reasons for placing that caution.

The claim that his property was a public pathway was further fueled by the reliance by the Petitioner's on the report of the Commission of Inquiry Into Illegal/ Irregular Allocation of Land (Hereinafter referred to as "The Ndungu Report") which they annexed at page 11 of their documents. For ease of reference, exhibited in the affidavit at pages 23 to 25 relevant copies of that Report.

h. At page 24 there was a property described as follows:-

> Msa Island/Block19/315, Access Lane, Ziwani Road. It then shows that am the current owner, and gave recommendations for revocation of that Title.

i. The Deponent did not know whether the Title for plot number Msa/1/Block19/315 was revoked, because this property had never at any time been registered in his name. In any event, the registration district of this property could be traced to Miritini, which was not on Mombasa Island where his property, Msa/XVII/1399 was located. There was a clear difference between property No. Msa Island/19/315 which the deponent did not own, and his which was Msa/XVII/1399, which had never been the subject of revocation of his Title.

j. The real reason for the Petitioners bringing this Petition was because they had constructed various commercial units behind his property, and now want him to vacate his, so that they could have unlimited access to their property through his plot

k. This desire by the Petitioners was what explained why they claim to have rights of Licensee over his plot, although they have never given either to this Court or to him, the details and nature of their Licence. The 2nd Petitioner, who placed the caution in the year 1995, had not given this Court the details of the Licence that he was then claiming, which now seemed to have motivated him to make further claims from behind the curtains of an existing public pathway which did not exist.

l. In order to visually and effectually demonstrate the matters stated above, he referred to a map of the area, which he exhibited in the affidavit, at page 26, and proceeded to explain the actual setup of the respective plots in relation to each other as follows:-

    a. The Deponent's plot number XVII/1399 was marked "A" and is shown abutting Tom Mboya Road at the front.

    b. There was a neighboring plot, on the left hand side to his plot as one faces Tom Mboya Road, with its boundary wall which he had "Marked B". The entire stretch of this wall is marked in "brown".

    c. The Petitioner's plot was behind his plot, he had marked it in blue and has its entrance from the point "Marked C", through the road that leads to Taratibu street.

    d. It will be observed that the length of my boundary wall along Tom Mboya Road was a continuation from the boundary wall of the neighbors plot from the point "Marked B" on the map he had provided.

    e. The Petitioners were in the process of putting up some commercial structures on their plot, and intend to obtain access to those development through his plot, at the point he had "Marked D."

    f. A cursory and visual observation of the location of his plot would show that there was no pathway, from the Petitioners property, through mine, which is for use by residents

of Ziwani Estate whom the Petitioners claim were the users of this pathway. No such pathway exists or has previously existed.

g. One final observation was that any movement of people from the point "Marked D," along his plot, will end at the neighbor's boundary wall, at the point "Marked B". This effectively rules out the possibility of the existence of a pathway over his plot in the manner in which the Petitioners claim

a. In order to effectively and fully demonstrate to the Court the matters that he had graphically explained above he offered to personally give evidence at the hearing of this Petition, and to humbly invite the Court to visit this site for a full appraisal of all these matters, first hand. The totality of the foregoing narratives led to the only inevitable conclusion that the Petitioners were desirous of creating an entry into their commercial structures, through his plot, while avoiding to use the road that gave direct access to their property through the point he had "Marked C", on the map he had exhibited to his exhibits.

b. The deponent now turned to respond to the allegations of the Petitioners, particularly at Paragraphs 30 to 32 of the Petition, that the constructions on his plot had been done unlawfully, unprocedurally, and without obtaining the relevant licences as required by law. To begin with, the deponent had paid the required land rates for the subject property, from the time the deponent purchased the same. Such rates were paid as shown in the Invoices received by the deponent, and payments effected, which evidence; he exhibited in the affidavit at pages 27 to 33.

c. It would be observed from these documents that he paid all the land rates for the above plot, until a hiatus was created by the confusion of property known as Block 19/315, which he had never owned. For avoidance of doubt, the Petitioners had helpfully annexed at page 7 of their documents, a search which showed that he was the owner of the plot number MSA/XVII/1399. Exhibited in the affidavit at page 34 a copy of that search certificate.

d. As a result of the matters stated at paragraph *28* above, and the attendant confusion in order to develop his parcel of land, on the 19th September, 2019, he applied for such development permission from the 4th Respondent through his letter to it of that date. Exhibited in the affidavit at page 35, a copy of his said letter for its fully terms. By a letter dated 22nd November, 2019, the 4th Respondent accepted his request and therein set out various conditions which were to be fulfilled. Exhibited in the affidavit at page 36 a copy of the said letter.

e. On the 2nd December, 2019, he wrote to the 4th Respondent, thanking it for its acceptance of his request. He exhibited in the affidavit at page 37, a copy of his said letter of 2nd December, 2019. He also applied for and obtained approval from the 3rd Interested Party, NEMA to undertake the developments that he had initiated on his property. Exhibited in the affidavit at page 38, a copy of the subject approval given to him by the 3rd Interested Party.

f. Similarly, he submitted building plans to the 4th Respondent for approval. They were approved before he commenced any construction works on

this plot, and an inspection for such confirmation can be carried out by any member of the public in the offices of the 4th Respondent. In the circumstances, all accusations of unprocedural and illegality made against him by the Petitioners had no support at all in the face of all the documentation that he had supplied in the manner he had explained above.

g. The Deponent had said before, and reiterated the same position now, am not the original allottee of property Mombasa/XVII/1399. He purchased this parcel of and in terms he had explained above. The Certificate of Lease clearly shows that the Lessor was the Municipal Council of Mombasa, whose successor was the 4th Respondent, County Government of Mombasa. Similarly, the Certificate of Lease was issued by the 2nd Respondent, represented in these proceedings by the 3rd Respondent, the Attorney General.

h. He had acquired property rights over this parcel of land, which rights were protected by *the Constitution*

i. As also explained earlier:-

i. He had invested in purchasing this property, in the year 1995 when he purchased the same.

ii. He had incurred expenses in obtaining the various licences to enable him commence construction works on the property.

iii. He had engaged professionals in the design and drawing of the intended buildings to be erected thereon.

v. All these expenditures and more could not be wished away without the 2nd, 3rd and 4th Respondents taking fully responsibility, if such an eventuality were to come to happen. The Affidavit was sworn in opposing the Petition filed herein, and in support of his response to Petition and the Cross – Petition.

IV. Submissions

42. The parties while all in court on the 5th November, 2024 consented to canvassing the Petition dated 8th December, 2020 by way of written submissions.

43. Pursuant to that, all parties obliged – whereby the Honourable Court feels highly indebted to sincerely express its gratitude to all the Counsels – M/s. Oluoch Wambi, M/s. Waswa, Mr. Tajbhai and Mr. Paul Buti in the professional manner they conducted this matter full of dedication, devotion, diligence and decorum. Thus, the Honourable Court reserved a Judgment date on 25th April, 2025 accordingly.

A. The Written Submissions by the Petitioners

44. The Petitioners through the Law firm of Messrs. Oluoch Kimori Advocates filed their written submissions dated 21st October, 2024. M/s. Oluoch Advocate commenced her submission by asking the Court to poetically and figuratively picture a bustling town where the streets were alive with voices and vibrant activities, and where each path has its own history, its own tale of connection. Now imagine that one day, a new structure rises, a bold statement in brick and mortar, casting shadows over familiar routes that had served as lifelines for decades. This structure didmore than change the skyline; it altered the very flow of the town- blocking paths, reshaping access, and redefining the rights of those who live and work nearby.

45. In this case, the Petitioners sought to protect-their vision of this altered landscape. They asked this Court to declare and grant orders regarding the use of what they called service lanes-lanes that, if obstructed, could change the nature of surrounding properties. But is this vision aligned with the law? And more importantly, do the changes they argue for respect the balance of rights that the law sought to maintain for all parties including the general public?

46. On the brief facts of the case, the Learned Counsel submitted that the suit property being Mombasa/ Block XVII/1399 was an access lane adjacent to the Petitioner's property known as Mombasa Block XVII/16 located at Tudor along Ziwani Lane, Mombasa for public use. It had been designated as a thoroughfare to facilitate movement and access for the surrounding community. The Petitioners asserted that this lane served a critical role in ensuring unrestricted access for the public-and was essential in the well-being and development of the local population. The Petitioners contend that the suit property was classified as public land, governed by the provisions of *the Constitution* of Kenya. It was held in trust for the citizens and was subject to the principles of equitable access, sustainable management, and responsible governance-outlined in the provision of Article 60 of *the Constitution*. The proper use and preservation of this public land were imperative to serve the interests of current and future generations.

47. The Petitioners initiated this suit and sought for relief of violations related to the management and use of the suit property. They alleged that the 4th Respondent had taken actions that threatened the designated public use of the access lane, adversely impacting the community's rights and access to essential services. This situation necessitated judicial intervention to restore the intended use of the property and safeguard the rights of the Petitioners. The Petition was supported by the Affidavit of the 1st Petitioner and the Petitioners' List and copies of documents filed on 14th March, 2022.

48. According to the Learned Counsel, while the 1st Respondent had not opposed the Petition, the 2nd and 3rd Respondents had supported the Petition through a Replying Affidavit filed on 14th March 2022, sworn by Government Surveyor Teddy M. Mulusa. However, the 4th Respondent opposed the Petition through a Replying Affidavit filed in court on 7th March 2022, sworn by Paul Manyala, the Chief Physical Planner of the 4th Respondent.The 1st Interested Party filed a response to the Petition on 14th January 2022, a Replying Affidavit filed on 17th January 2022 all in opposition of the Petition. The 2nd Interested Party had supported the Petition through a Replying Affidavit filed on 9th February 2022, sworn by Mohamed Issack. The 3rd Interested Party had not opposed the Petition, the 4th Interested Party opposed the Petition dated 1st November, 2023 and the 5th Interested Party had also expressed support for the Petition via a Replying Affidavit dated 4th February 2022, sworn by Arch Stephen Mwilu.

49. The Learned Counsel submitted that the Petitioners sought several remedies, including a declaration that their rights and those of the general public to access and utilize the suit property had been violated, an order for the restoration of the access lane for public use, and compensation and/or costs for any damages incurred as a result of the actions taken by the Respondents. The Petitioners asserted that the balance of rights, as protected by law, must be upheld for the benefit of the entire community.

50. The Learned Counsel relied on the following issues for determination:-

    a. Whether the suit property was public land and therefore was subject to the regulations governing public land use.

    b. Whether the Petitioners' rights and those of the general public to access and utilize the suit property had been violated.

c. What specific violations had the Petitioners suffered as a result of the Respondents' actions?

d. What remedies were available to the Petitioners for the violations they had experienced?

e. Whether the balance of rights, as protected by law had been maintained for the benefit of the entire community.

51. On whether the suit property was public land and was therefore subject to the regulations governing public land use. The Learned Counsel submitted that the central issue for determination was whether the suit property is public land under the management of the Respondents for the benefit of the citizens of Kenya. This determination was crucial to establishing the rights and responsibilities surrounding the use of the suit property.Public land is defined by the provision of Section 6 of the *Land Act*, No. 6 and Article 62 of *the Constitution* as all land that was neither private nor community land, including land explicitly designated as public by legislation. This categorization underscored the role of public land as a collective resource for both current and future generations, intended for the benefit of the entire populace.

52. The Petitioners had demonstrated through the document marked as annexure "SHS – 7" to the affidavit in support of the Petition that sometimes in the year 1995, the suit property, which had always been used by the residents of Ziwani, was irregularly and unlawfully leased to the 1st Interested Party for a period of 99 years commencing 1994, who immediately registered a caution on the suit property, claiming a license interest. This caution had never been withdrawn to date and since then they had continued to use the suit property as an access lane until sometimes in November, 2019 when the 4th Respondent again purported to issue the 1st Interested Party with an occupation license on The Public Access Lane for a period of 5 years commencing 22nd November, 2019. The Learned Counsel urged the Court to refer to annexure marked as "SHS – 9" and "SHS – 10" to the Petitioners' affidavit in support of the Petition. If the 1st Interested Party already held a 99-year lease over the suit property, what justification was there for issuing yet another license for the same property years later?

53. Further, the 1st Respondent, the National Land Commission, within its mandate, made a recommendation years back that the lease issued to the 1st Interested Party be revoked since the suit property was public land allocated to be used as an access lane for the general public. The Learned Counsel urged the Court to refer to the annexure marked as "SHS – 8" to the Petitioners' affidavit in support of the Petition. This was also published in the year 2004 in the Ndung'u Report of the Commission of Inquiry into illegal Allocation of Public Land, as evidenced by the report dated 17th February 2021, being document No. 4 in the Petitioners' list and copies of documents filed on 14th March 2022.

54. The 4th Respondent, through the affidavit sworn by Teddy M. Mulusa, a Government Surveyor in the Ministry of Lands and Physical Planning, had unequivocally confirmed that the property in question was designated as a road reserve. Specifically, the affidavit cites that the survey for Mombasa/Block XVII/1399, authenticated by the Director of Surveys in the year 1994, was part of the 100 ft road reserve, as outlined in Survey Plans Folio/Register Numbers 29/8 and 56/54. This confirmation, supported by historical survey records, indicated that the land was not only a designated access route but also governed by public land regulations, reinforcing its status as a public resource meant for the benefit of the community.

55. In addition to the affidavit by Teddy M. Mulusa, the report by the Petitioner's surveyor highlighted that the designation of the suit property as a record reserved was further supported by comprehensive historical and survey records. The director of surveys had validated these records, confirming that Mombasa/Block XVII/16 which belongs to the Petitioners and its adjacent parcels utilize the same

road as their official access point. This reinforced the understanding that the land served a critical public function, allowing free access to neighboring properties while adhering to the established regulatory frameworks governing public land. The report underscored the necessity of maintaining this road reserve for the benefit of the community, emphasizing that any alterations or claims to the property must align with its intended public use as mandated by law.

56. The provision of Article 62 of *the Constitution* of Kenya stipulated that public land is vested in the National Land Commission, which holds this land in trust for the people. Specifically, the Article provides that: (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, administered on their behalf by the National Land Commission, if classified under-(a) clause-(1)(a), (e), (d), or (e); and (b) clause (1)(b), other than land held, used, or occupied by a national State organ. This framework established the Respondents' authority to oversee public land and ensures that it was managed in the public interest. The Respondents were tasked with vital responsibilities under Article 67 of *the Constitution*, including monitoring and overseeing land use planning across the country. This oversight was essential for ensuring that public land served its intended purpose, benefiting all Kenyans.

57. According to the Learned Counsel, the provision of Article 60 of *the Constitution* emphasized that land in Kenya must be held, used, and managed equitably, efficiently, and sustainably. It further stipulates principles guiding Land use, such as: (a) equitable access to land; (c) sustainable and productive management of land resources; (d) transparent and cost-effective administration of land;(e) sound conservation and protection of ecologically sensitive areas. These principles underscored the duty of the Respondents to act in the best interests of the public.

58. Article 249 of *the Constitution* provided for the roles and functions of the 1st Respondent and states that the objects of the commissions and the independent offices were to (a)protect the sovereignty of the people;(b) secure the observance by all State organs of democratic values and principles; and (c) promote constitutionalism. It was therefore, followed that *the Constitution* created the 1st Respondent to ensure the community and public land use was no longer unregulated. In exercising its delegated authority pursuant to Article 62 of *the Constitution*, the 1st Respondent has a duty and obligation to act solely in the best interests of all Kenyans. Furthermore, the Respondents are bound in all their conduct and actions, including making and implementing public policy decisions, by the national values and principles of governance in Article 10 of *the Constitution*

59. The Learned Counsel contended that in considering the status of the suit property as public land, it was essential to acknowledge the position of the 5th Interested Party as well, which asserts that the management and use of public land must be guided by principles that prioritize transparency, accountability, and community engagement. The 5th Interested Party contends that any leasing or licensing agreements, such as the one issued to the 1st Interested Party, should be subjected to rigorous scrutiny to ensure they did not undermine the public's interest or the intended use of the land. As demonstrated by the 5th Interested Party's response it was clear that there are significant concerns regarding the legality of the 1st Interested Party's long-term lease and the subsequent issuance of an occupation license without proper community consultation. These actions not only contravene established regulations governing public land but also jeopardized the rights of local residents who have historically utilized the suit property for access. Therefore, it was clear that the 5th Interested Party was also urging the Honourable Court to uphold the principles of public land management by reaffirming the designation of the suit property as public land and rejecting any claims that undermine its essential role as a communal resource.

60. In light of the overwhelming evidence and the legal framework presented, the Learned Counsel respectfully submitted that the suit property unequivocally was public land. It was imperative that the Court upheld the principles of public land management, thereby safeguarding this vital resource for the benefit of the community and ensuring that the actions of the Respondents align with *the Constitution*'s intent to promote equity, sustainability, and public welfare.

61. On whether the Petitioners' rights and those of the general public to access and-utilize the suit property had been violated. The Learned Counsel submitted that the Petitioners averred that the process of licensing and/or leasing the suit property to the 1st Interested Party was not only procedurally flawed but had also directly led to the infringement of their right of access and that of the general public. The allocation by the 4th Respondent ignored the public's interest in accessing and utilizing this land, which has historically sieved as a public resource. Prior to the licensing and/or leasing, the suit property was accessible to the public, serving as a vital communal space. However, the subsequent allocation to the 1st Interested Party had effectively restricted this access, denying the Petitioners and the general public the ability to utilize the property for its intended public purposes. The Petitioners asserted that the fencing and development activities undertaken by the 1st Interested Party have physically obstructed entry, transforming what was once a communal space into a private, restricted area.

62. Article 62(1)(a) of *the Constitution* defined public land as land that should be available for use by the community at large. The restriction of access to this land undermines thisconstitutional guarantee, as the Petitioners and other members of the public are now unable to access the space as they previously did. The Petitioners' survey report indicated that the fencing and other physical developments undertaken by the 1st Interested Party have significantly altered the character of the suit property. The report highlights the erection of barriers that had physically restricted the community's access to the land, preventing activities that had been conducted there for years.

63. The 2nd Respondent's report corroborated these findings, confirming that the development activities on the suit property have led to access restrictions. The report noted that there was no public consultation or participation in the decision to allocate the land, as required under Article 10 of *the Constitution*, thereby disregarding the interests of the community who relied on the land. Article 40 of *the Constitution* protects the right to property, including the right to access and use public land. By issuing the license and/or lease without considering the impact on public access, the 4th Respondent violated this right, resulting in an arbitrary deprivation of the Petitioners' and the public's ability to enjoy the suit property.

64. To buttress on this point, the Learned Counsel relied on the case of "Kenya Anti – Corruption CommissionvFrann Investment Limited & 6 Others (2020) eKLR", the Court emphasized the importance of maintaining the public nature of land allocated for communal use. Any alienation or allocation that restricts public access must be carefully-scrutinized to ensure that it does-not undermine the public's-constitutional rights. The physical barriers and restricted entry, as reported in the surveys, illustrated a clear violation of these rights in the present case. Article 66 (1) of *the Constitution* empowers the State to regulate land use in the interest of the public. However, this regulatory power could not be used to deprive the public of access to land that serves a communal purpose. The Petitioners argued that the 4th Respondent's actions in issuing the license and/or lease failed to uphold this constitutional mandate, instead prioritizing private interests over the public's right of access.

65. The Learned Counsel further submitted that as observed in the case of:- "Kenya Anti-Corruption Commission vLima Limited & 2 Others (2019) eKLR", public land could not be alienated in a manner that denies the public their right to use the land. The findings in the 2nd Respondent's report underscored the failure to properly consult the community before issuing the license, making

the alienation process illegal and its resultant restrictions on access null and void. In light of these arguments, the Learned Counsel also urged the Court to refer to the 5th Interested Party support of the Petitioners' claim by-emphasizing-that the issuance of the license-and/or lease to the 1st Interested Party represented a stark deviation from the principles of public participation and transparency as-mandated by *the Constitution*. The 5th Interested Party contended that the lack of consultation with the affected communities prior to the allocation not only contravened Article 10 but also undermined the foundational tenets of democratic governance and accountability. They argued that the failure to engage the public in this decision-making process reflected a broader disregard for the collective rights of the community, which are enshrined in Article 62 (1) (a). Furthermore, the 5th Interested Party asserted that restoring access to the suit property was not merely a legal obligation but a moral imperative, as the land in question had historically served as a communal resource, vital for the social and economic well - being of the local population. Thus, they echo the Petitioners' called for the Court to annul the lease and/or license, reinforcing the necessity of prioritizing public access and communal rights over private interests in land management.

66. The Learned Counsel further argued that the licensing and/or leasing of the suit property to the 1st Interested Party had not only been conducted without due-process but had also directly infringed upon the right of the Petitioners and the general public to access the land. The reports from both the Petitioners' survey and the 2nd Respondent provided clear evidence of how the allocation had led to physical restrictions, denying the community their constitutionally guaranteed right to utilize the land. Therefore, they urged this court to declare the impugned license and/or lease null and void and to restore the public's access to the suit property.

67. On what specific violations had the Petitioners suffered as a result of the Respondents' actions. The Learned Counsel reiterated this Petition was premised on the claim that the actions of the Respondents had violated the Petitioners' constitutional rights together with the general public, including the right-to-access The Public Access Lane, access information, the right-to public participation, and the right to fair administrative action, as provided for under *the Constitution* of Kenya, 2010.

68. The Learned Counsel intimated to further demonstrate that these violations on detail, referring the relevant constitutional provisions and case law to support the Petitioners' claim. On the right to access to public lane, the Petitioners asserted that the proposed leasing and/or licensing of the suit property significantly infringes upon their right to access The Public Access Lane, which had been reserved for community use. This right was rooted in the principles of public interest and the necessity for free movement and access to public amenities.

69. *The Constitution* of Kenya, 2010 recognized the right to access public resources and spaces as part of the fundamental freedoms guaranteed under Article 10, which emphasizes the principles of public participation, equity and social justice. The lack of access to the public lane not only affected individual Petitioners but also had broader implications for the community that relied on this route for mobility and connectivity. The actions of the Respondents to lease and/or issue a license over the property without ensuring public access to the reserved lane reflect a disregard for the established rights of the community. The failure to facilitate access to this lane was a violation of the Petitioners' rights and served as a basis for their grievances against the Respondents.

70. To support her argument, the Learned Counsel relied on the case of: "Republic v Ministry of Lands & 2 Others [2015] eKLR", the court held that any action that impedes public access to reserved land undermines the social contract between the state and the citizens, which is essential for good governance and the rule of law. The Learned Counsel submitted that their right to access the public

lane has been violated, further compounding the impact of the Respondents' actions and necessitating judicial intervention.

71. The Learned Counsel submitted on the right to property that the Petitioners' right to property under the provision of Article 40 of *the Constitution* had been violated by the Respondents' actions, which threaten to issue a licence and commercialize a property that included the Public Access Lane. This lease or license constituted a dispossession without due process, depriving the Petitioners of their rights. Article 40 of *the Constitution* was titled "Protection of right to Property" and provided as follows: -

> "(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) 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."

72. The Petitioners owned property adjacent to the suit property and use the suit property as an access road to their homes as well as to the main Public Road Reserve as well as a pedestrian lane or footway. The Petitioners had a right to access their properties and the actions of issuing a license over the suit property by the 4th Respondent violated this right.

73. On the right to fair administrative action. The Learned Counsel submitted that in addition, the Petitioners contend that their right to fair administrative action, as guaranteed-under Article 47 of *the Constitution*, had been breached. The Respondents failed to provide adequate notice or opportunity for the Petitioners to voice their concerns regarding the licensing arrangement, which directly impacts their rights and interests. In the year 1995 upon discovery of the illegal leasing of the suit property to the 1st Interested party, the Petitioners lodged a caution on the said property, a caution which had yet to be withdrawn. The property lease was later recommended for revocation by the 1st Respondent only for the 4th Respondent to decide years later in the year 2019 to grant a license to the 1st Interested party over the same property that he purportedly still held a lease over. The issue of removal of caution was found in the provision Section 73 of the *Land Registration Act*, No. 3 of 2012, which provided as follows:

> "73.
>
> (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.
>
> (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice. (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.(4)If the cautioner objects to the removal of the caution, the cautioner

shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs."

74. The Learned Counsel asserted that it would be noted that the Respondents went ahead to issue a license on the 1st Interested Party and that the 1st Interested Party went ahead to-undertake construction with undue regard to existence of the caution lodged by the Petitioners and the recommendation by the 1st Respondent. Following this the Petitioners lodged several complains, however the same had never been acted upon.

75. According to the Learned Counsel, this disregard by the Respondents of the procedural requirements amounted to an abuse of the rules of natural justice and fair administrative action.

76. On the right to public participation. The Learned Counsel opined that the failure by the Respondents in notifying the residents of the area about the proposed licensing of the suit property as well as their failure to involve the public in such decision amounts to a violation of the constitutional requirement of Public Participation. The constitutional threshold for public participation is "reasonableness of notice", and "opportunity for public participation" as was set out in the case of"- "Attorney General & 2 Ors vNdii and 79-Ors, Prof. Rosalind Dixon & 7 Ors, [2022] KESC & KLR".

77. Additionally, the Counsel held that the principles that guide public participation were well laid out in the Supreme Court case of:- "BAT Tobacco and Kenya PLC (former BAT Kenya Ltd) v Cabinet Secretary for Ministry of Health & 2 Others, Kenya Tobacco Alliance and Anor Supreme Court Petition No. 5 of 2017 (2019) KLR" and emphasized that public participation is a constitutional requirement under the provision of Article 10 (2) and must be genuine, inclusive and meaningful, not just a formality. It applied to all governance processes, and the responsibility to ensure it lies-with the public-officer or entity involved. Even in the absence of a formal legal framework, public participation must still be facilitated through reasonable means, allowing both written and oral submissions, with the adequacy of participation-determined on a case-by-case basis.

78. The Learned Counsel further relied on the case of "Republic v Ministry of Finance & Another Ex Parte Nyong'o Nairobi HCMCA No.1078 of 2007 (HCK) [2007] KLR 299", the Court held:-

> " Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People's participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests."

79. According to the Learned Counsel, by failing to undertake a public participation exercise inclusive of the Petitioners and the residents of the suit land, the Respondents infringed on their right to public participation. The Petitioners were not given the opportunity to air out their positions with regard to the proposed licensing of the property by the Respondents, property which has been reserved for a public access road.

80. On the right to Access Information. The Learned Counsel asserted that the Petitioners were not duly informed of the leasing/ licensing of the suit property contrary to the provision of, which mandates

the Respondents to notify the affected party. The Learned Counsel further proceeded to rely on the provision of Article 35(1) of *the Constitution* provides that:-

35.(1) Every citizen has the right of access to-

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

81. The provision of Article 47 (2) of *the Constitution* further provides that if a right or fundamental freedom of a person had been or was likely to be adversely affected by administrative action, the person has the right to be given reasons for the action. The importance of the right to access to information could not be overemphasized. As was observed in the case of:- "Famy Care Limited v Public Procurement Administrative Review Board & another Nairobi Petition No. 43 of 2012-[2012] eKLR",

> " The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of *the Constitution*. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule-of law, social justice set out in the preamble to the-Constitution and Article 10 cannot be achieved unless the citizen has access to information."

82. "Hilary Delany in his book, Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272", notes that:-

> " Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."

83. The Learned Counsel referred Court to the case of "Sceneries Limited v National Land Commission [2017] eKLR", the Court held that:-

> " .... Failure to give proper notice is in itself a denial of natural justice and fairness...'

84. It was the Learned Counsel's submissions that failure by the Respondents to notify the affected parties' of the licensing of the public property amounts to a violation of their-right to information.

85. On the right to clean environment. The Learned Counsel submitted that Article 42 of *the Constitution* which states that:-

> " Every person has the right to a clean and healthy environment, which includes the right-

a. to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article

86. In the preamble to *the Constitution* the citizens of the Republic of Kenya made it clear that they were respectful of the environment, which was their heritage they were determined to sustain it for the benefit of future generations. The Learned Counsel relied on the case of "Olum & Another v Attorney General (2) [1995-1998] 1 EA 258" it was held although the national objectives and directive principles

of State policy are not on their own justiciable, they and the preamble of *the Constitution* should be given effect wherever it was fairly possible to do so without violating the meaning of the words used. A duty to have the environment protected for the benefit of present and future generations is imposed on both the State and every person under Article 69 of theConstitution which among others, requires the state to ensure sustainable exploitation, utilization, management and conservation of the environment.

87. In the case of "Patrick Musimba v National Land Commission & 4 Others [2016] eKLR" the court held that:-

> "…..the State under Article 69 of *the Constitution* is enjoined to ensure sustainable development: see also the Preamble to *the Constitution*. The State is also to ensure that every person has a right to a clean and healthy environment. However physical development must also be allowed to foster to ensure that the other guaranteed rights and freedoms are also achieved. Such physical development must however be undertaken within a constitutional and statutory framework to ensure that the environment thrives and survives. It is for such reason that *the Constitution* provides for public participation in the management, protection and conservation of the environment. It is for the same reason too that the Environmental Management and Coordination Act (" the EMCA")has laid out certain statutory safe guards to be observed when a person or the State initiates any physical development.
>
> At the core is the Environmental Impact Assessment and Study which is undertaken under Section 58 of the EMCA and the regulations thereunder. Under Regulation 17, the Environmental Impact Assessment Study must involve the public. The inhabitants of any area affected by a physical development must be given an opportunity to air their views on the effects of any such development. After the Environmental Impact Assessment Study report is compiled, the same report must be circulated to the affected persons."

88. It was the Learned Counsel's submission that the 4th Respondent's failure to include the residents of the area in the Environmental Impact Assessment (EIA) in determining whether to license out the property amounts to a violation of the Petitioner's right to clean environment.

89. In the case of:- "Ken Kasing'a v Daniel Kiplagat Kirui & 5 Others [2015] eKLR", it was held that:

> "I am prepared to hold that where a procedure for the protection of the environment is provided by law and is not-followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy environment, or at the very least, is one that has potential to harm the environment. This presumption-can only-be rebutted if proper procedure is followed and the end result is that the project is given a clean bill of health or its benefits are found to far-outweigh the adverse effects to the environment".

90. The Learned Counsel urged the Court to also acknowledge the significant position of the 5th Interested Party, represented by Stephen Mwilu, swore an affidavit outlining crucial compliance issues related to the construction project at the suit property. The 5th Interested Party, as the National Construction Authority (NCA), played a vital role in overseeing the construction industry as established under the *National Construction Authority Act*, No. 41 of 2011. In their affidavit, the 5th Interested Party admitted to the Petitioners' property rights (Paragraph *3*), which affirmed the legitimacy of the claims made by the Petitioners. Furthermore, the NCA's regulatory authority was pivotal, as highlighted in Paragraphs *4* and *5*, where it underscores their mandate to ensure quality assurance and safety within the construction sector.

91. The investigation conducted on 27th November 2020 revealed significant non-compliance at the site, including the absence of safety measures and qualified personnel (Paragraphs *10* and *12*). These findings substantiate the Petitioners' concerns regarding illegal construction activities and the subsequent suspension of works as per the NCA's findings. In the public interest, as stated in Paragraph 17 of the affidavit, it was imperative that this Honourable Court grants the necessary orders to restrain the 1st Interested Party from proceeding with the construction.

92. According to the Learned Counsel, it was clear that the Respondents' actions constitute multiple violations of constitutional rights, including the right to access the public lane, property rights, and rights to fair administrative action and participation in decision-making. Therefore, they urged the court to grant the Petitioners the relief sought to uphold their rights and interests. The Learned Counsel relied on the "Mumo Matemu case", where it was stated:-

> "It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of *the Constitution*."

93. On what remedies were available to the Petitioners for the violation they had experienced. The Learned Counsel submitted that the Petitioners were entitled to appropriate remedies for the violations of their constitutional rights and that of the general public and/or the residents of Ziwani Lane. *The Constitution* of Kenya, 2010, under the provision of Article 23, empowered this Honorable court to grant appropriate reliefs where rights and fundamental freedoms have been violated. The Honourable Court had both the Constitutional and inherent jurisdiction to grant the remedies sought in this petition and the Learned Counsel now proceed to outline the legal and factual basis for these remedies.

94. On the declaratory reliefs. The Learned Counsel averred that the Petitioners respectfully seek declarations affirming that their rights had been violated. It was settled law that declaratory reliefs-are-available-where constitutional rights are breached. As affirmed in the case of:- "Anarita Karimi Njeru v The Republic [1979]eKLR", the courts have the power to make declarations when rights are violated, irrespective of whether or not there is-specific proof of damage suffered. The Petitioners sought a declaration that the Public Access Lane forms part of public property and cannot be subjected to private leasing or licensing or commercialization by the Respondents. This remedy was essential in protecting the integrity of public resources and preserving the rights of the community to access essential public amenities.

95. The Petitioners also sought declarations that their rights to property under Article 40 and their right to fair administrative action under Article 47 were violated. These declarations will affirm the Petitioners' rights and the unlawful nature of the Respondents' actions.

96. On the injunctive reliefs. The Learned Counsel submitted that the Petitioners sought a permanent injunction restraining the Respondents from licensing, leasing, dealing, or otherwise interfering with the Public Access Lane. This remedy is crucial in preventing further violation of the Petitioners' rights and ensuring that the community continues to enjoy free access to the lane. In the case of "Giella v Cassman Brown & Co Limited [1973] EA 358", the court set out the conditions for the granting of an injunction, which the Petitioners have met. There is a prima facie case, the Petitioners would suffer

irreparable harm if the injunction is not granted, and the balance of convenience lies in their favor, as restricting-public access would harm not only the Petitioners but the entire community.

97. On the judicial review reliefs. The Learned Counsel asserted that on Mandamus that the provision of Article 23(3)(f) of *the Constitution* empowers this court to issue orders of Mandamus to compel the performance of public duties. The Petitioners sought an order of mandamus directing the Respondents to take necessary steps to ensure that the Public Access Lanes and other public resources in the disputed area were available for use by the Petitioners and the public.

98. To back the Counsel, she relied on the Court of Appeal in the "Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & Others [1997] eKLR" held that an order of Mandamus would issue to compel the performance of a public duty where a public officer or body failed to perform that duty to the detriment of an individual's legal rights. In this case according to the Learned Counsel, it had been established that the Respondents have an unambiguous legal duty to ensure The Public Access Lane remains accessible to the Petitioners and the wider public. This duty has been violated by the licensing and/or leasing of the land to the 1st Interested Party, a decision that has effectively blocked access to the public lane. The Respondents' neglect of their public duty has caused irreparable harm to the Petitioners, and this court should issue an order of mandamus compelling the Respondents to take immediate steps to rectify the situation.

99. On the order of Certiorari. The Learned Counsel submitted that the Petitioners sought an order of Certiorari to quash the decision made by the 4th Respondent to license and/or lease the Public Access Lane to the 1st Interested Party. It is trite law that certiorari is available to quash decisions made without jurisdiction or in breach of the rules of natural justice, as stated in the case of "Kenya National Examinations Council vRepublic Ex - Parte Geoffrey Gathenji Njoroge & Others (Supra)".The decision by the 4th Respondent to lease public land to the 1st Interested Party was ultra vires and in violation of the right-to-public-resources guaranteed under Article 62 of *the Constitution*. The Petitioners submitted that this Honorable court should quash this unlawful decision to prevent further violation of public access rights.

100. The 1st Interested Party raised an objection that the remedies sought by the Petitioners were time barred under the provision of Order 53 Rule 2 of the Civil Procedure Rules, 2010 which imposes a six-month limitation period for judicial review applications. With respect, the Petitioners submitted that this argument was misplaced for the following reasons: -

i. Constitutional Petition vs. Judicial Review.

   The Petitioners have filed this case as a Constitutional Petition, not merely as a Judicial Review application. The Petitioners are seeking redress for violations of their fundamental rights under Articles 40, 42, and 47 of *the Constitution*. The remedies available under Article 23 of *the Constitution* are not limited by the six-month time frame imposed by Order 53 Rule 2.

ii. No Time Bar for Constitutional Petitions.

   There is no statutory time limit for filing constitutional petitions, as established by the Court of Appeal in "Mary Wambui Munene vPeter Gichuki King'ara & 2 Others (2014) eKLR". The Petitioners are within their right to seek constitutional remedies-at any time when violations of fundamental rights are continuing.

iii. Continuous Violation of Rights.

   The denial of access or the public lane and the unlawful licensing and leasing of the property are continuing violations of the Petitioners' rights, which tolls any limitation period. As held in the

case of:- “Isaac Githui Mwangi vDirector of Public Prosecutions & Another (2014) eKLR”, where a violation is ongoing, the time limit for bringing an action does not start running until the violation ceases.

101. On the compensation for violations suffered. The Learned Counsel submitted that compensation was an appropriate remedy for the material and psychological harm caused by the violation of their rights. The provision of Article 23 (3) (e) of *the Constitution* allowed the court to award compensation as a remedy for violations of constitutional rights. The Petitioners sought:-

a) General Damages.

Compensation for the suffering and inconvenience-occasioned-by the unlawful actions of the Respondents, including the deprivation of access to the public lane and the adverse impact on their property rights. In the case of:- “Koigi Wamwere vAttorney General [2015] eKLR”, the court awarded general damages for the violation of constitutional rights, emphasizing that monetary compensation is appropriate where the violation has caused harm.

b) Compensation for Economic Losses

The Petitioners seek compensation for any direct economic losses occasioned by the restriction of access to their properties, including increased transportation costs, lost business opportunities, and any other financial hardships that can be directly linked to the actions of the Respondents.

102. On the orders for restitution and public interest remedies. The Learned Counsel opined that the Petitioners further sought an order of restitution that the Public Access Lane be restored to its original state taking that this lane was essential to the well-being of the community. Restitution is a recognized remedy aimed at restoring a party to the position they were in before the violation occurred. The Counsel referred Court to the case of:- “Republic v National Land Commission & 4 others Ex - Parte Fulson Company Limited [2020] eKLR”, the court held that restitution is necessary to restore the public’s rights to public land unlawfully alienated. On the public interest orders. The Learned Counsel further argued that as the Public Access Lane was a communal resource. The Petitioners also sought orders compelling the Respondents to ensure the lane was maintained for public use and to refrain from any further actions that would restrict or privatize this essential access. This remedy is critical to ensure that the-broader public interest is protected. On the costs the Learned Counsel submitted that the Petitioners respectfully prayed for an award of costs of this Petition. As established in “Republic v Minister for Agriculture & 2 Others Ex-Parte Samuel Muchiri W'Njuguna & 6 Others [2006] eKLR”, costs follow the event, and the Petitioners, having succeeded in their prayers, are entitled to the costs of this Petition.

103. In light of the foregoing, the Learned Counsel respectfully submitted that they were entitled to the remedies sought, including declaratory reliefs, injunctive orders, remedies of mandamus, certiorari, compensation, and orders for restitution. These remedies werenecessary to protect the Petitioners’ rights, restore their access to the public lane, and ensure that the Respondents’ unlawful actions did not recur. The 1st Interested Party’s argument on limitation should be dismissed, as the Petitioners have rightly invoked the court’s constitutional jurisdiction and demonstrated that their rights are being violated on a continuing basis.

104. On whether the balance of rights, as protected by law, has been maintained for the benefit of the entire community, the Learned Counsel submitted the primary question raised under this issue was whether the rights and interests of the Petitioners, and by extension, the wider community, had been protected and maintained in accordance with the law. In this case, the Petitioners had demonstrated that several

of their constitutional rights have been violated by the Respondents' actions. The Public Access Lanes, which served a critical community function, had been blocked by the unlawful license granted to the 1st Interested Party. This had affected not only the Petitioners but also the general public that depends on these lanes for access.

105. The provision of Article 62 of *the Constitution* of Kenya mandates that public land be held by the state for the benefit of all citizens. The decision to lease a public access lane to a private individual without consideration of the community's rights was a direct violation of the constitutional principles governing the utilization of public resources. While the Bill of Rights guarantees both individual and community rights, Article 24 of *the Constitution* provides that any limitation of rights must be reasonable and justifiable in an open and democratic society. In this instance, the restriction of public access has been done arbitrarily and without justification. The rights of the Petitioners, as members of the community, had been disregarded in favor of a private party. The balance of rights had, therefore, shifted unfairly to the detriment of the Petitioners and the wider public.

106. The provision of Article 10 of *the Constitution* highlights sustainable development and public participation as key principles of governance. In this context, sustainable development means that public resources such as access lanes must be managed in a manner that benefits both current and future generations. The unlawful granting of a license over a public lane to the 1st Interested Party had blocked access for community members, violating their right to access public resources and inhibiting community development. This action is contrary to the principles of sustainable development enshrined in our Constitution, which require that all decisions affecting the public must be in the public interest and promote the well-being of the entire community.

107. The balance of rights could not be said to have been maintained if the entire community suffered the loss of public access and environmental degradation due to actions that solely benefit a private party. In the case of "Beatrice Wanjiku & another v Attorney General &others [2012] eKLR", the court reaffirmed that any government action must always balance individual rights with those of the public and that community interests cannot be sacrificed for private gain.The right to a clean and healthy environment under the provision of Article 42 was a collective right, which protects not just individual citizens but the community as a whole. By allowing the 1st Interested Party to-carry out activities that obstruct access lanes and potentially cause environmental degradation, the Respondents had failed in their duty to safeguard the community's environmental rights.

108. The Learned Counsel further relied on the case of "Ken Kasinga v Daniel Kiplagat Kirui & 5 others [2015] eKLR", the court emphasized that the public interest in environmental protection must outweigh private commercial interests, and that the balance of rights must always favor the community where public resources are involved. In this case, it was evident that the Petitioners' right to a clean and healthy environment has been subjugated in favor of private interests. It was therefore clear that the rights of the Petitioners and the wider community had been unfairly undermined by the actions of the Respondents. The balance of rights, as protected by *the Constitution* and relevant statutes, had not been maintained for the benefit of the community.

109. The Learned Counsel respectfully submitted that this Honorable court should intervene to restore this balance: -

    a. Quashing the decision to grant a license the public lane to the 1st Interested Party;

    b. Compelling the Respondents to reopen access to the public lane for the community's use;

    c. Issuing declarations that the Petitioners' rights, as well as the community's collective rights, have been violated; and

d. Granting appropriate relief to protect public interest and the constitutional rights of the Petitioners and the community at large.

110. In response to the 4th Respondent's position. The Learned Counsel submitted that the Petitioners filed this Petition to seek the court's intervention in protecting their property rights, public access rights, and general public interest relating to the illegal and unlawful allocation of Plot No. Mombasa/ Block XVII/1399. This property had historically served as a pedestrian footpath, providing free and unrestricted access to residents and the public. The Petitioners' property abuts the Public Access Lane, and their enjoyment of the property had been substantially hindered by the ongoing construction works, authorized by the 4th Respondent, which illegally leased and or granted a license over the lane to the 1st Interested Party.

111. The 4th Respondent, the County Government of Mombasa, issued a Reply to the Petition that contained various denials and raised certain defenses, including claims of lawful procedures followed in the issuance of licenses and permits. The Petitioners now submitted the following in response. On the illegality of the 4th Respondent's action, the Learned Counsel submitted that the 4th Respondent's decision to issue a license or lease out the Public Access Lane to the 1st Interested Party and authorized construction thereon was illegal and unconstitutional. The 4th Respondent, being a county government, was bound by Article 10 of *the Constitution* of Kenya, 2010, which required public officers and state organs to adhere to national values and principles of governance, including participation of the people, transparency, and accountability.

112. The Public Access Lane was reserved for public use, and the 4th Respondent had no legal mandate to alienate this land for private development. The Petitioners rely on Article 62 (1)(d) of *the Constitution*, which classified public land as that which is used-or occupied by the public. The leasing or granting a license over this public access land violates this provision. Furthermore, the 4th Respondent has failed to demonstrate that the license and subsequent development approvals adhered to statutory requirements, including public participation, as stipulated under Article 196 (1) (b) of *the Constitution*. This omission rendered their actions procedurally unfair and unlawful.

113. On the violation of the Petitioners' property rights. The Learned Counsel posted that the construction authorized by the 4th Respondent on the Public Access Lane had directly infringed upon the Petitioners' right to quiet enjoyment and possession of their property, which was protected under Article 40 of *the Constitution*. By blocking access to their property and restricting their development plans (a fact which the 4th Respondent had admitted-in-writing), the 4th Respondent had, in effect, dispossessed the Petitioners of a fundamental right to use and access their property.

114. The Respondent's argument that their actions were lawful was untenable in light of the fact that The Public Access Lane was never intended for private development. The Petitioners had demonstrated that this lane had historically served the public, and the 4th Respondent's failure to maintain the lane for its intended purpose has resulted in a violation of both Articles 40 and 47 (right to fair administrative action) of *the Constitution*.

115. On the failure to consult the Petitioners and general public. The Learned Counsel submitted that the 4th Respondent had also failed to conduct adequate public participation as required under *the Constitution* and Section 87 of the *County Governments Act*. The purported issuance of a license for the construction of shops and kiosks on public land, which had historically been used as a footpath, was carried out without any consultation or engagement with the affected parties, including the Petitioners and the residents of the Ziwani Lane area.In this regard, the Petitioners submitted that the 4th Respondent's actions amounted to a violation of Article 232 of *the Constitution*, which enshrines

the principles of public service, including the need for public participation and responsiveness in decision-making.

116. On the environmental and public safety concerns. The Learned Counsel submitted that the 4th Respondent's actions had resulted in a direct violation of the public's right to a clean and healthy environment, as protected under Article 42 of *the Constitution*. By authorizing the construction of shops and kiosks in a space meant for public access, the 4th Respondent has created a hazardous situation where pedestrians, who would ordinarily used the Public Access Lane, were now forced to use the main road, exposing them to potential accidents.

117. Furthermore, the 4th Respondent had failed to provide evidence that the requisite environmental impact assessment were carried out prior to the issuance of the construction permits, as required under the *Environmental Management and Co-ordination Act* (EMCA). This further highlights the reckless disregard for environmental safety and the wellbeing of the public.

118. On the contradictory and unlawful permits. The Learned Counsel submitted that the construction permits issued by the 4th Respondent were irregular, as there were significant discrepancies in the documentation and approvals. For instance, the 1st Respondent (National Land Commission) recommended the revocation of the lease on the Public Access Lane due to the irregularities surrounding its allocation. Despite of this, the 4th Respondent proceeded to issue occupation licenses to the 1st Interested Party, blatantly disregarding these recommendations. Moreover, the continued construction despite unresolved disputes over unpaid land rates (totaling over Kshs. 2,000,000) further demonstrated the irregular nature of the approvals and licenses issued by the 4th Respondent. The failure to address these outstanding issues points to the 4th Respondent's lack of transparency and accountability.

119. Further on the violation of fair administrative action. The Learned Counsel submitted that the 4th Respondent's actions were carried out without due regard to procedural fairness, in contravention of Article 47 of *the Constitution*. The failure to consult the Petitioners, the residents, and the general public, and the arbitrary issuance of licenses and permits without following due process, violated the Petitioners' right to fair administrative action. The 4th Respondent's decision was capricious, lacked transparency, and was done in bad faith, ultimately denying the Petitioners their constitutional rights.

120. In light of the foregoing submissions, the Learned Counsel humbly prayed that the Court found in their favor and grants the orders sought in the Petition. The 4th Respondent's actions were unconstitutional, illegal, and procedurally flawed, warranting intervention by this Honorable Court to protect the Petitioners' property rights, the public interest, and the rule of law. They urged the Court to issue the necessary orders to halt the ongoing construction, revoke the irregular permits, and restore The Public Access Lane to its intended use for the benefit of the Petitioners and the public.

121. In response to the 1st Interested Party's position, the Petitioners the Learned Counsel argued as registered proprietors of the land adjacent to the Public Access Lane, had a vested interest in the use and enjoyment of the lane as per their constitutional rights. The 1st Interested Party may argue that the 1st Interested Party has rights over the Public Access Lane. However, the Petitioners' rights, backed by historical usage and registered interests, supersede any claims of private interest over public land.

122. The Petitioner had shown that the license granted to the 1st Interested Party was done so in contravention of established procedures. The 1st Interested Party may contend that all necessary approvals were obtained; however, the Learned Counsel submitted that the 4th Respondent issued the license without conducting necessary public consultations, thus violating the principles of fair administrative action as outlined in Article 47 of *the Constitution*. The construction permits were

granted despite the 1st Interested Party's outstanding rates, highlighting the irregularities in the decision-making process. The Public Access Lane was designated for public use, as evidenced by its historical usage as a footpath. The existence of a caution registered by the 2nd Petitioner confirmed the acknowledgment of the lane as public land.

123. The 1st Respondent's recommendation to revoke the lease further reinforced that the lane was public land, and the failure to implement this recommendation constitutes a dereliction of duty by the Respondents. The Learned Counsel submitted that the 1st Interested Party's actions, supported by the Respondents, infringed upon fundamental rights as stipulated in *the constitution*. The ongoing construction had resulted in tangible harm to the Petitioners, including: -

a. Restricted Access: The construction blocks access to their property, impacting their ability to develop and manage their land. This restricts not only their rights but-also the rights of the general public, as highlighted in the petition;

b. Public Safety: By forcing pedestrians to use the main road due to blocked access, there is an imminent danger to public safety, further justifying the need for the court's intervention.

124. In response to the 4th Interested Party's position, the Learned Counsel submitted that the affidavit sworn by Mr. Victor O. Obiko, the Senior Land Surveyor at Kenya Urban Roads Authority (KURA), raised several statements that, upon careful analysis, appear to be mere averments without any substantive supporting documentation or independent verification, contrary to the legal requirements for such serious claims. On the lack of substantive evidence, the Learned Counsel argued that the affidavit failed to attach any documentary evidence to substantiate the claims made therein. The deponent makes several assertions without presenting supporting documents such as:

Official survey reports;

Current and historical road designs;

KURA's road reserve maps;

Records from the Ministry of Lands or the County Government of Mombasa;

Any communication or approvals related to the alleged non-existence of access lanes.

125. In contrast, the Petitioners had presented clear evidence supported by professional opinions, including a government surveyor, who confirmed that the suit property formed part of a road reserve. Moreover, even the Office of the Attorney General has aligned with this conclusion. The affidavit presented by the 4th Interested Party fails to rebut this solid evidence.

126. The Learned Counsel submitted that there were notable contradictions and gaps in the affidavit sworn by Mr. Obiko:

> Paragraph 6 states that KURA is undertaking routine maintenance of Tom Mboya Road and that this scope of work does not affect the subject parcel (Mombasa/Block XVII/1399). However, the Petitioners are not questioning routine maintenance but rather the fundamental issue of whether this land is part of a road reserve;

The affidavit does not address the key legal question of the road reserve designation, despite this being the core issue of the Petition. The averment that the land was surveyed and-authenticated back in the year 1994 never ruled out the fact that this could have been improperly designated for private use while it actually forms part of a public road reserve.

127. On the compliance with legal standards. The Learned Counsel submitted that it was a well-established legal principle that mere averments, unsupported by evidence, hold no probative value in legal proceedings. In thecase of:- "Nguruman Limited v Shompole Group Ranch-& another[2014] eKLR", the Court held that any assertions made in affidavits must be supported by/ credible evidence to be considered in the determination of a dispute. The 4th Interested Party's affidavit falls far short of this-standard, being bereft of any concrete, independently verifiable evidence.

128. On the expert opinions and alignment with other authorities, the Legal Counsel argued that as the Court was aware, both a government surveyor and a separate professional expert had already confirmed that the suit property was a road reserve. The Office of the Attorney General had corroborated this position through their witness, further solidifying the Petitioners' case. In contrast, Mr. Obiko's affidavit did not provide any expert counter-evidence to discredit the findings of these independent professionals. This lack of evidence should lead to the conclusion that the Petitioners' case stood unchallenged on this crucial issue.

129. On the Petitioners' consistent position. The Learned Counsel submitted that the Petitioners had consistently maintained that the suit property formed part of a road reserve, which had been confirmed by credible evidence. This position had not been shaken by the 4th Interested Party's response, which lacked the necessary depth and support. Additionally, the Petitioners were not alleging the existence of any new or unauthorized access lanes, as suggested in paragraph 7 of the affidavit. This point was irrelevant and distracted from the central issue, which was the true designation of the land in question.

130. In conclusion, the affidavit sworn by Mr. Victor O. Obiko according to the Learned Counsel, failed to meet the evidentiary standards required to rebut the Petitioners' case. The lack of supporting documentation, the contradictions, and the failure to provide expert counter evidence render the affidavit insufficient to challenge the solid evidence already on record. The Petitioners' evidence, including the professional opinions of both a government surveyor and the Office of the Attorney General, remains uncontested. They therefore urged the Court to disregard the unsupported averments made by the 4th Interested Party and to rule in favor of the Petitioners.

131. In conclusion, the Learned Counsel submitted that when they began they painted a picture of a bustling town, a town where every street, every lane, plays a crucial role in the lives of its residents. The Petitioners brought this matter before this Honorable Court, not just to protect their own rights, but to defend the intricate balance that holds their community together. The Public Access Lanes, much like the lifeblood of this town, serve a vital purpose. They were more than merepathways; they are a symbol of the principles of fairness and responsibility that bind our society together.

132. As they had shown, the Respondents' actions-especially the unlawful licensing and or leasing of the access lane did more than just alter the physical landscape; they disrupted the social fabric and the legal protections that should safeguard both individual and collective rights. These lanes were not only property but a public resource, meant to benefit all, and their obstruction cannot be justified by private interest or arbitrary administrative decisions.

133. This case was not about halting progress, but about ensuring that progress respects the rights of all. It is about ensuring that lawful use of public resources aligns with the principles of justice and the rule of law. The Petitioners ask this court to restore the balance that has been upended by these unlawful actions, to reaffirm the legal and constitutional rights that have been trampled upon. The constitutional rights had been violated, the Respondents' actions were not only in contravention of the law but have also disregarded their public duty. The balance of rights within the community has been disturbed, and it is this Honorable court's role to restore it.

134. According to the Learned Counsel, just as they started this submission by reflecting on the changing landscape of this Ziwani lane we now end by urging this court to ensure that the rule of law prevails and that the rights of all parties-both the Petitioners and the wider public were respected and upheld. By granting the prayers sought, this court will not only correct the wrongs done but also protect the integrity of public spaces for the benefit of the entire community.

135. They humbly submitted that the Petitioners had made a clear and compelling case for the remedies sought and they trusted in the wisdom of this Court to do justice in this matter; justice must prevail, not just for the Petitioners but the community as a whole. The Learned Counsel concluded that it was time to restore balance and ensure that the rights protected by law were upheld for the benefit of all.

A. The Written Submissions by the 4th Respondent

136. The 4th Respondent through the Office of County Attorney of the County Government of Mombasa filed their written submissions dated 4th November, 2024. Mr. Tajbhai Advocate commenced by stating that the Petitioners herein filed a Petition dated 8th December, 2020 and had sought several prayers which the Learned Counsel chose not to replicate in the submissions. On the part of the 4th Respondent, they filed a Replying Affidavit sworn by Mr. Paul Manyala dated 3rd March 2022 in opposing the Petition dated 8th December 2020.

137. The Learned Counsel relied on the following issues for determination:-

i. Whether the Petitioners ought to be granted the prayers sought?

ii. Whether Mombasa/Block VII/1399 was leased by the 4th Respondent to the 1st interested party and whether it is a public access road?

iii. Whether the Petitioners grievances are time barred

138. On whether the Petitioners ought to be granted the prayers sought. The Learned Counsel submitted that it was trite law that he who claims must prove. It was their humble submission that the Petitioners had miserably failed to fulfill this, as he who alleges must prove. Furthermore, the Petitioners had failed to prove the manner in which the Respondents had violated their rights or infringed on the same particularly the 4th Respondent.

139. According to the Learned Counsel they said so because, first and foremost, the Petitioners had alleged that the 4th Respondent leased Mombasa/Block XVII/1399 to the 1st Interested Party which they believed was a public access road. However, they had attached a Green Card in support of their Petition and it was crystal clear that the 1st Interested Party purchased the said property from one Adhan Isaak and it was not allocated and/or purchased by or from the 4th Respondent.

140. Secondly, the Petitioners had averred that the property Mombasa/Block XVII/1399 was a public access road yet they did not tender any document to substantiate this position. In fact, during the site visit it was established that the Petitioners to be precise the 2nd Petitioner had actually encroached into the 1st Interested Party's property.

141. Thirdly, the Petitioners had alleged that they never had access to their property due to the 1st Interested Party blocking access to their property. However, during the site visit it was observed that the Petitioners had access to their property through two (2) different entries. In addition, the Petitioners alleged that the general public had been prohibited and/or their rights infringed by the 1st Interested Party especially for accessing a public access lane and that there was no footpath. The Counsel averred that there had never been a complaint by any member of the public to that effect. During the site visit

there was existence of a footpath which parties even used to measure the road on both ends. Finally, although the Petitioners cited several provisions of *the Constitution* alleging to be infringed, but they failed to indicate to what extent those rights had been infringed if any.

142. To buttress on this point, the Learned Counsel relied on the Court of Appeal decision in the case of:- "Bethwell Allan Omondi Okal v Telkom (K) Limited (Founder) &2 Others [2017] eKLR" the court states as follows:-

> "The Appellant also failed to not only cite the articles of *the Constitution* he felt the Respondents offended, but also failed to show the manner in which the Respondents violated them. It was not enough to mention perceived violations of *the Constitution* in generalities as the Appellant had done in his petition. Even the provisions of Sections 1A and 1B of the *Civil Procedure Act* and Sections 3A and 3B of the *Appellate Jurisdiction Act* cannot be invoked in his aid".

143. The Learned Counsel also relied on the case of "Susan Mumbi v Kefala Grebedhin (Nairobi HCCC No.332 of 1993)" where Justice Juma stated: -

> "The question of the Court presuming adverse evidence does not rise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant did not adduce any evidence is immaterial."

144. The Learned Counsel submitted that the Petitioners had failed to prove the extent to which their rights had been infringed and failed to prove their claim.

145. On whether Mombasa/Block XVII/1399 was leased by the 4th Respondent to the 1st Interested Party and whether it was public access road, the Learned Counsel submitted that the 4th Respondent had not leased the property to the 1st Interested Party, in any event the 1st Interested Party had purchased the property from an individual Adhan Isaak who was unfortunately not a party to this suit. Furthermore, the property Mombasa/Block VII/1399 was leased by the Municipal Council of Mombasa to Adhan Isaak and considering that interest had not been challenged by the Petitioners then there was no point to find out whether indeed that allotment was properly done or not as it was not an issue before this instant Petition.

146. Finally, the Learned Counsel submitted that the Petitioners claimed that they had registered a caveat over the property on the basis that they had an interest over the suit property i.e. a license interest over the 1st Interested Party's property Mombasa/Block VII/1399. However, they had never attached any license to prove such claim to their Petition. If at all, for argument's sake there was a license by the 1st Petitioner, that meant the same issues they were once guilty of were the same ones they were now challenging as against the 4th Respondent and the 1st Interested Party. The Petitioners were aware that the property could be alienated.

147. On whether the Petitioners grievances were time barred. The Learned Counsel argued that it was their humble submission that the Petitioner had not adhered to the time limitations set out by the various statutes from the *Physical and Land Use Planning Act* No. 13 of 2019 to the *Fair Administrative Action Act*. Therefore, their suit was time barred. They referred this Honourable Court to the *Physical and Land Use Planning Act* No. 13 of 2019 where it provided for instances where the Petitioners would had first exhausted the alternative dispute resolution by engaging the County Executive Committee Member Lands, Planning and Housing over their grievances before approaching this Honourable Court.

148. Secondly, the Petitioners ought to have exhausted the time frames stipulated in the *Physical and Land Use Planning Act* No. 13 of 2019 by lodging a complaint within 14 days to this Honourable Court in the absence of the County Physical and Land Use Planning Liaison Committee as captured in Section 78 and 79 of the Act. Thirdly, to the above submissions, the Petitioner has moved this Honourable Court for orders of Certiorari and bearing in mind they had done so through a Constitutional Petition, the law that governed such orders is the *Fair Administrative Action Act*, 2015.

149. The provision of Section 12 of the *Fair Administrative Action Act* 2015 stated as follows:-

> " This Act is in addition to and not in derogation from the general principles of common law and rules of natural justice."

150. The Civil Procedure Rules at Order 53 and the *Law Reform Act*, Cap. 26 at Section 9 (2) prescribes a time frame of six (6) months or a shorter period for one to challenge a decision made by an administrative body after the act or omission has occurred. Order 53 rule 2 of the Civil Procedure Rules was a mandatory provision prohibiting the grant of an order of certiorari unless the application is made not later than six months after the date of the proceedings against which it was to be issued. In the instant case according to the Learned Counsel, the Petitioner had filed this suit on 8th December, 2020 and the approvals were issued on 22nd November, 2019 beyond the six (6) months as envisaged by the law thus the prayer for Certiorari has been brought outside the time as stipulated above. The net effect was that the other prayers sought by the Petitioners as against the 4th Respondent also failed.

151. Regarding the argument of the suit being time barred, the Learned Counsel stated that it was worth noting that the 1st Petitioner was aware of the alienation of the property Mombasa/ Block XVII/1399since the year 1995 and did not take any measures to challenge its alienation until after twenty-five (25) years when it realized its commercial activities would not bear fruit due to the proprietary interest held by the 1st interested party. Thus, this Honourable Court should not aid an indolent part.

152. In conclusion, the 4th Respondent's position was that the suit property Mombasa/Block XVII/1399 was not alienated to the 1st Interested Party by the 4th Respondent and in any event it was not a public access road as alleged by the Petitioners.The Petitioners interest in this suit are those of private party interests and it was a tussle between the Petitioners and the 1st interested party due to commercial activities that the Petitioners seek to undertake and the 1st interested party's proprietary interest in Mombasa/Block XVII/1399 had posed the Petitioners a challenge and they wished to take away those rights. The Petitioner had thus filed this Petition as a wolf in a sheep's clothing.

153. In light of the above submissions, the Learned Counsel concluded that the 4th Respondent prayed that the Petition be dismissed with costs to the 4th Respondent.

A. The Written Submissions by the 1st Interested Party

154. The 1st Interested Party through the Law firm of Messrs. Paul O. Buti Advocates filed their written submissions dated 25th October, 2024. Mr. Buti Advocate commenced by stating that the Petition herein was filed in Court on the 8th December 2020. The 1st Interested Party (Hereinafter referred to as 'Bayusuf') filed a Response to Petition on 14th January 2022. The grounds of opposition to the Petition and a Replying Affidavit, were filed on 17th January 2022. Bayusuf would relied on these documents. A perusal of the Petition showed that it was basically a complaint directed against acquisition of the leasehold property number Mombasa/Block XVII/1399, although this rather veiled complaint does not come out clearly from the pleadings.

155. The Learned Counsel submitted that at Paragraph 19 of the Petition, it averred that:-

> " The Public Access Lane was set apart and or reserved to be used as an Access Lane and as a Foot Pathway."

156. According to the Learned Counsel, this was written in reference to plot Msa/Block XVII/1399, which the Petitioners alleged, without evidence, that it lied on what was otherwise a Public Access Lane. This was the foundational centre of the entire Petition around which all other peripheral issues revolved. The other peripheral issues in his view, which were raised in the Petition and the Learned Counsel submitted they would raise were:-

a. Allegations that plot number Msa/Block XVII/1399 was irregularly leased to Bayusuf. (See Petition paragraph 20).

b. Placement of a caution over the said property in the year 1995. (See paragraph 22).

c. Whether the National Land Commission discovered that The Public Access Lane was unlawfully leased to Bayusuf. (See paragraph 23 and 24).

d. Allegations of failure to implement the 1st Respondents recommendation for revocation of the lease/licence given to Bayusuf. (See Paragraph 45).

e. Efficacy and jurisdiction of this Court to deal with matters that fall under The National Environment & Management coordination Act, and *Access to Information Act* (See Paragraphs 46, 47, 48 & 50)

157. The Learned Counsel submitted that the Petitioner were seeking for the following cluster of prayers, namely:

a. Declarations of four different types.

b. Prohibitive and mandatory injunctions.

c. An order of Certiorari and an order of Mandamus

158. These were the areas that Bayusuf should strenuously strive to address and submit upon. According to the Learned Counsel, in the entire Petition, the Petitioners contended that the 4th Respondent, County Government of Mombasa, unlawfully leased to Bayusuf, property known as Mombasa/Block XVII/1399, which was previously designated as a Public Access Lane. This allegation was also repeated at Paragraph 12 of the Petitioners' affidavit in support of the Petition.

159. For this reason, prayer 3 of the Petition sought for the following relief:

> " A declaration that the alienation of a reserve land by the 4th Respondent (The County Government of Mombasa) to the 1st Interested Party Bayusuf for private use was a violation of the Petitioner's and the Residents of Ziwani Lane right to clean and healthy environment."

160. In short, the Petitioners were faulting the 4th Respondent for having unlawfully alienated a public lane and caused the same to be registered in the name of Bayusuf for private purposes. However, and contrary to the postulations of the Petitioners summarized above, Bayusuf had with utmost clarity set out at Paragraph 20 of his Response to Petition, the manner in which he acquired this property. He articulately states:

20. The Petitioners erroneously designate the property of the 1st Interested Party as public access lane. This is not right. The 1st Interested Party acquired his leasehold interest in Msa/Block XVII/1399 in this manner:

    (a) The subject parcel of land was originally allocated to one Adhan Isaak, from whom the 1st Interested Party purchased the leasehold interest pursuant to a Sale Agreement dated 5th January 1995, for a consideration of Kshs. 2, 400,000.00. This sum was paid in the manner explained in the 1st Interested Party's Replying Affidavit filed in these proceedings.

    (b) It was upon purchase of this parcel from the previous owner that a Transfer was registered in the name of the 1st Interested Party, and all documents relating to this parcel of land in the Lands Registry show the name of the 1st Interested Party as such bona fide Transferee thereof.

    Therefore, the allegations in the Petition that this parcel of land was irregularly and unlawfully leased to the 1st Interested Party in the year 1995 are without the correct factual basis of the transaction on the matter.

161. According to the Learned Counsel, in addition to the foregoing, the same matters had been set out at Paragraphs 5 to 12 of his Replying Affidavit. In addition to that, there was exhibited at page 6 of that Replying Affidavit an Agreement of sale entered into between the initial allotee, Mr. Adan Isaak and Bayusuf, on the sale of this property to Bayusuf. Finally, at page 12 of the Petitioner's Exhibits, there was exhibited a Green Card of this property. Bayusuf had also annexed it at page 5 of his exhibits in the Replying Affidavit. This Green Card showed that Adan Issak was the original Lessee of the subject property, and not Bayusuf who was owner thereof by reason of being a transferee after purchasing the property from Mr. Adan Isaak.

162. In the circumstances, the claim by the Petitioners that the 4th Respondent unlawfully alienated Mombasa/Block XVII/1399 to Bayusuf, must, in the Learned Counsel's Submission, totally fail. The Learned Counsel advanced two reasons for this Submission. First, it was factually incorrect for the Petitioners to allege that the 4th Respondent unlawfully alienated this property to Bayusuf. The facts as analyzed above negated that proposition advanced by the Petitioners. The Second reason was to be found in the purpose and function of pleadings. In the treatise, Bullen & Leakey & Jacob, Precedents of Pleadings Volume 1, 18th Edition, paragraph *4*, page 6: it was observed that:-

    4.The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed.(see page 2 list of authorities).

163. The Court of Appeal had adopted a similar approach in among others, the decision in the case of:- "IEBC & Another v Stephen Mutinda Mule & others [2014] eKLR" where that Court adopted the words of Sir Jack Jacob - 'Present Importance of pleadings,' which the Learned Counsel submitted in verbatim for their effect, as follows:-

    "(a)As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party therefore knows the case he has to meet

and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves.

(b) Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

(c) In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to.(see page 5 list of authorities)

164. After citing this with approval, the Court then concluded as follows:

> "As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.

165. The Response to the Petition and Replying Affidavit of Bayusuf were filed and served on the Petitioners on 14th and 17th January 2022 respectively. All the facts showing that Bayusuf was not an original allotee of property Mombasa/Block XVII/1399 were fully disclosed. These facts clearly showed him as an Innocent Purchaser for value from the original allotee. In addition to this, the Petitioners had themselves exhibited at page 12 of their exhibits, the property Green Card, which showed who the original allottee of the property was. However, despite being in possession of the information and facts as set out above, the Petitioners never sought to correct that anomaly by Amendment. They must live with the painful consequences of their errors. For these reasons, the Learned Counsel submitted as follows:-

a. The Petitioners were fully bound by their pleadings.

b. This Court was equally bound by the pleadings of the Petitioners in the manner they had been drawn and presented before it.

166. Therefore, the contention by the Petitioners that the 4th Respondent unlawfully alienated plot number Msa/Block XVII/1399 to Bayusuf has no factual foundation to support it. This contention, advanced in error, must therefore fail.

167. On the third issue of whether Msa/Block XVII/1399 was a Public Access Lane, the Learned Counsel submitted that this parcel of land was not a Public Access lane. For this reason, at paragraph 21(a) of the Response to Petition, Bayusuf stated that:

(a) There is no public access lane in existence. The Petitioners ought to first establish with facts and evidence from survey records that there is a portion of land called 'a Public Access Lane' in existence before proceeding to designate any land in this manner.

168. It would be noticed according to the Learned Counsel that no survey records, or any other evidence has been tendered by the Petitioner's to demonstrate that Msa/Block XVII/1399 was a Public Access Lane. In the Replying Affidavit of Bayusuf, he had stated at paragraph *22* that:-

> " The 2nd Petitioner, who placed the caution in 1995, has not given this Court the details of the Licence that he was then claiming, which now seems to have motivated him to make further claims from behind the curtains of an existing public pathway which does not exist."

169. Then at paragraph *23* he had graphically explained as follows:-

> 23. In order to visually and effectually demonstrate the matters stated above, I refer to a map of the area, which I exhibit hereto, at page 26, and proceed to explain the actual setup of the respective plots in relation to each other as follows:
>
> a. My plot number XVII/1399 is marked 'A' and is shown abutting Tom Mboya Road at the front.
>
> b. There is a neighboring plot, on the left hand side to my plot as one faces Tom Mboya Road, with its boundary wall which I have "marked B". The entire stretch of this wall is marked in "broom".
>
> c. The Petitioner's plot is behind my plot, I have marked it in blue and has its entrance from the point 'Marked C', through the road that lead is to Taratibu street.
>
> d. It will be observed that the length of my boundary wall along Tom Mboya Road is a continuation from the boundary wall of the neighbors plot from the point 'Marked B' on the map I have provided.
>
> e. The Petitioners are in the process of putting up some commercial structures on their plot, and intend to obtain access to those development through my plot, at the point I have 'Marked D.'
>
> f. A cursory and visual observation of the location of my plot will show that there is no pathway, from the Petitioners property, through mine, which is for use by residents of Ziwani Estate whom the Petitioners claim are the users of this pathway. No such pathway exists or has previously existed.
>
> g. One final observation is that any movement of people from the point "Marked D", along my plot, will end at the neighbor's boundary wall, at the point "Marked B". This effectively rules out the possibility of the existence of a pathway over my plot in the manner in which the Petitioners claim.

170. The explanations given at Paragraph 23 (a) to (g) of Bayusuf's Replying Affidavit are to visually explain the diagram/map of the area which was annexed at page 26 of his exhibits. The layout of plot Msa/Block XVII/1399 did not make that property a lane as the Petitioners erroneously describe it. In addition to the explanations given by Bayusuf at paragraph 23 of his Replying Affidavit, the Learned Counsel drew the attention of the Court to the "site visit" of the property. In terms of visual impact, one fact that could not be gainsaid was Bayusuf's averment at Paragraph 23 (d) of his Replying Affidavit, which was as follows:

> (d) It will be observed that the length of my boundary wall along Tom Mboya Road is a continuation from the boundary wall of the neighbor's plot from the point 'marked B' on the map I have provided.

171. Indeed, when the Court visited the site, it was confirmed that the point 'Marked B' is the boundary wall of JCC Church along Tom Mboya Road. It was this same boundary wall which will be continued to form the boundary wall of plot Msa/Block XVII/1399 along the same Tom Mboya Road.It was further submitted that the "site visit" fully confirmed the veracity of the matters stated by Bayusuf in his Replying Affidavit at paragraph *23*(a) to (g),which have been reproduced above. In concluding this aspect, the Learned Counsel would plagiarize and domesticate on behalf of Bayusuf, the averments in the 4th Respondents Affidavit, County Government of Mombasa, where it:

> " ...invited the Petitioners to specifically either point out or produce before this Court the documents, if any exists, that described or designates plot Mombasa/Block XVII/1399 as a Public Access Lane in the manner pleaded by the Petitioners."

172. Again, as before, it was submitted that the Petitioners had not produced any document to demonstrate to this Court that plot Msa/Block XVII/1399 was a Public Access Lane. Roads within Townships, fall within the jurisdiction of the Kenya Urban Roads Authority, the 4th Interested Party in this Petition. It has filed an affidavit, sworn by Victor Obiko, in which the interested Party had specifically negated/ denied the existence of Public Access Lane where the suit property stands. For their centrality in these proceedings, the Learned Counsel reproduced those paragraphs verbatim, starting with Paragraph 3 thereof as follows:-

> 3. That I conducted a Ground Survey of Mombasa/Block XVII/1399 and the following analysis of data and information was established.
>
> 4. That the above mentioned parcel of land was surveyed on the 14th September,1994 and authenticated by the Director of Surveys on Plan Folio/Register 270/61. The parcel is approximately 0.0887Ha in acreage along Tom Mboya Road.
>
> 5. That the above mentioned Survey was implemented pursuant to the authority of the District Land Officer's letter reference No. 1058/XVII dated 14th September, 1994 and the approved scheme plan by the Municipal Council of Mombasa currently the County Government of Mombasa, since the Tom Mboya road was under their jurisdiction.
>
> 6. That the road is currently under Kenya Urban Roads Authority which is currently undertaking performance based routine maintenance of Tom Mboya Road and this scope of works does not affect the subject parcel of land; Mombasa/Block XVII/1399.
>
> 7. That further, KURA wish to state that there is no current approval for any access lane designed at the Section of the road segment to abutting parcels as being alleged by the Petitioners

173. In the Learned Counsel's submission, these averments fully explained, in plain language, that there was no Public Access Lane where property number Msa/Block XVII/1399 currently stands. The allegations of the Petitioners on this aspect of the matter had therefore been proved to be totally wrong. It was not just any surveyor who should conduct a survey and then tell this Court whether a Public Access Lane existed or not. The body mandated to manage these Roads had authoritatively confirmed that there was no Public Access Lane where property Msa/Block XVII/1399 stood. This was the body that had expressly and affirmatively stated in its Replying Affidavit that:-

> " there is no current approval for any Access Lane designed at the Section of the road segment to abutting parcels as being alleged by the Petitioners."

174. According to the Learned Counsel, these very clear words needed no further elucidation. The Petitioner claimed that the suit property was a Public Access Lane. Bayusuf had denied this allegation at paragraph 19 of his Response to Petition. The 4th Respondent (County Government) had equally denied the allegations of the Petitioners. It further challenges the Petitioners to 'produce any evidence, if any exists,' to prove their allegation.

175. Considering all these factors, it was submitted that the Petitioners had failed to prove their case to the standards required by Section 107 of the *Evidence Act* which provided that:

107:Burden of proof

Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

176. It was incumbent upon the Petitioners to prove that a Public Access Lane existed over where property Msa/Block XVII/1399 stands. This they had not done. No attempt to do so was even ventured into. Although the Respondents and Bayusuf were not under any legal obligation to prove any fact on behalf of the Petitioners, they had however proceeded to show and prove with tangible evidence that no Public Access Lane existed as alleged by the Petitioners. In consequence therefore, the Petitioners had not proved existence of any facts that prove existence of a Public Access Lane. Again, as submitted before, this limb of the Petitioner's claim must fail.

177. Further, the Learned Counsel responded to the other issues raised from the submissions by the Petitioners. At page 4 of their Submissions, the Petitioners referred to an affidavit of one Teddy Mulusa, and submitted that this surveyor had:-

> " unequivocally confirmed that the property in question is designated as a road reserve."

178. This was a departure from what was pleaded in the Petition. The Petitioners contend that the suit property lied on a public access lane, which served both the Petitioner's property and the residents of Ziwani. A road reserve, and a designated public access lane served two totally different and unique purposes. The Petitioners were litigating to preserve what they alleged to be a designated public Access Lane. Since they were, as a matter of law, bound by their pleadings, the evidence they ought to produce was that which would prove existence of a public access lane, and not otherwise. This the Petitioners had failed to do. Instead, they had gone outside the realm of their pleadings, and sought to introduce in the Petition matters concerning a road reserve, which was not part of their case as pleaded.For the reasons set out above, it was submitted that the Petitioners had not kept within the domain of their case as pleaded in the Petition, which must therefore fail.

179. On the alleged recommendation for revocation of the Lease. The Learned Counsel averred that at paragraph 24 of the Petition, repeated at paragraph 13 of its Supporting Affidavit, the Petitioners contend that the 1st Respondent 'discovered' the irregular and unlawful allocation of Msa/Block XVII/1399 to Bayusuf, but they do not state the date of the 'discovery'. They then allege that the 1st Respondent recommended for 'revocation' of the lease to Bayusuf, but this had not been done.

180. Accordingly, the Learned Counsel argued that all these allegations remained unproven to the standard required by Section 107 of the *Evidence Act*, Cap. 80 already reproduced above. On this failure of the Petitioners to prove their allegations the Learned Counsel further submitted that as follows:

181. First, annexture 6 (see page 11) of the Petitioners Supporting Affidavit was an extract from an unexplained and undated document. This was the document that the Petitioners rely upon for the allegations for revocation of the lease. Secondly, this undated document never showed the author/

writer, and who was to implement the alleged recommendations. For these reasons, the probative/ evidentiary value of the document is at best non-existent. This Court could not rely on such a document to make any of the Orders that the Petitioners were seeking.

182. Although Bayusuf was not under any obligation, legal or otherwise, "to fill in the gaps" of the Petitioner's case which never conform to Section 107 cited above, he has however fully explained the Petitioners allegations in his Replying Affidavit at paragraphs *16* to *19*. It would be seen that Bayusuf explained that the document the Petitioners relied on was 'A Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land' ("The Ndungu Report"). This report was prepared before the year 2000. At that time, the National Land Commission was not in existence. The submission by the Petitioners that it was the 1st Respondent (NLC) that made these recommendations was therefore a factual error. This Report was annexed at pages 23 to 25 of Bayusuf's exhibits. Then at paragraphs *17* to *19* for ease of reference, he stated as follows:-

> " 17. That at page 24 there is a property described as follows:
>
> Msa Island/Block19/315, Access Lane, Ziwani Road. It then shows that am the current owner, and gave recommendations for revocation of that Title.
>
> 18. That I do not know whether the Title for plot number Msa/1/Block 19/315 was revoked, because this property has never at any time been registered in my name. In any event, the registration district of this property can be traced to Miritini, which is not on Mombasa Island where my property, Msa/ XVII/1399 is located.
>
> 19. That there is a clear difference between property No Msa Block 19/315 which I do not own, and mine which is Msa/XVII.1399, which has never been the subject of revocation of my Title.

183. According to the Learned Counsel these specific explanations afford an impeccable and pristine answer to the allegations of the Petitioners. In addition to the matters stated above, the Learned Counsel made reference to the provisions of Part V of the *Evidence Act*, which outlawed the substitution of extraneous matters for what is actually written in a document. In this litigation, the property that was earmarked for revocation of the lease thereon is plot number Msa Island/Block19/315, which was described to be Residential property.

184. There was no legal or other rational basis for the Petitioners to request this Court for substitution of that property, (Msa Island/Block 19/315) by removing it from the list of plots whose titles was marked for revocation, and in its place introduce Bayusuf's Title No Msa/Block XVII/1399. If at all the Petitioners wanted to have this substitution, they should have done so, from the relevant Commission of Inquiry, before bringing that document to court. That they did not do. Neither could this Court do it now.

185. On the same issue it was now apparent that the subject document did not originate from the 1st Respondent, National Land Commission, as the Petitioner's wrongly allege. Such mis-steps all go a long way in confirming that the Petitioners were not in a position to prove any of their allegations using existing and admissible factual evidence. Finally on that issue, the Learned Counsel referred to the *National Land Commission Act*, 2012 which had commencement date of 2nd May 2012.

186. The provision of Section 14 (1) of that Act provides as follows:-

Subject to Article 68 (c) of *the Constitution*, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county

government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

187. Invariably, every individual, including the Petitioners herein, had the right to lodge a complaint with the 1st Respondent - NLC raising any issues that they may have had, concerning Bayusuf's plot Msa/Block XVII/1399. This should had been done and concluded within the 5 (five) year period as provided in the Act. However, the Petitioners never did so. In the Learned Counsel's submission, if the Petitioners were of the view that Bayusuf's plot lies on a public Access Lane, they should had raised this as a complaint to the 1st Respondent (NLC) in accordance with the law cited above. Having failed to do so, it was now not open for them to raise this complaint in this Court.

188. The Learned Counsel further posited that the Petitioners contended that 'annexture *6*' of their exhibits was a recommendation by National Land Commission to revoke Bayusuf's Title. However, the NLC never revoked his Title within the 5 (five) year period from 2nd May 2012 as mandated by the Act. In the circumstances, it was submitted that Bayusuf's property was not a Public Access Lane. Had it been public property illegally alienated, then it could have been dealt with under the provision of Section 14 as mandated by law. It was not dealt with in that manner which confirmed that it was not public property or a Public Access Lane as the Petitioners alleged. Again, as before, for these reasons, the Learned Counsel submitted that the Petitioners claim under this limb of their allegations must also fail.

189. On the caution. The Learned Counsel submitted that the Petitioners stated in the Petition and supporting affidavit that the 2nd Petitioner (now deceased) placed a Caution on the suit property in the year 1995. (see paragraphs *22* and *12* respectively). In annexure 7 of their exhibits a search exhibited thereat showed that the 2nd Petitioner was "claiming a Licence Interest."None of the Petitioners had explained the nature of this Licence, and from whom and in what capacity the same was claimed.This Licence was allegedly lodged in December 1995. However, its existence was never brought to the attention of Bayusuf, until the time of service of this Petition on him. It was for this reason that it was specifically pleaded at Paragraph 19 of the Response that:-

> " The 1st Interested Party avers that he has never been served with the Notice by the Registrar in accordance with the provisions of Section 132 (1) of the Registered *Land Act* (now repealed)."

190. For ease of reference, the provision Section 132 (1), while in force, provided as follows:

> " The Registrar shall give notice in writing of a Caution to the proprietor whose land, lease, or charge is affected by it."

191. The Learned Counsel submitted that these mandatory provisions of law was never complied with from December, 1995 to date. This made the first shortcoming of that caution. This caution had other shortfalls. The provision of Section 132 (2) (now Section 71(2) of the *Land Registration Act*, No. 3 of 2012 provides that: -

(2)A caution may either:

(a) forbid the registration of dispositions and the making of entries altogether, or,

(b) forbid the registration of dispositions and the making of entries to the extent therein expressed.

192. The Learned Counsel asserted that it was the duty of the Petitioners to inform this Court and all other parties the nature of the Caution registered on the property. To simply refer to it as a "Licence" without

fulfilling the mandatory requirements of the provisions of the Act reproduced above did not suffice. In the circumstance, the Learned Counsel submitted as follows: -

(a) The alleged Caution has not been exhibited by the Petitioners. What has been disclosed of it is scanty, and falls short of the requirements of the Act.

(b) This alleged Caution was never served on Bayusuf as required by law.

(c) The same has remained in the register for a period of over 25 years now, until the Cautioner became deceased.

193. Therefore, such a document could not be used in any manner to advance the allegations of the Petitioners that Bayusuf's property was a Public Access Lane. Once again as earlier submitted, this limb of the Petitioner's claim ought and should fail:-

1. Environmental Management & Coordination Act (EMCA).

2. *Access to Information Act*.

194. At paragraphs 48 and 50 of the Petition, the Petitioners complained that the 3rd Respondent failed to call for Public Participation of residents of Ziwani Lane in what they describe as:

> "In management and protection of the environment to ensure the 1st Interested Party complies with Environment Impact Assessment legal regulations, and eliminate unlicensed and unregulated construction activities."

195. The Environment Impact Assessment referred to by the Petitioners was a requirement under Section 58 of the EMCA. That Section falls under Part VI of the Act, which specially dealt with "Environmental Impact Assessment." Any person aggrieved by a decision reached, or any omission made in complying with Part VI of the Act had a right to:

a. Either complain to the Complaints Committee established under Section 31 of the Act, or

b. File an Appeal in the National Environment Tribunal established under Section 125 of the Act.

196. Decisions reached by the National Environment Tribunal then find their way into Court as Appeal filed under the provision of Section 130 of the Act. Therefore, this Court had no original jurisdiction to deal with any matters that fall to be determined either under Sections 31 or 125 of EMCA. For these reasons, the Learned Counsel cited to this Court the decision of the Court of Appeal in the case of:- "Kibos Distillers Limited & 4 Others v Benson Ambuti Adega [2020] eKLR", where at page 19 of that decision, it was held as follows: -

> "I find that the Learned Judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes."

197. This decision was appealed against, to the Supreme Court, in the case:- "Benson Ambuti Adega & 3 others - v Kibos Distillers Limited & 4 others". The Supreme Court, in its decision, fully upheld the conclusion reached by the Court of Appeal, and in particular, the above citation. In the circumstances, the Learned Counsel submitted that all the complaints raised by the Petitioners touching on matters to do with construction and NEMA were not justiciable in this Court in its original jurisdiction. They were for dismissal.

198. On the *Access to Information Act*, and alleged breached thereof, raised at paragraph 46 of the Petition. The Petitioners pleaded that *the Constitution* allowed them "the right of Access to Information". That was absolutely true. The same Constitution had made provision for the enactment of an Act of Parliament, which was the *Access to Information Act*, 2016. The modalities to be followed under that Act were as follows:-

(a) An Applicant has to apply under Section 8 to be supplied with the required information.

(b) A response to the application has to be given to the Applicant within 15 (fifteen) days by the Information Officer, as set out in Section 11 of the Act.

(c) Where the Information is not supplied, the Applicant has to apply in writing, under Section 14, to the Commission, for Review of the decision.

(d) Then there is Section 23(3) which provides that:

> " A person who is not satisfied with an Order made by the Commission may appeal to the High Court within 21 days from the date the Order was made."

199. The Learned Counsel argued that appeals were to be made to the High Court and not to the Environment and Land Court. The Learned Counsel relied on the High Court decision in the case of:- "Dock Workers Union of Kenya vKenya Ports Authority & Portside Freight Terminals Ltd (Petition E006 of 2020)" copy attached. Among the orders sought by the Petitioners was production of various documents held by the Respondent, in which objection was taken (see page 5 paragraph *10*) as follows:-

> " The 1st Interested Party in its grounds of opposition avers that Article 35of *the Constitution* of Kenya does not give power for anybody to request whimsically for all manner of information. The 1st Interested Party states that there has been enacted an Act of Parliament, The *Access to Information Act*, No. 31 of 2016. Section 21 thereof provides for a commission empaneled to hear and determine complaints arising from the lack of access to information. The 1st Interested Party further averred that Section 23(2) of the Act gives the commission authority to listen to complaints such as this, brought before Court, and the High Court holds appellate jurisdiction in that regard.

200. In determining that issue, at paragraph *22*, the Court held as follows: -

> " 24. In the case herein there existed an avenue for the Applicant to request for information from the Respondent as provided under Section 14 of the *Access to Information Act*. (see page 18, list of authorities)"

201. It was then concluded that the Court lacked jurisdiction to Order for release of the information sought without the Applicant first following the proper avenues provided for in the Act.The Petitioners herein should also follow the proper procedural avenues to request for any information that they may require. This they could only do by complying with the provisions of The *Access to Information Act*, and

not by coming to this Court. Secondly, even if they were dissatisfied with decisions reached by the Commission established under that Act, any appeal therefrom was to be lodged in the High Court and not the Environment and Land Court.

202. It was now clear that the Environment and Land Court was not the proper forum for the Petitioners to raise their complaints on anything to do with Access to information. This part of claim by the Petitioners, the Learned Counsel submission was that it must also fail. In this part, the Learned Counsel submitted on the jurisdictional issues raised in Bayusuf's "Grounds of Opposing the Petition" dated 17th January 2022 and filed on the same day. The same were as follows: -

a. The decision of the 4th Respondent to lease property Mombasa/Block XVII/1399 to Adhan Isaak, was made and concluded in the year 1995.The 1st Interested Party also purchased that interest in the same year.

b. During the year, 1995, the law then applicable on matters relating to certiorari and Mandamus was provided for in the *Law Reform Act*, which by Section 9 (2) thereof made provision that:

"..application for an Order of Mandamus, prohibition or Certiorari shall in specified proceedings, be made within six months, or such shorter periods as may be prescribed after the act or omission to which the application for leave relates.

This Petition, has been brought exactly twenty five years (a quarter a century later) since the date of the act now complained of.

c. The sum total of the foregoing is that this Court is now not vested with any jurisdiction to grant either the Orders of Certiorari or Mandamus sought by the Petitioners. The jurisdiction that existed for any Court to grant the same lapsed and was wholly extinguished at the lapse of six months from the date when the decision complained of was made and concluded in the year 1995.

d. No Court can extend time or enlarge such time for the doing of any act, unless specifically authorized to do so by either *the Constitution* or Statute. No such provision exists that will enable the Petitioners to seek for prayers numbers 8 and 9 set out in their Petition. Again, and for this further reason, this Court lacks jurisdiction to grant those Orders

203. These grounds which the Learned Counsel had reproduced above verbatim form the foundational anchor of the proposition that this Court had no jurisdiction to grant the prayers sought by the Petitioners at their prayers 8 and 9 of the Petition. The Supreme Court, in the case of "Samuel Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR" definitively held at paragraph 68 of that decision that: -

"

"68. A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law.

It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

204. In this Petition, it is appreciated that the Petitioners, had invoked the provisions of Article 47 of *the Constitution*. That Article directed 'Parliament to enact legislation to give effect to the rights

in Clause(1) of that Article. It is pursuant to this that the *Fair Administrative Action Act*, 2015 was enacted, (Hereinafter referred as "FAAA".)A perusal of Section 12 of the FAAA showed that it provided as follows: -

> " 12. Principles of common law & Rules of Natural justice
>
> This Act is in addition to and not in derogation from the general principles of common law and the Rules of Natural Justice"

205. This effectively incorporated the *Law Reform Act* which provides in its preamble that it was: -

> " An Act of Parliament to effect reforms in the law relating to civil actions and prerogative writs."

206. There was no doubt that Prerogative writs were common law remedies which had been fully incorporated in the FAAA by virtue of the provisions of Section 12 thereof. It was for the foregoing reasons that it is submitted that any claim for the remedy of Certiorari or Mandamus, even when sought under the provisions of Article 47, must still comply with Statutory provisions as set out both in the FAAA and the *Law Reform Act*. By the provisions of Section 9 (2) of the *Law Reform Act* (cited above), the Petitioner's claims should have been brought within 6(six) months from the date of the 'act' complained of, which 'act' was done in the year 1995.

207. The Petitioners could feign ignorance of the commission of the 'act' because it was in this same year that they purported to register a Caution over the suit property.The Petitioners claimed for Prerogative Orders were therefore brought out of time and this Court lacks jurisdiction to grant them. In the case of "Aprim Consultants v Parliamentary Service Commission & Another, Civil Appeal No E039 of 2021", the issue revolved around a judicial review which was filed outside the time stipulated by the Act. That matter was handled in this manner. (see page 34, list of authorities).

(a) At page 10, the Court of Appeal posed this question:

> "Is it open to the High Court, no matter how reasonable its premises, to go ahead and flout the timelines or proceed as if they do not exist?"

208. The Court also referred to a decision of Odunga J in the case of:- "Republic v PPART Ex -Parte Wajir County Government [2016] eKLR" that:-

> " We endorse and approve the reasoning of Odunga J where he first referred to Section 9 (2) of the *Law Reform Act* which provides that an application for an Order of Certiorari shall not be granted unless made not later than 6 months after the date of the decision sough to be quashed, or such shorter period as may be prescribed under any written law."

209. The Learned Counsel submitted that it would be noted that Wajir County Government case was decided on 19th September, 2016, while that in case:- "Aprim Consultants case" was decided on the 8th October 2021. All those cases were decided when the FAAA was already in operation, having come into force in the year 2015.In the circumstances, the two decisions show that notwithstanding the existence of FAAA, enacted under the provision of Article 47 of *the Constitution*, any claims for grant of Prerogative Orders have to be brought as directed by Section 9 (2) and (3) of the *Law Reform Act*.

210. It was for the foregoing reasons that the Learned Counsel submitted that the Petitioners claims for grant of Orders of a Prerogative nature are all time barred. This Court therefore lacks jurisdiction to entertain and adjudicate on any claims of this nature.

211. On the brief consideration of the Petitioner's submissions, the Learned Counsel argued that the Petitioners commenced their submissions with a rather long introduction of classical rhetoricians (Exordium) and brief facts. Then they delved into a consideration of Articles 62, 60, 66 & 249 in that order. Submissions on these Articles of *the Constitution* are at pages 4 to 8 of their submissions. A perusal of the Petition filed by the Petitioners will show that the same is not brought pursuant to the provisions of Articles 60, 62, 66 or 249 of *the Constitution*. Similarly, there were no pleadings in the Petition which relate to any of these four Articles, which had been brought to light, for the first time, in the submissions.

212. It was trite law, that a party in proceedings cannot expand its case outside the scope of its pleadings. It is for this reason, that at paragraph 11(b) of these submissions, the words of Sir Jack Jacob, adopted by the Court of Appeal in the case of "IEBC v Stephen Mule Mutinda (supra)" were cited. They were, for ease of reference, as follows:-

> " Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

213. The Petitioners never pleaded these Articles in their Petition. Therefore none of the Respondents and Bayusuf were afforded an opportunity to reply/respond to any of the new matters now raised by the Petitioners in their submissions. In the circumstances, if the Court were to consider these newly introduced Articles in determining this Petition, then that alone will amount to condemning Bayusuf, without giving him an opportunity to be heard in defence of the new claims which were not pleaded. The Learned Counsel therefore submitted that all allegations raised on Articles 60, Article 62, 66 and Article 249 were not for consideration in the determination of this Petition.

214. The Petitioners had raised issues on Public Participation relating to the licence that the Petitioners made reference to in their submissions. The Counsel held that it should be remembered, at all times, that matters relating to development of property are first to be addressed under the Environmental Management & Coordination Act. (EMCA) These had been the subject of the Learned Counsel's submissions at paragraphs *42* to *47* above, together with the authorities therein cited. The same were herein reiterated, with the consequence that the Petitioners were in the wrong forum, complaining about public participation on matters related to development, which they should have raised before the National Environment Tribunal, or the body established to receive such complaints under the Environmental Management & Coordination Act. The Petitioners had avoided to use the correct avenue as mandated by Statute. Such matters were now raised in the wrong forum, with the consequential result that this Court lacked original jurisdiction to deal with such matters.

215. At page 15 of the Petitioners Submissions, the Learned Counsel relied on the Court of Appeal decision of the case of:- "Mumo Matemu v Trusted Society of Human Rights" was referred to, specifically in these terms:-

> " It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determine class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for any

appropriate direction, order or writ in the High Court under Articles 22 and 258 of *the Constitution*."

216. In the Learned Counsel's view and submission, this correctly, decided case did not support the Petitioners in any manner whatsoever, as he fully demonstrated. First it was the Petitioner's case that this Petition was brought on behalf of residents of Ziwani and Tudor. This was a claim in the supporting affidavit which was not properly explained in the Petition itself. The decision in "Mumo Matemu case" was specific that such claim could only be brought on behalf of others, where: "there is a determinate class of persons." The Petitioners had not given any particulars that could assist the Court to specifically determine this class of persons. Secondly, the case decided that it must be shown that such determinate class of persons was: -

> "by reason of poverty, helplessness, disability or socio-economic disadvantage unable to approach the Court for relief."

217. Again, the Petitioners had not shown that the alleged persons on whose behalf they brought the Petition fall into any of the categories pinpointed above. Consequently, the Learned Counsel submitted that this Petition was in all ways incapable of being determined in favour of any of the alleged members of the general public, without strict compliance to the pronouncement of the Court of Appeal in the "Mumo Matemu Case".

218. If the 1st and 3rd Petitioners could not sustain this Petition on behalf of the Public, on the basis of which reason they were in Court, it followed that they could also not sustain this Petition on their own behalf. In that case, when their Public Interest pursuit failed, there remained nothing for the two to protect in this Petition on their own behalf, or for themselves. The two Petitioners had no property rights to protect in whatever capacity. This was borne out both by the pleadings of the two Petitioners and the law applicable thereon, all of which matters had been specifically raised in Bayusuf's Response to Petition.

219. In conclusion, the Learned Counsel submitted that none of the prayers sought by the Petitioners was in any way available to any of them. Therefore, he prayed that the entire Petition herein be dismissed with costs to Bayusuf.

A. The Written Submissions by the 5th Interested Party

220. The 5th Interested Party through Ms. Carol Korir Advocate, of the National Construction Authority filed their written submissions dated 14th October, 2024. M/s. Korir Advocate re – capped the above cited Petitioner's Petition dated 8th December 2020 and the orders sought. The Learned Counsel submitted that the Petitioners lodged this Petition on their own behalf and for the benefit of the general public and/or residents of Ziwani Lane in Tudor Estate Mombasa who were natural citizens of the Republic of Kenya to protect and uphold the rights and freedoms expressly set out in Chapter 4 and more specifically Articles 23(3), 35, 40, 42, 47, 50, 69, 70, 232, 258, Chapter 6 and 13 of *the Constitution* of Kenya.The Petitioners averred that The Public Access Lane was set apart and/or reserved to be used as an access lane for the general public and has been over the years been used as a foot pathway until recently when the 4th Respondent illegally and irregularly authorized the 1st Interested party to develop and construct shops and/or kiosks on The Public Access Lane.

221. According to the Learned Counsel with the mandate of the 1st Respondent it was established and discovered that the Public Access Lane had been irregularly and unlawfully leased to the 1st Interested party and therefore it made a recommendation that the lease be revoked since the property was public land allocated to be used as an access lane by the general public. Despite the recommendation from the

1st Respondent the 4th Respondent on or about November 2019 purported to issue the 1st Interested party with an occupation license over the lane for a period of five (5) years from 22nd November, 2019.

222. The purported license and approvals were granted even contrary to the terms and requirements needed for such approvals to be issued. On or about 20th November, 2020, the 1st Interested Party purportedly through the licenses and approvals issued commenced construction works on lane. The construction works were being undertaken without lawfully and procedurally obtaining the requisite licenses, approvals, or sanctions from the 3rd, 4th and 5th Interested Parties.

223. The only issue for determination that the Learned Counsel for the 5th Interested Party relied on was whether the 5th Interested Party fulfilled its mandate in line with the laws and regulations. The Learned Counsel submitted that save what was herein expressly admitted, the 5th Interested Party denied each and every allegation of fact as set out in the Petition as if the same was herein set out verbatim and traversed seriatim. The 5th Interested Party was established under the provision of Section 3 (1) of the *National Construction Authority Act* No.41 of 2011 (Hereinafter referred to as "the Act") with a mandate to oversee the construction industry and coordinate its development. Further, pursuant to Section 5 (2) (g) of the Act, in furtherance of its mandate the 5th Interested party promoted and ensured quality assurance in the construction industry.

224. According to the Learned Counsel to supplement the Act, the National Construction Authority Regulations 2014 were gazetted and commenced on 6th June 2014 under Legal Notice No.74 (Hereinafter referred to as Regulations). Regulations 17 of the said Regulations provided for registration of all construction works, contracts, or projects either in the public or private sector with the 5th Interested party in accordance with the Act. The 5th Interested Party admitted the contents of Paragraphs 1 to 10 of the Petition as the same was merely descriptive of the parties herein.

225. In response to Paragraphs numbers 11 to 14 on the legal foundations of the Petition, the 5th Interested Party stated that averments in the Petition never disclosed any violations of the Petitioners rights as alleged as against the 5th Interested Party. In response to Paragraphs *15* to *41*, the Learned Counsel submitted that on the facts relied forming the basis of the Petition, the 5th Interested Party averred that it was a stranger to the allegations therein and that its mandate was limited to compliance and quality assurance of projects under construction, and never extended to county planning approvals and conducting Environmental Impact Assessment on construction sites.

226. In response to Paragraph *46* on Violations of *the Constitution* and Fundamental Rights and Freedoms the Learned Counsel submitted that the Petitioner made general averments that lacked preciseness and particularity of infringement; and never disclosed any violations of the said fundamental rights and freedoms. The allegations according to the Learned Counsel as set out in Paragraphs *49*, *50* and *52* on Violations of *the Constitution* and Fundamental Rights and Freedoms were denied. In further response to the allegations therein, the 5th Interested Party stated that the 1st Interested Party had not registered his project with the National Construction Authority.

227. The Learned Counsel submitted that on 29th January 2021 under Ref. No. PRJREG. IQB 202101291150 the 1st Interested Party tried to register the project. However since the matter was pending in court the 5th Interested Party never approved the project pending the determination of the matter.

228. It was the Learned Counsel's humble submission that the 5th Interested Party fulfilled its mandate. The 5th Interested Party took cognizance that a government and any public body could only do what the law positively allowed before deciding or taking other action. The powers of such government or public body answer will be found in *the Constitution*, Acts of Parliament, or regulations. In the matter of the

"Commission on Administrative Justice vInsurance Regulatory Authority & another[2017] eKLR" held that:-

> " A statutory body is bound to adhere to mandate stipulated in the statute creating it, and its actions must conform to the constitutional prescriptions as clearly provided in our transformative constitution."

229. For the reasons thereof the Learned Counsel invited this Honourable Court to find and hold that:-

> " a. The 5th Interested Party fulfilled its mandate under the *National Construction Authority Act*, No.41 of 2011 and the National Construction Authority Regulations, 2014.
>
> b. Such other orders as this Honourable Court may grant."

IV. Analysis and Determination

230. I have carefully considered all the filed pleadings pertaining to the Constitutional Petition dated 8th December, 2020, the Supporting Affidavits by the Petitioner, the responses thereof; the articulate and comprehensive written submissions by all the parties herein, the myriad of cited authorities, the appropriate provisions of *the Constitution* of Kenya, 2010 and the statures.

231. For the Honorable Court to reach an informed, just, fair and reasonable decision, it has delineated and condensed the Subject matter into the following three (3) salient issues for its determination. These are:-

a. Whether the Constitutional Petition meet the threshold for Constitution Petitions.

b. Whether *the Constitution* Petition has any merit and, if affirmative, if the Petitioners are entitled to the reliefs sought?

c. Who will bear the Cost of the Petition?

Issue No. a). Whether the Constitutional Petition meet the threshold for Constitution Petitions.

232. Under this Sub heading, for the Court to respond to this query, assessing certain aspects of the concept of Constitutional provision are inevitable. To begin with, under the provision of Article 2 (1) & (4) of Constitution of Kenya defines *the Constitution* as being the Supreme law of the Republic and it bids all persons and all States at all levels. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in in contravention of this Constitution is invalid.

233. Additionally, I dare say that a Constitution is a living tissue. Just like all other tissues, it has to be constantly fed and watered. It breathes without oxygen and freshness it will die. I have learnt that these things are not just metaphorical. They are real. As a matter of course, *the Constitution* of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

a. Promotes its purposes, values and principles;

b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c. Permits the development of the law; and

d. Contributes to good governance....."

234. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

235. Based on the principles set out in the edit of the Court of appeal case of the "Mumo MatemuvTrusted Society of Human Rights Alliance & Another [2013] eKLR" provided the standards of proof in the Constitutional Petitions as founded in the case of "Anarita Karimi Njeru v Republic [1980] eKLR 154" where the court is satisfied that the Petitioner's claim were well pleaded and articulated with absolute particularity. It held:-

> " Constitutional violations must be pleaded with a reasonable degree of precision..."
>
> Further, in the "ThorpvHoldsworth [1886] 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:
>
> "The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing."

236. Article 23(3) of *the Constitution* empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.

237. In this Petition, the Petitioner seeks for a declaratory orders area within Mombasa County most especially the 4th Respondent. The Petitioner sought declarations on the violations of the alienation of a reserve land by the 4th Respondent to the 1st Interested Party for private use was a violation of the Petitioners' and the residents of Ziwani Lane right to clean and healthy environment and equal access to public property.

238. The Petitioners were apprehensive that their right to information that can facilitate the Petitioner to seek protection of its fundamental rights. The Respondents failure to give the Petitioners or disclose details of the 1st interested Party application and licensing to carry out construction works through public notices, display or otherwise as required by the provision of Section 59 of the EMCA Act infringes on the Petitioners right under Article 35(1) of *the Constitution*. The Petitioners have alleged lack of public participation by the 3rd Interested Party which to them was an infringement to their rights and freedoms guaranteed by the provision of Articles 42 and 69 of *the Constitution* of Kenya, 2010.

239. The Petitioner contended that the Respondents and Interested Parties, by their acts of omission and commission jointly and severally violated the Petitioners right to administrative action that is fair lawful, efficient, lawful and reasonably fair and to be given reasons for permitting construction works and development on public property that are not licensed or compliance with the EMCA Act contrary to Article 47 of *the Constitution*. The Respondents and Interested Parties had jointly and severally violated the Petitioners right under Article 50 of *the Constitution* to have a dispute on exploitation of public property reserved for public use in accordance or in compliance with the EMCA Act and County Government Act with by laws thereto.

240. Legally speaking, matters on public participation and violations on Fair Administrative Action are not issues that can be dealt with in a conventional suit but can only be dealt with in a Constitutional Petition taking that they are violations to *the Constitution*. Article 60 of *the Constitution* of Kenya provides for land use and states that land in Kenya shall be held, used and managed in an equitable, efficient, productive and sustainable manner. It is therefore the duty of the State to ensure that land use in Kenya is sustainable and therefore any change of user maintains the sustainability element. Besides, under the provision of Article 69 of *the Constitution*, the State is obligated to encourage public participation in the management, protection and conservation of the environment. The principle of public participation which requires involving the people in decision making of certain policy and matters likely to adversely affect them, is at the core of governance and is based on the sovereignty of the people as captured in Article 1 of *the Constitution*. Indeed, the provision of Article 10 (2) (b) of *the Constitution* of Kenya, 2010, recognizes participation of the people as one of the national values and principles of governance.

241. Therefore, those public agencies involved in processes geared towards environmental protection and conservation must involve the people in decision making.

242. Thus, in application of these set out legal principles for filing a Constitutional Petition, the Honorable court is fully satisfied that the Petitioners herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents and the Interested Parties herein and pleading for the prayers sought as clearly set out under the case of "Anarita Karimi Njeru (Supra).".

Issue No. b). Whether the Constitutional Petition has any merit and, if affirmative, if the Petitioners are entitled to the reliefs sought?

243. The Site Visit Report

Before embarking on the analysis of the issues under this sub heading, as indicated, do find herewith a full report of the site visit ("Locus in Quo") conducted in the presence of all parties for ease of reference.

Republic Of Kenya

In The Environment Land Court

At Mombasa

A Report Of The Site Visit ("locus In Quo") Held At Tudor Junction And/or The Round About Of Tom Mboya Road Of The County Of Mombasa On 17Th March, 2023 At 9.50am

I. Introduction

1. The Judge called the site visit team to order at 9.50am. After a short opening prayers, he invited the members present to introduce themselves. Thereafter he informed the team that the site visit was being conducted pursuant to a Court order issued on diverse dates of 17th November, 2022, 27th February, 2023 and 2nd March, 2023 respectively.

2. Essentially, it pertains to the issues raised in Court through the filed Constitution Petition No. 44 of 2020 and two suit properties being all that parcels of land known as "Mombasa / XVII/16 measuring 0.988 acres registered in the names of Awadh Saleh Said; Mohammed Saleh Said & Hussein Saleh Said - the Petitioners herein and "Mombasa/Block/XVII/1399 measuring 0.0887 Hectares registered in the names of Iqbal Ahmed Bayusuf, the 1st Interested Party herein.

3. The Judge briefly explained and provided the purpose and procedure to be followed during the visit as stated herein below in accordance with the provisions of the law under Article 159 (1) & (2) of *the Constitution* of Kenya, 2010, Section 3 (4) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013; Sections 3 & 13 of the Environment & *land Act*, No. 19 of 2011; Sections 101 of the *Land registration Act*, No. 3 of 2012; Section 150 of the *Land Act*, No. 6 of 2012 & Order 18 Rule 11 of the Civil Procedure Rules, 2010.

II. Court:-

1. Hon. Justice L. L. Naikuni – ELC No. 3.
2. The Court Assistant: M/s. Yumna.

III. The Petitioners

1. M/s. Lillian Oluoch, Advocate for the Petitioners.
2. Mr. Swaleh Mohamed.
3. Mr. Swaleh Hussein.
4. Mr. Dennis Malembeka – A Private/Independent Surveyor.
5. James Gitonga – A Private/Independent Surveyor.
6. Lewis Mutuma – A Private/Independent Surveyor.

IV. The Respondents

1. Mr. Mwandeje holding brief for Mr. Mbuthia – 1st Respondent
2. Mr. Mwandeje holding brief for Miss. Waswa – 2nd and 3rd Respondents.
3. Mr. Teddy Mulusa – A Government Surveyor.
4. Mr. Tajbhai Advocate for the 4th Respondent
5. Mr. Paul Manyala – Director Physical Planning County.

V. Interested Parties: -

1. Mr. Paul Buti Advocate for the 1st Interested party.
2. Mr. Fahad Ahmed Akbal Bayusuf a holder of the Power of Attorney for Mr. Ikbal Ahmed Bayusuf the 1st Interested Party.
3. M/s. Sindi Ogola, Advocate for the 5th Interested Party and holding brief for M/s. Carol Korir accompanied by compliance officers.

VI. In attendance.

1. Mr. Jason Maina Mwangi – NCA Compliance Officer
2. Mr. Betty Mutuku – Administrator NCA Msa Office.
3. Mr. Mohamed Mbarasa, a neighbour.
4. Suhayb Timim, a neighbour on behalf of Awadh of Awadh Salim (Petitioner)

VII. Security Operatives.

1. Inspector Maxwel Nderitu – Central Police Station.
2. Sergeant Faliz Mohamed – Central Police Station.
3. Police Constable, Paul Kazungu – Central Police Station.
4. Police Constable, Fredrick Mzungu – Central Police Station.

VIII. The Purpose for the Site Visit

5. As stated above, the purpose of the Site Visit ("Locus in Quo") was explained. The Visit conducted pursuant to the mutual consensus of the parties and a Court directive and/or order issued on diverse dates of made on diverse dates of 17th November, 2022, 27th February, 2023 and 2nd March, 2023 respectively.

6. Additionally, in view of the pending land dispute pending in court whereby on the one hand the Petitioners have averred that that the 1st Interested party whose land is adjacent to their parcel of land had illegally and unlawfully accessed onto a restricted area reserved for public access land/pathway and in so doing undertaken illegal and unlawful construction of some commercial development activities. The Petitioners have stressed that the area was reserved and always been used by the general public and the residents of the area as an access land and foot pathways. As a result, the 1st Petitioner in the year 1995 registered a caution.

7. On the other hand, the 1st interested party has vehemently refuted these allegations holding the land is lawfully registered to him and there are no encumbrances against it all. The development on it has been approved by all the relevant authorities.

8. Therefore, without belabor on the issues before Court and awaiting further adjudication and determination, it is with this background that it became imperative for the Honorable Court to conduct the site visit. The Court is empowered at any stage to inspect the property or thus concerning which a question may arise – in this case the ongoing construction and settlement into the suit land. In the given circumstance, Court invoked the provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit:-

   Power to court to inspect;

   > " The court may at any stage of a suit inspect any property or thing concerning which any question may arise"

9. And order 40 Rule 10 (1) (a) of the Civil Procedure Rules, to wit:-

   > 40 (10) (1) "The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-
   >
   > a. Make an order for ....Inspection of any property which is the subject matter to which any question may arise therein.

10. Rule 3 (4) of *the Constitution* of the Kenya (protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013) provides:-

> " The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases"

11. The provisions of Article 159 (1) & (2) of *the Constitution* of Kenya, 2010 provides for the Judicial authority to undertake such activities of this nature. The provision of Sections 3 & 13 of the Environment & Land Court *Act, No. 19 of 2011*; Section 101 of the *Land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act*, No. 6 of 2012 provides the Court with the Jurisdiction to conduct such exercises which include site visits.

12. Ideally, the site visit – "the Locus in quo" was with a view of fact finding and making observation on the issues on the matter inorder to assist the Court into a fair, reasonable and just decision making functions and/or process.

    Suffice it to say, Court explained to the parties that the purpose was not to move Court room to site. It was not intended to adduce any fresh evidence nor venture onto the exercise of the veracity of the evidence already adduced through examination in chief, cross examination or re – examination whatsoever, filling in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

13. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred. The report has endeavored to make some salient findings, perhaps some recommendations and directions in order to expedite the hearing and final determination of the case.

14. It was explained that the team would commence by fully guided by the maps available – and under the guidance of the Land Surveyor. The team would then move from one plot to the other in sequential manner accompanied by the Security operatives. The said maps are attached hereof for ease of reference. By consensus of the team, it was agreed that Mr. Malembeka becomes the Lead Surveyor for purposes of this site visit exercise.

15. The instruments and/or tools used by the surveyors during site visit. These were:-

    a. A Map – FR/270/61 folio dated 19th December, 1994 prepared by the Director of Survey and submitted by surveyor called F.M. Kimotho and FR/270 and Folio 61.

    b. A tape measure device.

    c. Although the team agreed on each Surveyor preparing an independent report but there also there could be a joint Surveyor report.

    d. The team conducted a physical tour onto the parcels of land outside the suit plot; the suit plot itself and the adjacent plots surrounding the suit plot. In so doing, the team was making its own observations accordingly.

IX. Observations.

16. Collectively, the team was able to make the following observations. These were:-

SUBPARAGRAPH 1.

The outer side of the two Plots.

17. On the outer side there exists the Tom Mboya road. It is an 12 metres wide road. From the round about and hence the starting point of the road it runs close to 200 metres to the adjoining main Nyali bridge road. It is approximately 11 metres from the second beacon that is SS1 of the 1st Interested Party's property. Beacon 16B is a boundary wall, its offset 11 meters to Beacon SS2. Beacon SS1 – SS2 is 80 meters.

18. Visibly from the Tom Mboya road round about, there exists 9 to 10 metres high concrete built truncating points at the end of the four (4) Plots. They emerge at the point where two road meets to roads intersect. Truncation was explained as being curved high wall placed at the end of a long stretch making a donation of space to allow the construction of the road and a round about. See the attached Land Surveying Map Folio No. 170 Registered No. 61 prepared on 14th September, 1994.

19. Right outside Plot No. 16 there were several temporary structures in form of metallic containers and commercial business kioks (vibandas) used for various commercial purposes. For instance, retail shops, vegetables and fruits stalls, charcoal and so forth serving the neighbor hood. As explained by the Surveyor from the County Government of Mombasa, all these were occupying the road reserve and there was proof to that effect in form of the Survey map for the area. The owners looked frightened by our presence. Eventually, these stalls would have to be demolished.

2. On the plot belonging to the Interested party

The team made a tour onto this Plot and made the following observations:-

a. The shape and Size of the suit land:- the Shape of the Plot No. 3799 is rectangular. It measures 0.0887 Hectare approximately 0.219 an acre.

b. There was a 80.65 metres long by 11 meters width raised firm and permanent foundation using cement concrete to details. Between the plot and the Tom Mboya road is 9.0metres. From the Plots across the road on the opposite side is 16.8 metres.

c. There was a pedestrian path in between. The team learnt from the 1st interested Party that they intended to put up commercial 60 stalls on it upon completion. in 3799 Plot. It was still incomplete. Thereafter, they planned on undertaking construction of a store and Cabro works to details to serve as parking bay and connecting the commercial structure with the main road.

d. The front side of the Plot was fenced off using some mixture of slightly used and rusty iron sheets wall with a temporary gate. The team was informed it was for protective purposes during the construction works. Behind the plot there was a thin concrete wall directly touching on the Plot. No XVII/16 which belongs to the Petitioners herein.

There was an electric Transformer and three (3) concrete electric posts on it; two (2) mango fruit trees.

3. Onto the property for the Petitioners

The team made the following observations:-

a. The property is adjacent to the plot belonging to the 1st Interested Party. It is situated on Plot No. XVII/16 and on the FR. No. 16. It is well kept close to one and half (1 1/2 acre of land or thereabout.

b. It surrounded by a high perimeter wall. There is a huge wide metallic gate on the southern part of the Plot. There were four (4) blocks of four to five stories apartments (gated community for the lower middle class) at different position with adequate parking area and several water tanks. On the northern side of the Plot, it borders with the Jesus Celebration Centre (JSS) Church closely associated with Pastor Wilfred Lai. Although there was a small gate connecting these two plots but it was unused. On the Eastern side there was a approximately 30 metres long "L" shaped but incomplete concrete structures with 24 small stalls without any evidence of windows provided though. At the corner of the structure there exists the truncation. The structure directly holds onto the wall of the Plot belonging to the 1st Interested Party.

c. The team was informed that the stalls may be utilized for servant quarters for residents from the main houses occupying the apartment or better still for commercial purposes. The design drawings were provided.

X. Directions

Towards the conclusion of the visit, and as matter of moving forward, the Honorable Court with the consensus of the team made the following direction.

a. That Leave was granted for the 1st Interested Party (Paul Buti) to file the Architectural Plan for the project being undertaken by the 1st Interested party drawn by Disaini Team by N.M.O.

b. That an order was made to have KURA be served and/or to be brought in the suit as Interested Parties. There is great need for them to participate in this matter in order to assist the Court on resolving some sticky issues that emerged during the site visit and the filed pleadings. The Petitioners to serve them accordingly.

c. That the matter shall be mentioned on 20th March, 2023 for compliance of these orders and further direction.

The site visit ended at 11.00 am with a word of prayers.

SITE VISIT REPORT PRESENTED ON THIS ...20TH ...DAY OF...JUNE... 2023.

..

Hon. Justice Ll. Naikuni, Judge,

Environment & Land Court At

Mombasa

Annextures.

1. A sketch Plan of the Area.

2. The Land Survey Map, for Folio 270 & Register No. 61

244. Now turning to the analysis of the issues under this sub heading. Essentially, the Honorable Court has noted that the Petition was established for the purposes of reclaiming back what has been termed as "The Public Access Lane" which from the facts – the maps and the information gathered from the site visit - neighbors the Petitioners property and which was set apart and/or reserved to be used as an access lane for the general public and has been over the years been used as such and as a foot pathway until recently when the 4th Respondent illegally and irregularly authorized the 1st Interested party to develop and construct shops and/or kiosks on Lane.

245. The Petitioners pleaded that the proprietors of the properties fronting Ziwani Lane and the public have over the years used the said lane to access the main Public Road Reserve and as a pedestrian lane/ foot pathway. The aforesaid access to the main Public Road Reserve and pedestrian lane has over the years been free and unrestricted through the said lane. Sometimes, in the year 1995 the 2nd Petitioner discovered that the lane had been irregularly and unlawfully leased to the 1st Interested Party and immediately registered a caution on the said lane claiming a license interest. The said caution had never been withdrawn as was duly registered by the 2nd Respondent.

246. Additionally, the Petitioners have vehemently argued that by the 4th Respondent allowing the 1st Interested Party's impugned activities, it was despite the non-compliant of the Environmental Management and Coordination Act (EMCA Act) and National Construction Authority the Respondents risk breach and violation of the Petitioners right guaranteed under Article 27(2) of *the Constitution* which guarantee equality in enjoyment of rights and fundamental freedoms in so far as they allow 1st interested party to exploit construction works on public property without compliance with the law but at the same restrict other Kenyans from developing public property.

247. Further, the Petitioners, posited that the provision of Article 35(1) of *the Constitution* guarantees the Petitioners a right to information that could facilitate the Petitioner to seek protection of its fundamental rights. The Respondents failure to give the Petitioners or disclose details of the 1st Interested Party application and licensing to carry out construction works through public notices, display or otherwise as required by section 59 of the EMCA Act infringes on the Petitioners right under Article 35(1) of *the Constitution*.

248. Fundamentally, from the filed Petition the issues for determination are mainly four – fold in nature:-

a). Firstly, whether the suit property was a public land/utility in form of a public access road for the residents of the Ziwani area within Tudor of the County of Mombasa and the Petitioners;

b). Secondly, whether there were illegalities or faults committed by those responsible for alienating the suit property;

c). Thirdly, whether the decision by the 4th Respondent in granting the 1st Interested Party Certificate should be quashed by this Court through the issuing the prerogative orders of Certiorari and Mandamus; and

d). Finally, whether the Petitioners were entitled to be granted the reliefs sought including permanent injunctive orders sought.

249. On the issue of whether the land was Public or not. As already rightfully stated out by the Learned Counsel for the Petitioners, Public land is defined by the provision of Section 6 of the *Land Act*, No. 6 and Article 62 of *the Constitution* as all land that was neither private nor community land, including land explicitly designated as public by legislation. This categorization underscored the role of public land as a collective resource for both current and future generations, intended for the benefit of the entire populace. The provision of Article 62 of *the Constitution* of Kenya stipulated that public land is vested in the National Land Commission, which holds this land in trust for the people. Specifically, the Article provides that: (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, administered on their behalf by the National Land Commission, if classified under-(a) clause-(1)(a), (e), (d), or (e); and (b) clause (1)(b), other than land held, used, or occupied by a national State organ. This framework established the Respondents' authority to oversee public land and ensures that it was managed in the public interest. The Respondents were tasked with vital responsibilities under Article 67 of *the Constitution*, including monitoring and overseeing land use planning across the country. This oversight was essential for ensuring that public land served its intended purpose, benefiting all Kenyans. The provision of Article 60 of *the Constitution* emphasized that land in Kenya must be held, used, and managed equitably, efficiently, and sustainably. It further stipulates principles guiding Land use, such as: (a) equitable access to land; (c) sustainable and productive management of land resources; (d) transparent and cost-effective administration of land; (e) sound conservation and protection of ecologically sensitive areas. These principles underscored the duty of the Respondents to act in the best interests of the public. The law provides the procedure to be followed in order to create a public right of way under Section 143 of the *Land Act* No. 6 of 2012 which vests the power to do so on the National Land Commission. Section 143 (1) provides:-

> " 143.(1) Subject to and in accordance with this Section and Section 146, the Commission may, create a right of way which shall be known as public right of way.
>
> (2) A public right of way may be:-
>
> (a) ....
>
> (b) a right of way created for the benefit of the public, referred to in Section 145 of this Act as a communal right of way."

250. Section 145 provides thus:

145. A County Government, an association or any group of persons may make an application to the Commission for a communal right of way.

251. According to the Petitioners, the property was adjacent to all that parcel of land known as Plot No. Mombasa/Block XVII/1399 – the lane. The Petitioners averred that lane was set apart and/or reserved to be used as an access lane for the general public and has been over the years been used as such and as a foot pathway until recently when the 4th Respondent illegally and irregularly authorized the 1st Interested party to develop and construct shops and/or kiosks on Lane.

252. The proprietors of the properties fronting Ziwani Lane and the public have over the years used the said lane to access the main Public Road Reserve and as a pedestrian lane/foot pathway. The aforesaid access to the main Public Road Reserve and pedestrian lane has over the years been free and unrestricted through the said lane. It was sometimes in the year 1995 that the 2nd Petitioner discovered that lane had been irregularly and unlawfully leased to the 1st interested party and immediately registered a caution

on it claiming a license interest. The said caution has never been withdrawn as was duly registered by the 2nd Respondent.

253. Within the mandate of the 1st Respondent when it discovered that lane had been irregularly and unlawfully leased to the 1st Interested Party it made a recommendation that the lease be revoked since the property was public land allocated to be used as an access lane by the general public. Exhibited in the affidavit and marked as exhibit "SHS - 8" was a true copy the 1st Respondent's recommendation. However, its factual that todate this recommendation has never been executed whatsoever. Besides, there was no empirical evidence demonstrated before the Court that the suit owned by the 1st Interested Party was public land as per the clear definitions stated out here. For these reason, it would be erroneous on the Court's part to assume that the said lane was under the category of public land.

254. On whether there were any irregularities caused by the 4th Respondents in issuing the Leases to the 1st Respondent. It is not in doubt that legal ownership of the aforementioned parcels of land are not disputed. The 1st Interested Party has elaboratively explained how he acquired the suit property as bona fide innocent purchaser for value on notice. Paradoxically, this aspect was never challenged at all by the Petitioners.

255. Let us get into the ownership of the suit property a.k.a the access lane; the subject parcel of land was originally allocated to one Adhan Isaak, from whom the 1st Interested Party purchased the leasehold interest pursuant to a Sale Agreement dated 5th January 1995, for a consideration of a sum of Kenya Shillings Two Million Four Hundred Thousand (Kshs. 2, 400,000.00). This sum was paid in the manner explained in the 1st Interested Party's Replying Affidavit filed in these proceedings. It was upon purchase of this parcel from the previous owner that a Transfer was registered in the name of the 1st Interested Party, and all documents relating to this parcel of land in the Lands Registry show the name of the 1st Interested Party as such bona fide Transferee thereof. According to the 1st Interested Party, there was no public access lane in existence in these proceedings. The Petitioners ought to first establish, with facts and evidence from survey Records, that there was a portion of land called "a Public Access Lane" in existence before proceeding to designate any land in this manner. The National Land Commission has no mandate, authority or other powers, to cancel, or revoke legally issued Titles of land. This much, these Courts had previously so expressed themselves, and the Petitioners were not exempted from such decisions. There had never been made any recommendation by any commission or other investigative body by law established, that the 1st Interested Party's plot No Mombasa/Block XVII/1399 was irregularly or unlawfully obtained, or that such lease issued over that parcel of land be revoked. If there was no access road procedurally to begin with can the Petitioners really contend that the said suit property was not disposed to the 1st Interested Party lawfully.

256. Nonetheless, forward moving, the provision of Section 9 of the *Public Roads and Roads of Access Act*, Chapter 399 Laws of Kenya provides for two ways in which an access road may be created. It thus provides;

> (1) Where any owner or occupier of land is in respect of his land so situated in relation to a public road which is passable to vehicular traffic, or to a railway station or halt, that he has not reasonable access to the same, he may make application to the board of the district in which such land is situate for leave to construct a road or roads (hereinafter called a road of access) over any lands lying between his land and such public road or railway station or halt, and every such application shall be made in duplicate in the form and contain the particulars required by the First Schedule to this Act: Provided that, if the applicant is unable to make the sketch plan mentioned in the said Schedule without entering upon the lands over which he proposes that the road of access is to pass, he may apply to the board for leave to enter upon the said lands for

the purpose of making the said sketch plan and the board may then make an order entitling the applicant to enter on the said lands.

(2) Any owner or occupier of lands who has constructed a road in circumstances which did not require the making of an application under subsection (1) of this section may make application to the board of the district in which the road is situated for a declaration that the road is a road of access, and for the registration of the road of access as though an order had been made under section 11 of this Act.

(3) Every such application shall be accompanied by such fees as the Minister may prescribe, and the board shall not be obliged to proceed upon any such application except upon payment of such fees.

257. There is no doubt from the above provisions of law, that there are two ways in which an access road may be created. One where there is public land and or road the Act requires the party to make an Application. But from the reading of the provision of Section 9(2) where the land is not public land, then the party may make an Application. In the Court's considered view, the use of the word may does not connote a mandatory nature.

258. The question that then comes to the court's mind is was there an application made for the creation of the access road, a deed plan and map to show that the same was marked as an access road (G.L.). Be that as it may any allocation of the said land by any body in this Court's considered view required that Section 14(d) of the Physical Planning Act was followed to the latter and that a party causing the said sub division is required to mark the roads and lanes in blue which signifies surrender. It provides;

> " the proposed scheme of subdivision, the boundaries in red and the approximate dimensions of sub-plots and the proposed means of access, road or lane system (if any) with the widths of such streets, roads or lanes clearly indicated appropriately in blue on each plan. Other colours to be used in the subdivision plan shall be blue for surrender and yellow for demolition;"

259. The Public Road and Roads of Access Act recognized two categories of roads. The first category is that of public roads. A public road is defined under Section 2 of the *Public Roads and Roads of Access Act* as:-

a) any road which the public had a right to use immediately before the commencement of this Act;

b) all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East Africa Land Regulations, 1897, the Crown Lands Act , 1902, or the Government Lands Act (Cap. 280), at any time before the commencement of this Act;

c) all roads and thoroughfares hereafter reserved for public use;.

260. The second category of roads envisaged under the *Public Roads and Roads of Access Act* is the road of access. Although the Act does not expressly define what a road of access is, Section 9 stipulates an elaborate procedure through which a road of access is created. It is created in a scenario where a parcel of land does not have reasonable access to a public road which is passable to vehicular traffic or to a railway station or halt. The owner or occupier of the land is required to make an application to the Roads Board for leave to construct a road of access over any lands lying between his land and the public road, railway station or halt. After due process, the application is determined. If found to have merit, leave for creation of a road of access is granted under Section 11 of the Act and a notification is sent to the Land Registrar for registration of an entry against the affected title or titles.

261. From the materials presented in this Petition, the access land was not created as a result of resurvey, sub-division and parcellation of the neighboring parcels of land and was therefore not and is not a road of access or access land as contemplated under Section 9 of the Act. I say so because its creation did not take the elaborate statutory procedure for creation of a road of access.Were that to happen, the land registrar would have to satisfy himself that every new parcel contemplated in the new layout is served by a public road before accepting the layout. This did not happen. What therefore exists was just a parcel of land that could have been subdivided and reassigned to another land user. I do take note though the Petitioners contend that the same is an access to their properties and that the at to the 4th Respondents have violated the Petitioners' right to property as envisaged under Article 40 of *the Constitution*. Failing to ensure implementation of the 1st Respondent's recommendation of revocation of the lease and license issued to the 1st Interested Party by the 4th Respondent the Respondents have violated the Petitioners' right to equal access and use of public property. Besides, from the affidavit sworn by the 4th Interested Party being the statutory body mandated to deal on Urban - Rural roads in the Country that the suit property by the 1st Interested Party was not on road reserve is already conclusive and full proof prima facie evidence to the effect that the there was no violation of the Petitioner's rights at all. Thus, I discern that by issuing the 1st Interested Party with the approvals and the Certificate of Lease to the suit property as per the provision of Article 40 of *the Constitution* of Kenya, 2010 to undertake the construction, the 4th Respondent acted within its legal mandate.

262. On whether there was any violation of the rights for the Petitioners on public participation and the EIA as stipulated under EMCA. By allowing the 1st Interested Party's impugned activities that were non-compliant Environmental Management and Co - ordination Act (EMCA Act) and National Construction Authority the Respondents risk breach and violation of the Petitioners right guaranteed under Article 27(2) of *the Constitution* which guarantee equality in enjoyment of rights and fundamental freedoms in so far as they allow 1st Interested Party to exploit construction works on public property without compliance with the law but at the same restrict other Kenyans from developing public property. On this aspect, I wish to fully concur with the arguments advanced by the Learned Counsel for the 1st Interested party based on the "Doctrine of Exhaustion" as dictated under the provision of Section 58 of EMCA (See "Benson Ambuti Adega & 3 others - vKibos Distillers Limited & 4 others (Supra). This Court clearly is denied the mandate to deal on these matters taking that the correct forum ought to have been the National Environment Tribunal under Section 125 of EMCA establishes the National Environment Tribunal including its composition which is meant to deal with the issues of granting of licences or permits or refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations. The tribunal can also issue its recommendation of public participation but be that as it may, the 1st Interested Party only raised this issue as a Defence and not through the proper application. This Honourable Court would only come in to deal as an appellate court under the provision of Section 130 of EMCA. I also do agree with the 1st Interested Party that this Court was not the correct forum for the Petitioners to raise the complaint.

263. Be that as it may, the provision of Article 35(1) of *the Constitution* guarantees the Petitioners a right to information that can facilitate the Petitioner to seek protection of its fundamental rights. The Respondents failure to give the Petitioners or disclose details of the 1st interested Party application and licensing to carry out construction works through public notices, display or otherwise as required by section 59 of the EMCA Act infringes on the Petitioners right under Article 35(1) of *the Constitution*.

264. This leads the Court to the next issue was the public included on the construction of the property by the 1st Interested Party?The three-judge bench in the case of "Mui Coal Basin Local Community & 15 others vPermanent Secretary Ministry of Energy & 17 others [2015] eKLR", stated that public

participation in the area of environmental governance, at a minimum, entails the following elements or principles:

> "From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:
>
> a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
>
> b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation...
>
> c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012)...In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.
>
> d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance...A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
>
> e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme...

f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand."

265. In considering the case above, the court in "Okiya Omtata Okoiti v Commissioner General, Commissioner General, Kenya Revenue Authority & 2 Others [2018] eKLR" observed that there are at least two aspects of the duty to facilitate public involvement.The first is the duty to provide meaningful opportunities for public participation in the process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations prescribes the nature of public participation that ought to be undertaken while conducting an environmental impact assessment study. It provides as follows:

"(1) (1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.

(2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall-

(a) publicize the project and its anticipated effects and benefits by-

(i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;

(ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and

(iii) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;

b. hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;

c. ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and

d. ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.

266. In all fairness, I have noted that the 4th Respondent has not adduced copies of the minutes for any public participation meeting held; nor public notices sent to the Petitioners and the residents of Ziwani Lane in a language that all the residents of Ziwani Lane understood. This is a clear that the public was not consulted in the said licence issued to the 1st Interested Party.

267. The provision of Article 10 (2) a of *the Constitution* outlines participation of the public as one of the national values and principles of governance which bind all state organs and public officers. Article 69(1) (d) of *the Constitution* provides that the State shall encourage public participation in the management, protection and conservation of the environment.

268. Principle 10 of the Rio Declaration on Environment and Development [1992] also states as follows:

> " Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making process..."

269. This court accepts the principles set out in the "Mui Coal Basin case (supra)" as the applicable principles in examining the threshold of public participation that should be met in undertaking environmental projects. As already indicated above, I reiterate that the Second Schedule of EMCA as amended vide Legal Notice No. 31 of 30th April 2019 lists activities for which an environmental impact assessment study is required unless exempted by the National Environment Management Authority (NEMA). provides as follows: Section 58(1) and (2) of Environmental Management and Coordination Act (EMCA):

> (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
>
> (2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority; Provided that the Authority may direct that the proponent foregoes the submission of the environmental impact assessment study report in certain cases.

270. The extend of public participation varies depending with the nature of the project and further depending on whether the Environmental Impact Assessment report is processed as a project report or as a study report.

271. I take note that the 4th Respondent in their replying affidavit deponed that the Petitioners had embarked on developments on plot number Mombasa/Block XVII/16 without first applying for and obtaining the necessary approvals from the relevant Departments of the 4th Respondent. In consequences of (a) above, on the 27th May 2021, the 4th Respondent issued an Enforcement Notice on the 2nd Petitioner Awadh Mohammed Saleh, being the only serving registered owner of Msa/Block XV/II/16 notifying him of the "completing a development without the Approval of the County and developing kiosks (commercial use) in a residential area without a change of user on Plot No. 16/XVII/

M.I" (Exhibited in the affidavit and produced as exhibit a copy of the Enforcement Notice and marked as "PM – 1").

272. The 4th Respondent in the same enforcement notice required the 2nd Petitioner to immediately stop/ halt and desist from carrying out any operations to the development as defined in the *Physical and Land Use Planning Act* No. 13 of 2019, in or on the said land until he obtains permission from the 4th Respondent. Nearly one year later, since that Notice was issued, the 2nd Petitioner had not taken any steps towards remedying the error and in fact has continued with the illegal development. This is an indication that as per the Physical and Land Use Plan of the 4th Respondent, the Petitioners' structure were no existent and there was no access lane that the 4th Respondent had planned for. This information was well corroborated from the site visit conducted by court.

273. The Petitioners have also contended the violation of administrative action by the Respondents and Interested Parties. Article 47(1) of *the Constitution* is in mandatory terms that

> "every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

274. *The Constitution* binds all persons and all state organs in the course of performing their duties. The provisions in Article 47 to the extent that they require that an administrative action to be expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person's right or fundamental freedom, the affected person is entitled to be given written reasons for the action, is a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them. Failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of the provision of Article 19 (1) of *the Constitution* which states that the Bill of Rights is an integral part of Kenya's democratic state as the framework for social, economic and cultural policies. (See "Kenya Human Rights Commission & another v Non-Governmental Organizations Co - ordination Board & another [2018] eKLR").

275. In the case of:- "Dry Associates Limited v Capital Markets Authority and Another, [2012] eKLR" the Court observed: -

> "Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the *Law Reform Act* (Cap. 26 of the Laws of Kenya) but is to be measured against the standards established by *the Constitution*."
>
> (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
>
> (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
>
> (a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice; Administrative action to be taken expeditiously, efficiently, lawfully etc.

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.

276. The importance of this right to fair administrative action as a constitutional right in Article 47 of our progressive *Constitution of Kenya, 2010* cannot be over emphasized. Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in the provision of Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

277. All said and done, and for the sake of sustaining a balancing act on the substantive interest by all parties, the Petitioners have failed to demonstrate with specifications to the court that the Respondents' actions in any way failed the test of a fair administrative action and violated their rights to a fair administrative action under Articles 47 of *the Constitution*. The Court would have expected, for

instance, the Petitioners placing empirical evidence to the effect that from the construction by the 1st Interested Party, they would have no access at all to their adjacent property. Without prejudice, from the Site Visit conducted, it was clear that there Petitioner had a wide access to their property and that the whole plot was surrounded by a Perimeter wall in form of well partitioned stalls. The Land Surveyors clearly explained on the round about of Tom Mboya road there were four (4) Truncations built on all sides of the road. In simple terms, "the Truncations" were explained to mean high walls placed in an angular manner to indicate where constructions would be undertaken from. In this case the plot for the 1st Interested party was inside one of such boundary. Additionally, Court never saw any evidence in form of an affidavit sworn and filed by the Community members from the Ziwani area within Tudor of the County of Mombasa that by allowing the 1st Interested Party to undertake the construction they would be subjected to prejudice and hence exposed to danger such as wanton traffic accidents from the main road. Furthermore, for whatever its worth, the evidence relied on from the Report by the Presidential Commission on the Irregular and Illegal Acquisition of Public land ("The Ndungu Report) made reference to a parcel known as Plot No. 19/315 Ziwani Access Road. On keen assessment of this land, it was found to be unrelated to the suit land and physically found to be at Miritini area. If at all it was an inadvertent error, this was never corrected through amendment of the filed pleadings. The Petitioner has to be bound by their own filed pleadings.

278. Finally after all this, are the prayers sought by the Petitioners merited? The 1st Interested Party raised grounds of oppositions to prayers 8 and 9 stating that the same were time barred. Judicial review jurisdiction is a special Jurisdiction which is neither Civil nor Criminal and it is governed by Sections 8 and 9 of the *Law Reform Act*, Cap. 26 which is the substantive law while the provision of Order 53 of the Civil Procedure Rules, 2010 set out the procedural law. By those provisions the court is mandated to issue the prerogative writs in form of Mandamus, Certiorari or Prohibition in appropriate judicial review proceedings. The same orders may be obtained through the provision of Articles 23 (3) (1) of our progressive *Constitution of Kenya, 2010*.

279. However, applications for prerogative orders have a limitation period. The *Law Reform Act* Cap. 26 Laws of Kenya, provides as follows at Section 9 (3):-

> " In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law: and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

280. The above provision couched in mandatory terms by use of term "Shall" is echoed in the Civil Procedure Rules, 2010, which in Order 53 Rule 2 provides as follows: -

> " Order 53 Rule 2 – Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act: and where the proceedings is subject to appeal and the time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

281. It is discernible from the above, that one needs to file an application seeking leave to apply for orders of certiorari, within a period of 6 months of the decision. Prayers 8 and 9 are as follows:-

h. An order of Judicial Review in the nature of Certiorari to bring into this Court and quash the decision of the 4th Respondent to lease, alienate, or grant a license over all that parcel of land known as Mombasa/Block XVII/1399 to the 1st Interested Party.

i. An order of Judicial Review in the nature of mandamus to compel the 2nd Respondent and/or its successors in title to cancel and or revoke the license and lease registered on all that parcel of land known as Mombasa/Block XVII/1399.

282. The suit property was leased in the year 1995 when the 2nd Petitioner discovered that "The Public Access Lane" had been unlawfully leased to the 1st Interested Party by the 4th Respondent. The said Petition was instituted in year 2020 which was 25 years after the decision by the 4th Respondent to lease the said land in which the 4th Respondent by then was not operating in its current capacity as it was the Municipal Council of Mombasa. The Court of Appeal case in "Wilson Osolo v John Ojiambo Ochola & another [1996] eKLR" expressed itself thus:-

> " It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from Section 9(3) of the *law Reform Act*. Whilst the time limited for doing something under the civil procedure rules can be extended by an application under order 49 of the civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case the *Law Reform Act*." There is no provision for extension of time to apply for such leave in the *Limitation of Actions Act* (Cap. 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here."

283. I am also guided by the case of "Republic v Chairman Amagoro Land Dispute Tribunal & another Ex - Parte Paul Mafwabi Wanyama [2014] eKLR" wherein D. Maraga JA (as he then was) held that:-

> " The judicial review proceedings before the learned judge, which have given rise to this appeal were therefore special in nature and the learned judge erred in importing provisions of the *civil Procedure Act* and rules to proceedings governed by the said provisions of the *Law Reform Act* and Order 53 Civil Procedure Rules. We agree with learned counsel for the appellant that the learned judge erred in extending time which he had no jurisdiction to do."

284. I am aware that by dint of the provisions of Order 50 Rules 5 & 6 of the Civil Procedure Rules, 2010, the court has power to enlarge time, where there is limited time provided for doing any act or taking any proceedings under the rules. Following this provision, it may be arguable that time may be enlarged to make an application for Judicial Review outside the 6 months limitation period. However, the challenge here, is that the limitation period is not just in the rules, but is also a statutory provision set out in Section 9 (3) of the *Law Reform Act* (above), and it is trite law that rules made under statute, cannot override a statutory provision. The *Law Reform Act*, itself has no provision for extension of time. I have seen no law, which can entitle me to enlarge time for the filing of an application for certiorari outside the 6 month limitation period. I have been unable to see what law one can base an application to extend time for the commencement of judicial review orders.

285. I do not even think that the often quoted cure for all. The provision of Article 159 (2) (d) of *the Constitution*, which requires courts to administer Justice without undue regard to procedural technicalities, can be of assistance, since I don't think that provisions of limitation of time, can fall

within the domain of technical rules of procedure. In my view, they are part of substantive and not procedural law, and cannot fall within the ambit of Article 159(2)(d) of *the Constitution*.

286. In that regard prayers 8 and 9 of the Petition fail not only because they were statute bound in terms of time but also by virtue of the fact that in as much as that this was a Constitutional Petition it is quite different from a Judicial Review Application.

287. With regard to Prayers 1, 2, 3, 4, 5, 6 and 7 on the foot of the Petition, without belabouring the point, it is clear from the elaborate and detailed examination of the facts and the exhibits produced that the parties that the Petitioners have failed to prove their case as per their Petition. It is trite law that he who alleges must prove. The provision of Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

288. In the case of:- "Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334", the Court of Appeal held that: -

> As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

289. It is not in dispute that the Petitioners have not proved their case to the balance of probabilities required in a civil case apart from the issue on public participation which the 4th Respondent counter reacted and indicated that the Petitioners had never sought any licence or approvals to commence any development on their suit properties and had been issued with Enforcement Notices which they had done nothing about. Therefore, in view of these sentiments prayers 1, 2, 3, 4, 5, 6 and 7 of the Petition fail. The costs shall be discussed below. I discern, in a nutshell that, this far the Petition dated 8th December, 2020 fails.

Issue No. c). Who will bear the Costs of the Petition dated 8th December, 2020

290. It is now well established that the issue of Costs is the discretion of Courts. According to the Black Law Dictionary, "Cost" is defined to mean:- "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other". The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides :-

> "(1) The award of costs is at the discretion of the Court.
>
> (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms."

291. Additionally, in the cases of "Reids Heweet & Company v Joseph AIR 1918 cal. 717" and "Myres v Defries [1880] 5 Ex. D. 180", the House of the Lords noted:-

> " The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

292. Further, these legal principles were upheld in the Supreme Court case of "Jasbir Rai Singh v Tarchalans Singh, [2014] eKLR" and the Court of Appeal case of "Cecilia Karuru Ngayu v Barclays Bank of Kenya & Ano. [2016] eKLR" the Courts held:-

> " .the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case".

293. Therefore, the events in the instant case is that the Petitioners herein have not succeeded in establishing their case on Preponderance of Probabilities nor the balance of convenience. For that very fundamental reason, therefore, the costs of this Petition will be made out to the 4th Respondent and the 1st and 5th Interested Party as the parties who actively participated in this Constitution Petition.

IV. Conclusion and Disposition

294. Consequently, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioners herein have not succeeded in all the prayers sought from its filed Petition. For avoidance of doubt, I proceed to disallow the Petition dated 8th December, 2020 specifically under the following terms:-

a. That Judgement be and is hereby entered in favour of the 4th Respondent, 1st and 5th Interested Party and dismiss the Petition dated 8th December, 2020 entirely with costs.

b. That the Petitioners herein have failed to prove their claim as per the Petition dated 8th December, 2020 and the same is hereby dismissed with costs to the 4th Respondent, 1st and 5th Interested Party.

c. That all status quo and interim orders issued herein pending the hearing and determination of this Petition are hereby vacated.

d. That the costs of this Petition dated 8th December, 2020 will be made out to the 4th Respondent, 1st and the 5th Interested Party to be paid by the Petitioners.

It is so Ordered Acordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT MOMBASA THROUGH MISCROFT TEAMS VIRTUALLY THIS 25TH DAY OF APRIL 2025.

.....

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT

AT MOMBASA

Judgement delivered in the presence of:-

a. M/s. Firdaus Mbula – the Court Assistant.

b. M/s. Lillian Oluoch – Wambi Advocate for the 1st, 2nd & 3rd Petitioners.

c. M/s. Waswa Advocate for the 3rd Respondent & 4th Interested Party.

d. Mr. Tajbhai Advocate for the 4th Respondent.

e. Mr. Paul Buti Advocate for the Interested Parties.

f. No appearance for the 1st & 2nd Respondents; The 2nd & 3rd Interested Parties.