



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 62 OF 2018

MUKURU KWA NJENGA SLUM RESIDENT.....1ST PETITIONER
HON. IRSHADALI MOHAMED SUMRA.....2ND PETITIONER
NJENGA MWENDA KARIUKI.....3RD PETITIONER
JOHN KIMUNYI KARIULI.....4TH PETITIONER
MUIRURI KARANJA.....5TH PETITIONER
ABDI ISAK.....6TH PETITIONER
JOSEPHINE ANYANGO OJOW.....7TH PETITIONER
JACINTA WAKINA NJUE.....8TH PETITIONER
KASSIM IBRAHIM.....9TH PETITIONER
PETER MWAURA MAWANIKI.....10TH PETITIONER
GULA FADHILI YUSUF.....11TH PETITIONER
ADAN GALGALO.....12TH PETITIONER
MARTIN KARANJA MUIRURI & OTHERS.....13TH PETITIONER

VERSUS

NAIROBI COUNTY GOVERNMENT.....1ST RESPONDENT
COMMISSIONER NAIROBI
CITY COUNTY.....2ND RESPONDENT
DEPUTY COUNTY COMMISSIONER EMBAKASI.....3RD RESPONDENT
ORBIT CHEMICALS LIMITED.....4TH RESPONDENT
CABINET SECRETARY MINISTRY OF LANDS.....5TH RESPONDENT
PRINCIPAL SECRETARY MINISTRY OF LANDS.....6TH RESPONDENT
CHIEF OFFICER LANDS (NAIROBI (NCCG)).....7TH RESPONDENT

THE CHIEF LAND REGISTRAR.....	8 TH RESPONDENT
NATIONAL LAND COMMISSION.....	9 TH RESPONDENT
KENYA URBAN ROADS AUTHORITY- (KURA).....	10 TH RESPONDENT
THE DISTRICT OFFICER (EMBAKASI SOUTH DIVISION).....	11 TH RESPONDENT
CABINET SECRETARY INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.....	12 TH RESPONDENT
THE AREA CHIEF (EMBAKASI – MUKURU KWA NJENGA LOCATION.....	13 TH RESPONDENT
THE ATTORNEY GENERAL.....	14 TH RESPONDENT

JUDGMENT

INTRODUCTION

1. Vide Petition dated the 11th October 2018, the Petitioners herein have approached the Honourable court and same have sought for the following Reliefs:

I. Temporary injunction restraining the Respondents either by themselves, their servants, agents, or howsoever from implementing undated and unsigned circular for Special Plan for Mukuru Kwa Njenga Slum residents without public participation, selling, subdividing, evicting, removing, destroying, demolishing and/or doing anything prejudicial to all persons living, working and/or doing business at Mukuru Kwa Njenga Slum and more particularly from L.R NO. 12425 (I.R) NO. 32622/1) AT MUKURU KWA NJENGA ALSO KNOWN AS ORBIT CHEMICAL INDUSTRIES LIMITED until this matter is heard.

II. Permanent injunction restraining the Respondents either by themselves, their servants, agents, or howsoever from implementing undated and unsigned circular for Special Plan for Mukuru Kwa Njenga Slum residents without public participation, selling, subdividing, evicting, removing, destroying, demolishing and/or doing anything prejudicial to all persons living, working and/or doing business at Mukuru Kwa Njenga Slum and more particularly from L.R NO. 12425 (I.R) NO. 32622/1) AT MUKURU KWA NJENGA ALSO KNOWN AS ORBIT CHEMICAL INDUSTRIES LIMITED until this matter is adjudicated.

III. A declaration that the resident of Mukuru Kwa Njenga rights to equal treatment before the law under Article 27 and 43 (1 b, c & d), 40 and 47(1), (2) & (3) of the constitution has been denied, infringed upon, violated and/or threatened.

IV. An order for compensating to Orbit Chemicals Ltd as per the ruling of the high Court in civil Case N. 876 of 2004 to pave way for settlement of the residents of Mukuru Kwa Njenga

V. An order restraining the 4th Respondent from selling plots in respect of 12425 (I.R) NO. 32622/1) AT MUKURU KWA NJENGA ALSO KNOWN AS ORBIT CHEMICAL INDUSTRIES LIMITED in Embakasi South Constituency.

VI. A judicial review order of mandamus compelling the treasury to implement the presidential directive issued in 2015 and actualized by Mr. Kinyua's letter.

VII. Any other declarations, writ or remedy or redress the honourable court may deem fit and convenient taking all the circumstances of this case into account.

VIII. Cost of the suit to be provided for

2. The subject Petition is supported by a total of seven (7) affidavits sworn by the 3rd to the 9th Petitioners, but which affidavits are similar in content, save for the names of the deponents, whereupon the deponents have alluded to the various issues underpinning the Petition.

3. Upon being served with the Petition the Respondents herein entered appearance and thereafter filed various Responses. For clarity, the Attorney General filed a Replying affidavit sworn by one, **Josiah Mwangi Wandurua**.

4. On the other hand, the 4th Respondent filed two sets of Replying Affidavits, namely, the Replying affidavit sworn by Sachin Chandaria on the 22nd February 2019, and a Further Replying affidavit sworn on the 16th April 2019.

5. It is also worthy to observe that the 9th Respondent duly entered appearance on the 26th February 2019, but however, same did not file any Replying Affidavit

DEPOSITIONS BY THE PARTIES

6. Vide the Supporting Affidavit sworn by the 3rd Petitioner, namely, Njenga Mwenda Kariuki sworn on the 11th October 2018, same as averred as hereunder;

7. Firstly, that 3rd to the 13th Petitioners herein and 26,000 Others, have been in occupation and possession of **12425 (I.R) NO. 32622/1 AT MUKURU KWA NJENGA ALSO KNOWN AS ORBIT CHEMICAL INDUSTRIES LIMITED**, since the year 1958.

8. It has also been averred that having being in occupation of the suit property since 1958, the Petitioners herein alongside other residents have thus acquired Legitimate Expectation over and in respect of the suit property and thus same ought not to be Evicted therefore.

9. On the other hand, the Deponent has further averred that the 2nd Respondent herein, served the Petitioners, with an undated circular for special plan for Mukuru Kwa Njenga, without Public Participation and that the circular has been indicated to threaten them, whatsoever.

10. Besides, the Deponent has further averred that Public participation is very important in developing In-site plans, but that same has been ignored in this case, and which involves Mukuru kwa Njenga Slums.

11. It has further been averred that the 9th Respondents is in the process of starting the construction of Catherine Ndereba Road, which runs to the Airport through Lunga Lunga Road, without permission, without public participation and is likely to affect many Residents.

12. Other than the foregoing, the deponent has averred that the 2nd Respondent has also threatened the residents with demolition to pave way and to set a Special plan for Slum Housing for the Residents of Mukuru kwa Njenga. In this regard, the deponent has averred that the intended demolition, shall violate and/or infringe upon the Petitioners wrights.

13. On the other hand, the deponent has further averred that the high court had issued an order whereby it was directed that Orbit Chemicals Company Ltd be compensated and thereafter, the land was to be allocated to the landless residents of Mukuru kwa Njenga.

14. Other than the foregoing, the deponent has further averred that the 4th respondent is breaching the Ruling delivered on the 12th October 2012 vide Hcc No. 876 of 2004. In this regard, the deponent has thus sought that the National Land commission, be directed to intervene and in particular, to implement the letter and spirit of the court orders.

15. Based on the foregoing, the deponent has thereby contended that the rights of the Petitioners and the other residents of Mukuru kwa Njenga slums, have been violated, breached and/or infringed upon.

16. Consequent to the foregoing, the deponent has thereafter dedicated a total of eleven pages running from Paragraphs 28 to 43, respectively, whereas same has reproduced various Articles of the Constitution, 2010, verbatim.

17. In the premises, the deponent thus reiterated that the court should proceed to and grant the Reliefs, that have been sought for vide the subject Petition.

RESPONSE BY THE RESPONDENTS

18. On behalf of the 2nd, 3rd, 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th & 14th Respondents, a Replying affidavit was sworn by one Josiah Mwangi Wanduraa, wherein same has averred as hereunder;

19. The Government of the Republic of Kenya was desirous and/or keen to commence the construction of the Cathrine Ndereba Road and in this regard, the Government commissioned a study, with a view to ascertaining the feasibility, preliminary design, Social and Environmental Impact Report.

20. It has further been averred that owing to the proposed construction of the Catherine Ndereba Road, the claimants herein opposed the process and thereby proceeded to and filed Judicial Review case No. 146 of 2017, challenging the Proposed Road construction.

21. It has further been averred that the said Judicial review proceedings, which essentially challenged the construction and/or proposed construction of the Kathrine Ndereba Road and the eviction of the claimants herein was ultimately, dismissed.

22. Further, the deponent has averred that during the process of carrying out the study, for purposes of ascertaining the feasibility and impact of the intended road, the various Residents of Mukuru Kwa Njenga slums were involved and/or consulted. In this regard, it is stated that the process therefore involved public participation and engagement.

23. Finally, the deponent has averred that the intended construction of Kathrine Ndereba Road, was useful for purposes of enhancing the Road network in the area, as well as facilitating road connectivity, which are essential to spur and promote Economic developments.

24. On the part of the 4th Respondent, one Sachin Chandaria has sworn an elaborate Replying affidavit, wherein same has sated as

hereunder;

25. The 4th Respondent herein bought, purchased and acquired **12425 (I.R) NO. 32622/1**) through public auction, which was carried out and/or undertaken by National Bank Ltd, to whom the Suit Property, had been charged.

26. It has further been averred that upon the purchase of the suit property, same was transferred to and registered in the name of the 4th Respondent. Consequently, the 4th Respondent is the lawful and legitimate owner over and in respect of the suit property.

27. Besides, the deponent has averred that by virtue of being the owner of the suit property, the 4th Respondent is therefore entitled to enter upon and develop the same. In this regard, the deponent has alluded to the provisions of **Sections 24 & 25 of the Land Registration Act, 2012.**

28. Other than the foregoing, the deponent has averred that on or about the year 1996, the Residents of Mukuru Kwa Njenga, through their Representatives, Amina Mohamed and 7 others, filed Judicial Review proceedings, whereby same were challenging their Eviction from the suit property. In this regard, the deponent has referred to **Nairobi HCC Misc. Civil Appl. No. 784 of 1996.**

29. It has been further averred that the said proceedings were heard and determined culminating into a ruling and order issued on the 5th May 2006, whereby the court decreed that the suit property lawfully belonged to the Interested party in the said proceedings and who is now the 4th Respondent.

30. Other than the foregoing, the deponent has also averred that there was also a civil suit vide Nairobi HCC No. 876 of 2004, whereby the 4th Respondent had sued the Attorney General, claiming orders for cancellation and/or discharged of a caveat that had been registered against the 4th Respondent's title.

31. Pursuant to the foregoing, the deponent has averred that the said suit was heard and determined vide judgment delivered on the 22nd September 2006, whereby the 4th Respondent's suit was allowed.

32. Other than the foregoing, the deponent has also averred that on or about the 12th October 2012, a Ruling was made whereby the Attorney general was ordered and/or directed to compensate the 4th Respondent herein for loss of income, mense profit and whereby Judgment was entered for the sum of Kes.6, 015,113,000/=.

33. However, the deponent has averred that despite the entry of the said judgment against the Attorney General, or better still, the Government of Kenya, same has never been complied with, adhered to and/or liquidated.

34. Be that as it may, the deponent has therefore averred that the subject suit, read Petition which touches on the ownership of the suit property, right of entry and possession, as well as Eviction of the illegal occupants thereof, has been heard and settled by courts of competent jurisdiction.

35. In view of the foregoing, the deponent on behalf of the 4th Respondent has therefore averred that the Petition herein is therefore *Res-judicata*. In this regard, the 4TH Respondent contends that the subject Petition, which seeks the same Orders as the ones which were sought in the previous suits, is therefore an abuse of the Court Process.

REJOINDER BY THE PETITIONERS

36. After being served with the 4th Respondent's affidavit, one Martin Karanja Mwiruri swore a Further affidavit, which was sworn on the 22nd May 2019, to which the deponent aver that same are strangers to the suit vide Nairobi HCC No. 876 of 2004, between the 4th Respondent and the Attorney General.

37. Nevertheless, the deponent has further averred that the 4th Respondent herein, has since been fully compensated by the National Government, as pertains to the suit property and therefore the land ought to be allocated to the landless.

SUBMISSIONS BY THE PARTIES

38. On the 25th November 2021, the subject Petition came up for mention, whereupon directions were taken to the effect that the Petition be prosecuted on the basis of affidavit evidence and thereafter the parties were ordered and/or directed to file and exchange written submission.

39. Pursuant to the foregoing order, the Respondents and more particularly, the 4th Respondent and the Respondent represented by the Attorney General, filed their Submissions.

40. However, the Petitioners herein failed to file their written submissions and thereby occasioned an extensively delay in the prosecution and ultimate adjudication of the Petition.

41. Be that as it may, the Petitioners' advocates finally filed written submissions on the 27th January 2022 and in this regard, same thud paved the way for the disposal of the Petition.

42. It is worthy to point out that the three set of written submissions, filed by the Petitioners, the 4th Respondents and the rest of the Respondents represented by the Attorney General are on record. For clarity, same have been duly considered and taken into account.

43. On the part of the Petitioners, same have contended that having lived and occupied the suit property for over 40 years, same have therefore acquired prescriptive rights and/or adverse possessory rights over and in respect thereto.

44. Owing to the foregoing, the Petitioners have thus contended that the Respondents therefore ought to be directed to issue the Petitioners with title deeds over and in respect of the suit property.

45. On the other hand, the Petitioners have also submitted that having lived on the suit land for over 40 years, same have also acquired a legitimate right over the suit property and therefore the same should be declared as the owners.

46. Other than the foregoing, the Petitioners have further submitted that same have a right pursuant to and under the provisions **Article 43(1) b of the constitution 2010**, and therefore the court ought to protect their of fundamental rights and freedoms, particularly to the suit land.

47. On their part, the 4th Respondent has submitted that the 1st Petitioner herein lacks the Requisite Locus Standi, to commence and institute the subject Petition, on account that same is not a legal person and/or entity, known to law or at all.

48. Besides, the 4th Respondent has further averred that the Petitioners herein, by themselves and/or authorized representatives had filed Judicial Review proceedings vide Nairobi HCC Misc. App. No. 784 of 1996, which matter was heard and determined vide the Ruling rendered on the 5th May 2006, whereby the court made the following orders;

I. It is hereby declared that no person, save under the law, or with leave of the interested party, may enter upon or remain on the suit property 12425, Nairobi.

II. In the event of non-compliance with the order herein before the interested party may apply to the court for eviction orders and any such application made in the high court shall be heard and disposed of in the Civil division and on the basis of priority.

III. Leave be and is hereby grated to the Provincial commissioner, Nairobi and the chief, Embakasi location to take action as necessary to evict the Applicants from the property of the Interested party, to wit L.R No. 12425.

49. In view of the foregoing, the 4th Respondent has therefore contended that the subject Petition is *Res-judicata*.

50. The 4th Respondent has further submitted that by virtue of being the Registered owner of the suit property, the 4th Respondent is entitled to exclusive occupation, possession and use of the suit property. In this regard, the 4th Respondent has relied upon the provisions of **Sections 24 and 25 of the Land Registration Act, 2012**.

ISSUES FOR DETERMINATION

51. Having reviewed the Petition herein, together with the supporting affidavits attached thereto, as well as the responses filed thereto and having similarly considered the submissions filed by the respective parties, the following issues are germane for Determination;

I. Whether the Petitioners herein have acquired prescriptive rights and/or adverse possessive rights over and in respect of the Suit property.

II. Whether the constitutional rights and fundamental freedom of the Petitioners has been breached, violated and/or infringed upon, either as alleged or at all.

III. Whether the suit herein is Res-judicata.

IV. Whether the Petitioners are entitle to the Reliefs sought at the foot of the Petition

ANNALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Petitioners herein have acquired prescriptive rights and/or adverse possessory rights over and in respect of the suit property.

52. As pertains to the claim for acquisition of prescriptive rights or better still adverse possessory rights over and in respect of the suit property, it is important to note that claims involving adverse possession are claims that lie under the private law as opposed to public law.

53. By virtue of being a claim under and in respect of private law, any person, the Petitioners not excepted, who seek to pursue a claim of this nature, namely adverse possession, ought to file and/or commence to file such proceedings either as prescribed under the relevant statute, if any or in manner envisaged for commencing Civil suits.

54. For clarity, constitutional petitions, ought to be filed and/or mounted in matters where constitutional rights and fundamental freedoms are concerned, but not where a party or group of parties are seeking to accrue private interest, in terms of acquisition of title to be registered in their own name vide Adverse Possession, as in the instant matter/ case.

55. In view of the foregoing, the obvious Conclusion pertaining to the Petitioners claim for adverse possession mounted by way of a constitutional petition, is that same is clearly erroneous, mistaken and/or otherwise an abuse of the due process of the court.

56. In support of the foregoing observation, I refer to and adopt the Decision in the case of **Kennedy Odoyo Okello v District Land Registrar, Migori & 2 others [2015] eKLR**, where the honourable court stated as hereunder;

“In our view, the petition did not raise any constitutional issues and whatever complaint the appellant had squarely lay in the domain of private law”.

57. In any event, a person seeking to acquire title by way of adverse possession, is enjoined to commence the civil proceeding by way of originating summons as prescribed vide the provisions of Order 37 Rule 7 of the Civil Procedure Rules 2010, which provides as hereunder;

7. Adverse possession [Order 37, rule 7.]

(1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The court shall direct on whom and in what manner the summons shall be served.

58. Based on the provision of Order 37 Rule 7 of the Civil Procedure Rules 2010, which have been alluded to, it is my humble view that where there exists a statutory or mechanism for addressing a particular cause of action, a party is therefore obliged to comply therewith.

59. Nevertheless, despite the existing mechanism for seeking a claim for adverse possession, the Petitioners herein have sought to commence their claim by way of a constitutional petition. Consequently, the commencement of this claim vide constitutional petition negates the rights of the Petitioners.

60. Notwithstanding the foregoing, it is also important to note that a claimant seeking a declaration for acquisition of land by way of Adverse Possession/prescriptive rights must place before the court evidence of Occupation, Possession and use of the suit property, which is sought to be affected by way of Adverse Possession.

61. In the premises, it was incumbent upon the Petitioners to avail to court evidence of occupation, possession and use. For clarity, such evidence could only be tendered by proof of say photographs showing the developments, if any, that have been carried out and/or undertaken on the suit property.

62. Nevertheless, the petitioners herein did not attach to the supporting affidavit any evidence or at all, to show that same are in occupation of the suit property. In this regard, the issue of occupation of the suit property by the Petitioners, was therefore left for the court to speculate upon same with a view to finding and holding in favor of the Petitioners.

63. Suffice it to say, that without evidence of occupation, the necessary Ingredients that underpin the claim for adverse possession, cannot therefore be proven. Simply put, the occupation and/or possession are critical and essential in a claim for adverse possession.

64. In support of the foregoing position of the law, I can do no better than to invoke and/or state the decision in the case of **M'Mbaoni M'Ithara v James Mbaka [2019] eKLR**, where the court referred in the case of **Kweyu Vs Omutut [1990] KLR 709** this Court (Gicheru JA stated as page 716:-

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which a title in appearance, but in reality is).

Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner.

The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued.

And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right.

A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously.

65. Other than the fact that the Petitioners did not lay before the court evidence of occupation and possession, there is also an apparent claim which touches on and/or concerns the portion of land wherein the Cathrerine Ndereba Road was/is to be constructed. For clarity, it is worth noting that the construction of a public road, the Catherine Ndereba road not excepted, is undertaken on Public land and not otherwise.

66. On the hand, if such a Road is to be undertaken on private land, then the Government is enjoined to undertake compulsory acquisition through the National Land Commission, subject to and in compliance with **the Provisions of Article 40 (2) of the Constitution of Kenya, as read together with the provisions Sections 109 to 111 of the Land Act, 2012.**

67. However, where private land is subjected to compulsory acquisition, upon completion of the acquisition process, the land becomes public land and reserved for the designated purpose.

68. However, in respect of the subject matter, there is no evidence that the suit property was ever acquired for a specific and/or designated purpose. Consequently, the portion where the Government seeks to Construct the Catherine Ndereba Road, must taken to be Public Land and not otherwise.

69. Owing to the foregoing, the Petitioners claim for adverse possession, which has been levied against all the Respondents, most of whom are Government departments and/or Officials, can therefore mean that the Petitioners are laying a claim for adverse possession on what is otherwise Public land, meant of the construction of Catherine Ndereba Road.

70. In the premises, the question that then arises, is whether a claim founded on prescriptive rights or adverse possession, which forms the crux of the Petitioners Claim herein, can be laid in respect of Public land.

71. In my humble view, a claim for adverse possession/prescriptive rights cannot lie in respect of public land or any Land that is designated for public use, including one that is reserved for the Construction of a Road.

72. In support of the foregoing observation, it is important to take cognizance of the provisions of Section 41 of the Limitation of Actions Act, Chapter 22, Laws of Kenya, which provides as hereunder;

41. Exclusion of public land This Act does not—

(a) enable a person to acquire any title to, or any easement over—

(i) Government land or land otherwise enjoyed by the Government;

(ii) mines or minerals as defined in the Mining Act (Cap. 306);

(iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);

(iv) water vested in the Government by the Water Act (Cap. 372);

(v) land vested in the county council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300)); or

(vi) land vested in the trustees of the National Parks of Kenya; or

(b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the

73. Further, the foregoing position has been underscored and/or emphasized by the Court of Appeal in the Decision in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR**, where the court observed as hereunder;

Until 1994 the property was Government land hence the period before 1994 does not account for the period to be computed in arriving at the statutory 12 years as there cannot be a claim of adverse possession against public land. See Wambugu v. Njuguna [1983] KLR 172. The relevant period would therefore be between 1994, the date of registration of the appellant as the proprietor and 2008 when the suit was filed. That period, in aggregate translates to 14 years which is the period the respondent can legitimately base his claim.

74. Based on the foregoing observations, it is my humble finding and holding that the Petitioners have not proven and/or established the claim to the suit property or otherwise, by way of prescriptive rights or at all.

Whether the constitutional rights and fundamental freedom of the Petitioners has been breached, violated and/or infringed upon, either as alleged or at all.

75. The Petitioners herein have contended that their constitutional rights and/or fundamentals freedom have been breached, violated and/or infringed upon.

76. Indeed, based on the foregoing allegations the Petitioners herein have reproduced verbatim various Provisions of the Constitution, 2010, which have been enumerated in more than 11 pages of the Petition. See paragraphs 28 to 45.

77. However, despite reproducing the various provisions of the constitution, the Petitioners herein have not stated and/or stipulated in what manner the rights enshrined in the quoted articles have been violated.

78. Suffice it to say, that other than quoting the various Articles of the Constitution, 2010, a party seeking to establish or prove, violation of constitutional rights is enjoined to proceed and provide particulars, pertaining to the manner in which his/her rights are being violated, breached and/or infringed upon.

79. On the other hand, it was also incumbent upon the Petitioners to also supply particulars as to who of the Respondents has breached and/or violated their rights and when such rights were violated.

80. Unfortunately, the Petitioners herein have similarly not shown who breached and/or violated their fundamental rights and when the violation and/or infringement arose, if any.

81. It is worthy to recall that the Petitioners herein alluded to being issued with undated and unsigned circular for special plan for Mukuru Kwa Njenga and that same was issued without public participation, and that same has been circulated to threaten them without due process. See paragraph 19 of the Petition.

82. I wish to restate that the contents of paragraph 19 which has been alluded to in the preceding paragraph, has been reproduced in paragraph 5 of the affidavit supporting of the Petition, save for the fact that in the affidavit, the issuance of the unsigned circular is now attributed to the 2nd Respondent and not the 1st Respondent.

83. The evident discrepancy between paragraph 19 of the Petition and paragraph 5 of the affidavit notwithstanding, it is important to note that the unsigned circular, which anchors the claim for violation of the Petitioners Rights and Freedoms, has neither been annexed or attached to any of the 7 affidavits or at all. Consequently, I am not able to ascertain the import and tenor of the alleged circular, if any, ever existed.

84. Based on the foregoing, it is difficult to appreciate and/or understand how and in what manner the Petitioners Constitutional Rights and Freedoms, have been breached and/or violated.

85. I must observe, that even in claims involving breach and/or violation of constitutional rights and fundamental freedoms, the claimants is still enjoined to lay before the Court Evidence, to prove and/or establish his/her case on a balance of probability.

86. To underscore the foregoing observation, it is worthy to take cognizance of the decision in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, where the honourable court had this to say;

“We have examined each of these grounds and our finding is that the evidence before the High Court or before us is not probative of any of the claims. We note that the High Court itself noted the evidentiary shortcomings by stating that it was not in a position to make any findings whether the above allegations had been proved or not.

Therefore, we respectfully hold that the court misdirected itself by concluding that the appellant was unsuitable to hold office, despite its own finding that there had been no conclusive proof of the allegations. It is our considered view that in cases seeking review of an appointment on grounds of the integrity of the appointee, the review cannot be half-hearted. It must be conclusive, fair and just. It was not enough for the High Court to state its commitment to “an intensely fact-based enquiry,” and then proceed to declare that only later legal proceedings would determine the “unresolved questions” while still holding the appellant to be unsuitable to hold State Office. To do so would be to drown the imperatives of due process, justice and fairness into tumultuous waters.”

87. Perhaps, the legal position pertaining to proof of claims made pursuant to constitutional Petitions was made clearer in the decision in the case **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR**, where the Court of appeal observed as hereunder;

“ It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted.

The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved.

If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

88. In my humble view, the Petitioners have not laid and/or adduced any credible evidence or at all to prove the claim pertaining to violation, Breach and/or infringement of their constitutional rights and/or fundamental freedoms.

89. In the premises, I am not inclined to make any assumption and/or otherwise speculate about the Petitioners rights, if any, which may or may not have been breached, violated and/or infringed upon.

ISSUE NUMBER 3

Whether the suit herein is Res-judicata.

90. Vide paragraph 11, 12 & 13 of the Replying affidavit sworn on behalf of the 4th Respondent dated the 22nd February 2019, it has been averred that sometime in the year 1996, when an Eviction process was commenced against persons resident on the suit property, duly authorized representatives of the residents of Mukuru Kwa Njenga proceeded to and commenced Judicial Review proceedings vide Nairobi HCC Misc. Appl. No. 784 of 1996.

91. For clarity, it has been stated, that the said proceedings were between Amina Mohamed & 7 Others v The chief Embakasi Location & The Provincial Commissioner, Nairobi and same involved and/ or touched on the subject Land herein.

92. Besides, it has also been posited that the 4th Respondent herein was also joined in the proceedings as an Interested party, insofar as the said proceedings touched on and/or concerned eviction in respect of the suit property.

93. It has also been averred that following the lodgment of the judicial review proceedings, the matter was heard and disposed of by way of a Ruling rendered on the 5th May 2006, where the court *inter-alia* declared that the suit property belongs to the 4th Respondent and also authorized Eviction of the illegal occupants thereof, who were represented by the Ex-parte Applicants.

94. It is important to point out, that the Ex-parte Applicants vide Judicial Review, namely, Nairobi HCC Misc. Appl. No. 784 of 1996, were representatives of Mukuru Kwa Njenga Residents and therefore their interest is similar to the interest of the Petitioners herein.

95. Indeed, it can safely be stated that Ex-parte applicants in the Judicial review proceedings, which were heard and disposed of in the aforesaid decision, were Representatives of the current Petitioners.

96. Even though the Petitioners filed a Further affidavit, namely the further affidavit sworn by Martin Karanja Muiruri, the issue that Amina Mohamed & 7 Others, had represented the interest of the current Petitioners and that the suit that was filed was dismissed, was not responded to by the Petitioners.

97. For coherence, I may not be able to discern the reason why the said pertinent issue was never responded to and/or controverted, but the failure to the respond thereto leaves the said deposition uncontroverted and/or unrebutted.

98. Be that as it may, to the extent that the claim by residents of Mukuru Kwa Njenga over and in respect of the suit property had been adjudicated upon and determined by a court of Competent jurisdiction, it therefore means that a similar issue cannot re-agitated. In this regard, the Plea of Res Judicata, is well grounded and proven.

99. It is also worthy to note that in the course of the Judicial review proceedings, the issue of Evictions of the residents of Mukuru Kwa Njenga, over and in respect of the suit property, was also deliberated upon and concluded. For clarity, the 4th Respondent was granted liberty to Evict.

100. In the premises, the issue that colors the subject Petition relates to a claim of ownership, title, right to occupy and threatened Eviction at the instance of the 4th Respondent.

101. Owing to the foregoing, it is evident and/or apparent that the claim before the court is obviously Res-judicata and in this regard, the court is barred from assuming jurisdiction and/or deliberating on a matter that has been previously litigated.

102. In support of the foregoing observation, I beg to refer to the decision in the case of **E.T. v Attorney General & another [2012] eKLR**, where the court observed as hereunder;

The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction

. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata'

103. It is also worthy to note that the doctrine of res-judicata also applies to constitutional Petitions. In this regard, one cannot evade the Doctrine of Res-judicata by filing a Constitutional petition.

104. For the avoidance of doubt, it is appropriate to refer to the same decision in the case of **E.T. v Attorney General & another [2012] eKLR**, where the court observed as hereunder;

In the case of Thomas v The Attorney General of Trinidad & Tobago [1991] LRC(Const) 1001, the Privy Council stated that it was, 'satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata.' The Board referred to a decision of the Supreme Court of India, Daryao and others v The State of UP and Others (1961) 1 SCR 574, 582-3 where Gajendragkar J stated, 'But, is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity.

Now, the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy.

It is in the interest of the public at large that a finality should attach to be binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32'.

105. In short, the filing of the subject petition, through a different set of Petitioners/Claimants and adding additional Respondents, does not change the character of the claim, which is being ventilated.

ISSUE NUMBER 4

Whether the Petitioners are entitle to the reliefs sought at the foot of the Petition

106. The Petitioners herein have sought various reliefs, which have been reproduced at the onset of this judgment.

107. Owing to the nature of Reliefs sought, it is therefore important to comment on same and in particular, their applicability and relevance, to the subject matter.

108. First and foremost, the Petitioners have sought for an order in the following terms;

I. Temporary injunction restraining the Respondents either by themselves, their servants, agents, or howsoever from implementing undated and unsigned circular for Special Plan for Mukuru Kwa Njenga Slum residents without public participation, selling, subdividing, evicting, removing, destroying, demolishing and/or doing anything prejudicial to all persons living, working and/or doing business at Mukuru Kwa Njenga Slum and more particularly from L.R NO. 12425 (I.R) NO. 32622/1 AT MUKURU KWA NJENGA ALSO KNOWN AS ORBIT CHEMICAL INDUSTRIES LIMITED until this matter is heard.

109. As pertains to the claim herein, what I wish to say is that a prayer of temporary injunction only arises and/or ensues during an interlocutory application pending the determination of the suit and/or petition.

110. Based on the foregoing, a prayer for temporary injunction can therefore not be granted at the conclusion and/or determination of a suit, either as sought or at all. Simply put, the prayer herein is misconceived.

111. Secondly, the Petitioners have also sought for an order of permanent injunction, which is directed against all the Respondent and which is intended to bar the Respondents from sub-dividing, selling, alienating, evicting, removing, demolishing and/or doing anything prejudicial to persons residing on the suit property.

112. Similarly, the Petitioners have also sought for an order restraining the 4th Respondent from selling plots in respect of the suit properties. Clearly, the prayer herein is tantamount to issuance of a Permanent injunction.

113. Be that as it may, the point I wish to make is that to the extent that the suit property belongs to and is registered in the name of the 4th Respondent, same is obliged to enter upon, take possession thereof, and/or use the suit property. For clarity, the provisions of sections 24 & 24 of the Land Registration Act, 2012, are imperative.

114. At any rate, an order of Permanent injunction ought not to issue against the registered proprietor or owner of a suit property, unless peculiar and/or exceptional circumstances are shown.

115. In support of the foregoing observation, I adopt and restate the holding of the Court of Appeal in the decision in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, where the court observed as hereunder;

It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so. The 1st respondent's 50% claim of shares in the appellant company, the resources he used for architectural design, to construct the camp, the airstrip, to grade the road network, US \$ 1,917,333 alleged advanced to the 2nd and 3rd respondents, and US \$ 14 million allegedly used in the management

and development of the camp, are all matters that can be resolved by arithmetical calculation and a refund made, if proved at the trial.

116. Thirdly, the Petitioners herein have also sought the prayer in the following terms;

I. An order for compensating to Orbit Chemicals Ltd as per the ruling of the high Court in civil Case N. 876 of 2004 to pave way for settlement of the residents of Mukuru Kwa Njenga.

117. In respect to the foregoing claim, it is important to note that the petitioners herein are not acting for and on behalf of the 4th Respondent and neither, have same been conferred with an authority to speak for the 4th Respondent, either towards seeking compensation or at all.

118. The other aspect that arises from this claim, is that it relates to enforcement of a judgment and/or decree that was issued elsewhere in a different suit. Consequently, such a judgment and/or decree can only be enforced in the suit where same was rendered and not by filing a new suit or at all. Clearly, the Relief premised and/ or predicated on the alleged Compensation, cannot be addressed vide the subject Petition, or at all.

119. Perhaps, it is imperative to take cognizance of the provisions of Section 34 of the Civil Procedure Act, Chapter 21, Laws of Kenya, which provides as hereunder;

Questions to be determined by court executing decree

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

120. Fourthly, the Petitioners have also sought for an order directing the Respondent to issue same with title deed of plots in respect to the Suit property. Here, it is important to note that the suit property is currently registered in the name of the 4th Respondent and same is therefore Private Property, for which the Provisions of Article 40 of the Constitution, 2010, do apply.

121. To my mind, there is no prayer and relief seeking for cancellation and/or revocation of the 4th Respondent's title and reversion of the Land, if at all, to Government and thus pave way for the proposed alienation in favour of the Petitioners, or at all.

122. The question that arises, is whether the Respondents, if at all, or any of them, are mandated to issue Titles and whether same can issue parallel titles to rival the title of the 4th Respondent, either in the manner sought or at all.

123. In my humble view, no second or third title can be issued over and in respect of the suit property, during the life time of the title of the 4th Respondent. In this regard, I also come to the conclusion this particular Relief, is calculated to create an absurdity. In any event, same is not legally tenable.

124. The Other critical Relief that has also been sought by the Petitioners relates to the following;

I. A judicial review order of mandamus compelling the treasury to implement the presidential directive issued in 2015 and actualized by Mr. Kinyua's letter.

125. In respect of the said prayer, I must observe that no such circular has been annexed to the Petition and or availed to the court in any other manner prescribed under the law.

126. Consequently, the issue of granting an order of judicial review in respect of a circular and/or directive, which has not been exhibited, does not arise. Simply put, an order of judicial review in the nature of mandamus cannot issue in vacuum.

127. But most importantly, assuming that the circular alluded to, which has not been exhibited and/or annexed is to the effect that H.E Uhuru Kenyatta, decreed that all landless residents of Mukuru kwa Njenga be issued with title deeds or leases, then the question that arises is whether the President has any powers to direct issuance of title or leases and/or alienation of any land, let alone private land.

128. In my humble view, if such a directive was indeed made, which am an ware of, then no order of Judicial Review of Mandamus can issue to enforce and or effectuate, that which is annulity.

129. In support of the foregoing observation, it is worthy to take cognizance in the Decision in the case of **Republic v Kenya Civil Aviation Authority & another ex-parte Elite Earthmovers Limited [2017] eKLR**, where the court stated as hereunder;

It is therefore clear that for an order of mandamus to go forth the applicant must satisfy the Court that the Respondent has a legal duty whether statutorily or at common law which the applicant expects the Respondent to fulfil and the Respondent has failed to do so. In other words Mandamus cannot issue against a person or authority for performance of a duty that the Respondent is not mandated or obliged to perform.

FINAL DISPOSITION

130. Having reviewed all the issues enumerated for determination, I am now minded to terminate the subject proceedings.

131. Taking into account the observations that have been made elsewhere herein before, I come to the conclusion that Petition herein, is not only misconceived, misguided, but same is also Legally untenable. Consequently, the Petition be and is hereby dismissed.

132. As pertains to costs and taking into account the circumstances surrounding the filing the Subject Petition, I order that Either Party do bear Own Costs.

133. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17th DAY OF FEBRUARY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

IN THE PRESENCE OF;

JUNE NAFULA COURT ASSISTANT

MS JOAN KIRIMI H/B FOR MR. WANJERI FOR THE 4TH RESPONDENT.

N/A FOR THE PETITIONERS.

N/A FOR THE REST OF THE RESPONDENTS.