James & 14 others; Mombasa County Government & another (Respondent) (Environment & Land Case 193 of 2016) [2022] KEELC 2995 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2995 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 193 OF 2016

LL NAIKUNI, J

JUNE 16, 2022

IN THE MATTER OF

NYAMASYO JAMES ..... 1ST PETITIONER

BONIFACE MUTUA ..... 2ND PETITIONER

DAVID SYANDI KASANGA ..... 3RD PETITIONER

JAMES MASAULU ..... 4TH PETITIONER

JAMES KARIUKI ..... 5TH PETITIONER

PAMELA WANJIRU ..... 6TH PETITIONER

RONALD MUTULI ..... 7TH PETITIONER

COSMAS KIMANZI ..... 8TH PETITIONER

KISOVO MULONZI ..... 9TH PETITIONER

SAMY KARUNGA ..... 10TH PETITIONER

MARY NELSON ..... 11TH PETITIONER

JONATHAN MAITHYA KATIKU ..... 12TH PETITIONER

HENRY O. MOMANYI ..... 13TH PETITIONER

JOHN KITHEKA ..... 14TH PETITIONER

KARITHI JULIUS ..... 15TH PETITIONER

AND

MOMBASA COUNTY GOVERNMENT ..... RESPONDENT

REGISTRAR OF TITLES, MOMBASA ..... RESPONDENT

JUDGMENT

I. Preliminaries

1. This Judgment pertains to the Amended Petition dated 23rd March, 2021 filed on 25th March, 2021. Initially, it was filed on 22nd September, 2014 by the Petitioners herein. It is brought under several provisions of *the Constitution* of Kenya herein.

II.The Petitioner's Case

2. The Amended Petition seeks to be granted the following orders.

   (a) A declaration that the allocation of the suit property to Saidia Twahir Hatimy and subsequently sub - division and/or transfers to the Affected parties was irregular, illegal ad void for all purposes.

   (b) An order for rectification of the register by cancellation of the Certificates of Leases and all entries on the Land Registrar with respect to the land known as sub-division No. 13642, 13643, 13641, 13640, 13638, 13636 (part of the Plot of Land originally known as Plot No. 143/2) of section one Mainland North and in lieu thereof the 2nd Respondent be directed to register the Petitioners as the joint owners of the said portion of land.

   (c) A declaration that the Petitioners are entitled to a quite and peaceful occupation of the land known as sub-division No. 13642, 13643, 13641, 13640, 13638, 13636 (part of the Plot of Land originally known as Plot No. 143/2) of Section one Mainland North, held in the names of Ahmed Mohamed Musa, Irshed Islamic institute, Amina Kusoma Buna, Abdi Kassim Ahmed, Said Ali Swabu and Athman Omar Abdalla.

   Further, a declaration to the effect that the Respondent and Affected Parties have no right to evict the Petitioners there from.

   (d) A conservatory order restraining the Respondents and the Affected Parties from interfering, entering upon, alienating, disposing, dealing in any way whatsoever with the land known as sub - division No. 13642, 13643, 13641, 13640, 13638, 13636 (part of the Plot of Land originally known as Plot No. 143/2) of section one Mainland North Plot of Land whose certificate of titles are held in the names of Ahmed Mohamed Musa, Irshad Islamic Institute, Amina Kusoma Bunu, Abdu Kassim Ahmed, Said Ali Swabu and Athman Omar Abdalla respectively.

   (e) Costs of this Petition.

3. The said Petition is premised on the grounds, testimonial facts and averments of the 19th Paragraphed Supporting Affidavits of David Syandi Kasanga sworn on 22nd September 2014, James Nyamasyo Wambua sworn on 7th November, 2019, James Kariuki sworn on 7th November, 2019 and Pamela Wanjiku Weru sworn on 7th November, 2019 summarized as follows:-

A. The Supporting Affidavit of David SyandiKasanga- sworn on 22nd September, 2014.

4. Mr. Kasanga averred that he was the 3rd Petitioner herein and as such competent to swear this affidavit on behalf of the other Petitioners. He stated that Kalidas Kanji and Company Limited and Twahir Mohamed owned all that parcel of land known as Plot No. 143 of section one Mainland North. The said Kanji and Twahir Sub-divided the said plot into various plots but left the middle section of the

said portion of land as open land for the public benefit and communal use. According to him having done that the said Kanji and Twahir relinquished any interest in the said property. He annexed a copy of the sketch indicating the initial layout of the property as sub-divided by the said Kanji. He posited that all the Petitioners had openly used and occupied part of the said communal land for over twenty 920) years. They had set up various businesses such as schools, hotels and stores which provided them with their daily subsistence. He deposed that the 1st Respondent had at all material times recognized the lawful existence of the petitioner as indeed it had approved and granted them with single Business Permits for the purpose of carrying out lawful businesses thereon. He deposed that over the years, the 1st Respondent repeatedly received Single Business Permit application from the Petitioner, approved the same received money for it and issued the said Permits to them. In particular it had

a. Received a sum of Kshs. 7,600/= from the 4th Petitioner in the years 2012 and 2014 to run a shop in the name of "Baba Dosi Enterprises" Marked as NJ-2"

b. Received a sum of Kshs. 50,000/= in the year 2014, Kshs. 25,000/= in the year 2013 and Kshs. 12,750/= from Precious Brown Nursery School and Primary School operated by the 1st Petitioner and also granted Single Business Permit – annexed and marked as "NJ-3"

c. Received Kshs. 50,000/= and granted an Alcoholic Drink License No. 93065 to the 6th Petitioner and by so doing authorized he to sell alcoholic drinks on any day at any time at her premises situated at Karama Stage – annexed a copy "NJ 4".

d. Received Kshs. 4,250/= in the year 2013 and Kshs. 7,600/= in the year 2014 from the 15th Petitioner, the owner of Nyambene Grocers as his fees for a Single Business Permit for the years 2013 and 2014. The permit was issued as number 2013/16449 and 2-14/16449 annexed and marked as "NJ-5"

e. Received Kshs. 10,000 from Benjamin Muange for his application for a Single and Business Permit to run a small eating house by the name of "Baby-Boom Café" – annexed a copy as "NJ-6"

f. Received a sum of Kenya Shillings Eight Thousand Five Hundred (Kshs. 8,500.00) for a Single Business Permit application from Kathekani Wine and Spirits also trading as Kongowea Karama Copy of Permit No. 2010/17416 and marked as "NJ - 7".

5. He held that all these above stated businesses are situated within the same location are the sources of subsistence for the said Petitioners, whereas without them carrying out these economic activities the Petitioners would be forced to beg or resort to unorthodox means to provide for their families.

6. He deponed that on 24th August, 2014 a Notice under Section 119 of the *Public Health Act* was issued to Ronald Mutili a business owner on the aforesaid parcel of land requiring him to remove his building from an alleged (Road Reserve" and also to provide an approved plan of the said building – a copy of notice – marked as "NJ - 8".

7. He informed Court that while he was being served, Mr. Mutili was told that all who had occupied the suit property were to be evicted by the 1st Respondent. He argued that it had been wrong and immoral for the 1st Respondent to have approved and granted the Petitioners their Single Business Permit being occupants to said property. While at the same time threatens them with eviction claiming that they had set up illegal structures contrary to the provisions of the *Public Health Act*. Furthermore, by the acts of commission by the 1st respondent, it had created a reasonable and legitimate expectation that they would have rights to use and occupy the land. He stated that as a response they wrote a letter dated 4th September, 2014 to the 1st Respondent explaining their predicament but it refused to neither

acknowledge nor respond to the said letter, an gesture that caused the Petitioner to be apprehensive that the 1st Respondent would use their powers capriciously and violently to evict them. He informed court that they conducted official searches and it emerged that the open land/area that Kanji and Twahir had left for communal use had been transferred to one Saidia Twahir Mohamed Hatimy on 2nd November, 2000 and issued with a Certificate of Title deed No. CR. 33878 marked as "NJ – a". The said Saidia transferred her interests thereon to Hatimy, to Mohamed Hatimy for a consideration of Kenya Shillings Eight Thousand (Kshs. 800,000/=) on 7th November, 2004 there was a court order in Misc. Civil Application No. 46 of 2002 revoking the title to the said Saidia and any other subsequent transaction. However the said court order was lifted by another court issued on 9th September, 2005. Although the case had no impact to this proceedings, but the Petitioner had not been aware about having learnt on it only in September, 2014.

8. He deponed that on 21st September, 2005 the said Saidia and/or Hatimy mysteriously managed to have the said property sub-divided into several sub-division of which 18 sub-divisions were transferred to the Affected Parties herein. The remainder of the Sub-division were retained by other persons and Mohamed Hatimy. He held that despite the said sub-division and transfers having purportedly taken place, the Petitioners enjoyed quiet and peaceful occupation and possession of the said property without any interference from any person. According to him, it follows that the petitioner acquired ownership rights to the suit property under the Doctrine of Land Adverse Possession and/or prescriptive rights over the suit property on account of being in possession of the land without any interference from any person for over twenty (20) years. His contention was that the Respondents were state offices whose authority was for the benefit of the public which was to be exercised in a consistent manner with the purposes and objects of the Constitutions manner with the purposes and objects of *the Constitution* of Kenya – which demonstrated respect for the people, bringing honor to the nation and dignity to the office they hold promoting public confidence integrity to the offices they hold under Article 73 of *the Constitution* of Kenya.

9. He further opined that the Respondents decision making ought to be guided by objectivity impartiality and not influenced by favourism, improper motives or corrupt practices. Hence they held that to them the Respondent's decision to allocate the suit property and their action to effect sub-divisions and register transfers over the said property in favour of the Affected Parties in total disregard of the existence of the Petitioners amounted to breach of the Public Trust entrusted to them.

10. He argued that the allocation of the open space to the Affected Parties was illegal and the Honorable Court should not allow the same to remain in place as the said illegalities constituted a breach of the Petitioners fundamental rights enshrined in *the Constitution* of Kenya. He held that in particular the 2nd respondent purported to create a sub-division scheme of the suit property without taking into consideration the existence of the Petitioners who had always been in actual possession and occupation of land. They purported to allocate the land which was an open space and being a public land as shown by the records at the land registry it was not available for allocation to individuals or private purposes. He argued that should the land have become available for allocation from public to private, then in all fairness and as provided for under Article 47 (1) of *the Constitution* of Kenya and the Fair Administration Action Act priority ought to have been given to the Petitioners who had been in physical occupation of the it for over 20 years.

11. He further contended that under the provisions of Article 27 of Constitution of Kenya 2010, the Petitioners were entitled to equal protection and equal benefit of the law, Equality including the full and equal enjoyment of all rights and fundamental freedom, women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres, state or any person should not discriminate directly or indirectly against another person's on any

ground including sex, marital status, ethnic or social origin, disability or culture. He opined that the said intended eviction would economically cripple and thereby expose and reduce the petitioners to a state of poverty, desperation and homelessness which would further violate their right to health, and life human dignity and security of person.

12. He cited the provisions of Article 53 of Constitution of Kenya where every child has the right to free and compulsory basic education and to be protected from all forms of violence. To him the intended capricious and illegal demolition of the said academic institutions would interfere with the Children's right to free and compulsory basic education.

13. Besides, the 1st Respondent has the responsibility to ensure that all schools going children in the County of Mombasa receive the free and compulsory basic education. But he held in effecting the intended eviction the 1st Respondent would only be exposing the said children to other forms of violence which were frowned upon by the said Constitution of Kenya. He further made reference to the Provisions of Article 46 of *the Constitution* of Kenya, the Petitioner have the right to protection of their economic interests. The demolition of the school, hotels and stores would only impoverish them as their economic interests would be destroyed, and by uprooting them cause them to suffer irreparable losses as the Petitioners would have lost the only means that they had for their daily survival. Further, the children who attended the said school would suffer unimaginable losses as they would have lost their opportunity to study in a school of their choice. In the long run, he averred that in light of the foregoing circumstances they prayed for appropriate orders as sought from the Petition.

The 6th Petitioner's Witness – Pamela Wanjiku Weru

14. M/s Weru, the 6th Petitioner tendered her evidence through a witness statement sworn and dated 16th March, 2016 and filed in Court on 18th March 2016. She averred that she resided at Kongowea with her son and brother aged 30 years. Her son attended Busy Bee Primary School and the brother Mt. Kenya University. She paid a sum of Kenya Shillings Thirty Seven Thousand (Kshs. 37,000/=) tuition fees for her son per term and a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000/=) for her brother per term. Her only source of livelihood was the business which she operated known as Pawatts Wines and Spirits. She stated that the said business occupied a portion of all that parcel of land originally known as Plot Number 143/2 of Section One Mainland North.

15. According to her she commenced the said business in the year 2009. She would be pay a sum of Kenya Shillings Six Thousand (Kshs. 6,000/=) for rent per month to Fairlane Valuers Limited from the year 2009 to that of 2011. She bought the premises (goodwill) for a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000/=). From then she had been quietly operating her business as and expounded from retail to now wholesale of Wines and Spirits. She stated that every year she obtained a single business permit and liqour licence from the 1st Respondent which costs a sum of Kenya Shillings Fifteen Thousand (Kshs. 15,000/=) and a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/=) respectively. She also remitted taxes.

16. She opined that the businesses catered for her livelihood and for others by engaging boda boda (cyclists) youths to transport goods from her business to others and hence keeps them away from petty crime and drugs which was prevalent in the area.

    He held that she was shocked to learn that they were going to be evicted from the suit land. Upon conducting official search, they realized that all that parcel of land had already been sub - divided into sub - division Numbers 13636, 13642, 13641, 13643 and 13638 and registered in the names of Affected parties. She had an interest in occupying the land and generating income for herself for her subsistence. She asserted that the open space was for public use if it had become available for private

acquisition then in fairness, priority ought to have been given to them. Furthermore, together with the other Petitioners they occupied the property without any interference from any person for which they believed that would have acquired ownership rights under the doctrine of Land Adverse Possession and in the alternative had acquired prescriptive rights over the suit property on account of the many years of possession without any interference from any person. She opined that it was not fair that this land which was public use was allocated to private individuals without their knowledge.

17. Besides, she held that the 1st respondent had encouraged them to continue with their businesses thereon yet they were at the same time changing the use and ownership of the same behind their backs. For all these years she had been paying single business permit business and liquor licences to the 1st Respondent annually for the past 10 years.

The 2nd Petitioner's witness statement by James Kariuki dated 16th March, 2016

18. He resided at Kongowea. He was a member of Umoja Self Help Group which consisted of members from various tribes residing in Kongowea. The self help group consisted of over fourty (40) members. Whereas they commenced the association in the year 2004, they obtained registration as a self help group in the year 2014. He stated that the purpose of the group was to contribute money in order to assist each other with material needs such as school fees, funeral arrangements and medical assistance. His testimony was that each member contributed a sum of Kenya Shillings Two hundred (Kshs. 200/=) per month and an annual one off fee of a sum of Kenya Shillings One Thousand (Kshs. 1000/-).

19. He stated that the said group had been meeting every evening for the last ten years on a portion of all that parcel of land, originally known as Plot Number 143/2 of Section One Mainland North. The venue was centrally located as it was easy for members to access. He averred that the suit land was a public and open space the same as Uhuru Gardens in Mombasa. Whereas they used the same to meet in the evenings and also to relax from work as they deliberated on the development of their community and crime prevention measures, other groups of persons from the community also used the same during the day as a parking lot, football site for the children and such like. As a matter of fact, he informed Court that personally, he played football on the aforesaid land when he was a child in the years of the 1970's.

    He stated that recently, some members of the self help group who were also business owners operating on various portions of all that parcel of land, originally known as Plot Number 143/2 of Section One Mainland North notified them of the planned evictions to be perpetrated by the Affected Parties herein. After conducting a search, they realized that all that parcel of land, originally known as Plot Number 143/2 of Section One Mainland North had already been sub-divided into known as sub-division Nos.13636, 13642, 13641, 13640, 13643 and 13638 which parcels of land were registered in the names of the Affected Parties.

20. Therefore, he urged this court to hold that they were entitled to a quiet and peaceful occupation of the land known as sub-division Nos. 13642,13643, 13641, 13640, 13638, 13636 (part of the plot of Land originally known as Plot Number 143/2) of Section One Mainland North as the same was originally designated as a public space and not private land.

The 3rd Petitioner's witness statement by James Nyamasyo Warubwa dated 17th March, 2016

21. Mr. Warubwa, the 1st Petitioner herein stated that he was a teacher by profession and now the assistant director of Precious Brown Education and Day Centre. It was situated in Kongowea on a portion of all that parcel of land, originally known as Plot Number 143/2 of Section One Mainland North. His testimony was that the said

school was initiated by his mother (Bernadete Katuku George) and father (George Wambua Musau — deceased) who were teachers by profession.

He stated that the area wherein the school was located was previously used as a dump site. As such, it had stagnant water which was a breeding ground for mosquitos and the like. He informed Court that his mother reclaimed the said land by filling the same with debris in a piecemeal fashion until the same was ready used. Prior to starting the school, he stated that his mother commenced with a grocery in the year 1985 and thereafter changed the same into a small hotel. After accumulating sufficient capital, his parents acquired more land and commenced a nursery school. He asserted that they had now expanded the same into a fully- fledged primary school. They had grown the school slowly and surely. In total, there were around 200 pupils and about 10 teachers at the school.

22. His testimony was that since inception of the school, his mother paid all the requisite single business permits over the years to the 1st Respondent and licenses from the Ministry of Education. The Ministry of Education approved it to register the Kenya Certificate of Primary Education (KCPE) candidates. They were allocated a KCPE Centre Code - 03106571. In the year 2015, they had their third set of students who sat for the Kenya Certificate of Secondary Education (KCPE) and many had done exceptionally well.

    He stated that many parents and students liked their school as it offered quality yet affordable education. He added that they also ran a feeding program for the vulnerable children within Kongowea Karama. Further, they organized sports programs for the community wherein the children from the school and those outside participate in the same. Such sports programs provided the much needed recreational activity which keeps our young ones away from crime other vices such as drugs and prostitution. He averred that the school not only provided his family with a means of livelihood, it also provided livelihood for others such as the teachers, the vendors who sell their wares and services to the school.

23. Despite their peaceful, quite possession of the portion of land wherein the School occupied for the last 20 years, they were quite shocked to receive a notice of eviction by the Affected Parties herein. After conducting a search, they realized that all that parcel of land originally known as Plot Number 143/2 of Section One Mainland North has already sub-divided into known as Sub-Division Nos. 13636, 13642, 13641, 13640, 13643 and 13638 which parcels of land were registered in the names of Affected Parties.

    He said that they had occupied the property without any interference from any person for which they believed that they had have acquired ownership rights under the doctrine of land adverse possession and / or in the alternative, we have acquired prescriptive rights over the suit property on account of the many years of possession without any interference from any person. He opined that it was not fair that this land which was for public use was allocated to private individuals without their knowledge. Further, that the 1st Respondent had encouraged them to continue with their businesses thereon yet they were at the same time changing the use and ownership of the same behind their backs.

    For the afore going reasons, he stated that they believed that the court should grant them the prayers as contained in their Petition.

The Petitioners List of Documents

24. The Petitioners produced and relied on the following documents:-

    a. A receipt for a sum of Kenya Shillings Seven Thousand Six Hundred (Kshs. 7,600/=) from the 4th Petitioner in the years 2012 and 2014 to run a shop in the name of "Baba Dosi Enterprises" Marked as NJ-2"

b. A receipt for a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/=) in the year 2014, Kenya Shillings Twenty Five Thousand (Kshs. 25,000/=) in the year 2013 and Kenya Shillings Twenty Thousand Seven Hundred and fifty (Kshs. 12,750/=) from Precious Brown Nursery School and Primary School operated by the 1st Petitioner and also granted Single Business Permit – annexed and marked as "NJ-3"

c. A receipt for a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/=) and granted an Alcoholic Drink License No. 93065 to the 6th Petitioner and by so doing authorized he to sell alcoholic drinks on any day at any time at her premises situated at Karama Stage – annexed a copy "NJ 4".

d. A receipt for a sum of Kenya Shillings Four Thousand Two Hundred and Fifty (Kshs. 4,250/=) in the year 2013 and Kenya Shillings Seven Thousand Six Hundred (Kshs. 7,600/=) in the year 2014 from the 15th Petitioner, the owner of Nyambene Grocers as his fees for a Single Business Permit for the years 2013 and 2014. The permit was issued as number 2013/16449 and 2-14/16449 annexed and marked as "NJ-5"

e. Receipt of a sum of Kenya Shillings Ten Thousand (Kshs. 10,000.00) from Benjamin Muange for his application for a Single and Business Permit to run a small eating house by the name of "Baby-Boom Café" – annexed a copy as "NJ - 6"

f. A receipt for a sum of Kenya Shillings Eight Thousand Five Hundred (Kshs. 8,500.00) for a Single Business Permit application from Kathekani Wine and Spirits also trading as Kongowea Karama Copy of Permit No. 2010/17416 and marked as "NJ - 7".

II. The Replying Affidavit by the 2nd, 5th and 6th Interested Parties

25. On 22nd January, 2019, the 2nd, 5th and 6th Interested Parties filed a 57th Paragraphed Replying Affidavit sworn by Athman Omar Abdalla dated same date.

The Deponent with the authority from the 2nd and 5th Interested Parties to swear this affidavit deponed that there existed no issues in dispute that required determination by this court and that the issue raised in the Petition against them and/or pertaining to their parcel of land were not backed by any evidence whatsoever, as they were frivolous unmeritorious and without any basis in law at all.

He averred they were all the legal proprietors of suit property known as (a) 6th Interested Party – Land Reference No. Sub-Division No. 13536 (Original No. 8826/10) of Section Mainland North CR. No. 39143 (b) the 2nd Interested Party was the registered owner of Land Reference No. 13640 Section Mainland North and (c) The 5th Interested Party was the registered owner of Land Reference No. 13643 Section 2 Mainland North all situated in Kongowea in Mombasa. They annexed true and certified copies of the said certificate of Title marked as "AOA – 3" and "AOA - 4"

26. Prior to the sub-division the parcels were Land Reference No. 8826 (Original No. 143/2) Section Mainland North which was owned by Saida Twahir Mohamed Hatimy. He held that he acquired the said property for valuable consideration paid to the then registered owner at a purchase price for a sum of Kenya Shillings One Thousand (Kshs. 1,000,000/=) and the same was transferred to him through a transfer dated 10th February, 2005 by Mohydaean Mohamed Hatimy –while the 2nd and 5th Interested Parties acquired their property through Transfer dated 10th February, 2005 and 18th April 2005 respectively.

He stated that after the said Saida Twahir Mohamed Hatimy transferred her interest in Land Reference No. 8826 Section 1 Mainland North there was an endorsement in the title where sub-division of the

suit property was allowed by the Defunct Municipal Council of Mombasa which issued a sub-division Certificate dated 19th August 1996 approving sub-division of the property into Land Reference No. 13630 to 13647.

He stated that on 9th August, 2016 he conducted an official search at the Land Registry in order to ascertain the true ownership of the above mentioned parcel and the search confirmed they were the bona fide registered and true registered owner.

27. He stated from the time of purchasing the property in the year 2005 they had been in occupation of the whole portion of land measuring approximately 0.0156 Hectares until sometimes in the year 2006 when some of the Petitioners illegally invaded and trespassed into her parcel of land and commenced construction of their illegal structures therein.

He deponed that the petitioner had themselves expressly admitted in their Petition that they were and remained landless people a clear admission that they had no interest whatsoever in the suit land fare for being in occupation and possession wrongly, illegally and unlawfully of the suit land. He deponed that it was after the Petitioners unlawfully, illegally and wrongfully trespassed and occupied into the Respondent's land that they commenced the illegal structures without their consent and approvals where they had been carrying their business activities. He further stated this land had always been private and never was it public or communal land as implied by the Petitioners without any basis and being unfounded whatsoever a fact which they admit from their own pleading's to wit the suit property was owned by Kalidas Kanji and Company Limited and Twahir Mohamed. He refuted the assertion by the Petitioners to the effect that the land was left or set aside for communal and/or public purposes.

28. He held that they were only seeking for sympathies and leniency from court by clinging upon the breach of fundamental rights. He asserted that the fact that the land remained open, vacant or undeveloped did not make or convert it to a public and/or communal land as there was no documentary evidence indicating the land was surrendered to either the Defunct Municipal Council of Mombasa or the court of Kenya or its agency for purposes of public or communal use. Nor was there such evidence to show that the petitioners were allocated, permitted and/or granted the right by any authority to use, process and/or occupy the said portion of land. Therefore, their occupation and use of the land remain trespass, illegal and unlawful and an infringement of the Respondents fundamental rights and freedom. The right to protection of their property, equal protection of the law fair administration action and equality.

29. On the fact they Petitioners hold that they acquired interest onto the parcel of land from the fact that they were frequently issued with business permits by the 1st Respondent, was misplaced as the 1st Respondent had never had such interest of the land the same being in the legal preview of the 2nd, 5th and 6th Interested Parties and which had never been passed to the 1st Respondent. They held based on the legal principles of "Nemo dat quad non habet" meaning the 1st Respondent could not pass any interest of land to the Petition as they never had it in the first place.

He argued that granting of business permit was difficult, separate and distance to passing the interest in land to another person and the same never validated their illegal use, occupation and ownership of the land.

With regard to the defence that the Petitioners acquired land by land adverse possession, the Deponent stated that the Petitioners had never been in occupation of the suit land for more than the prescribed period without any interruption and that there was no order from a competent court of law confirming the petitioner ownership by way of adverse possession and in any case their annexed business permits were for the years 2011, 2012, 2013 and 2014 which proved that their occupation was as recent as six

(6) years and where upon a period was interrupted from the notices issued to the Petitioners to vacate the suit land.

30. From the legal notices issued, the Petitioner sought for time to cause proper registration of the land from the government agencies an indication they were occupying land which was unregistered. He held that the sub-division of the parcel No. 8826 Section I mainland North and the transfer of the divided portion was proper, lawful, legal and procedural there was no illegality infringement or breach of the rights and freedom for the Petitioners.

He deposed that they had suffered substantially and incurred huge financial loss and expenses trying to cause the Petitioners vacate the suit land and in prosecuting this Petition. As the registered owner thy had been paying rates annually and requisite fees to the County Government of Mombasa, they applied for the development plans and recovered the approvals. Indeed upon complaining to the County Director of Education Mombasa vide a letter dated 27th May, 2015, the 1st Petitioner was advised to re-locate the school trading as Precious Browned School to another area.

Further, on 25th August, 2016, the Chief Officer Land Planning and Housing Mombasa wrote to the Director of Inspectorate advising the Petitioner to remove all the structures on the suit land as they were there illegally but they all refused to heed.

Based on the advise by their advocate on record the Deponent opined that the Petitioner: -

a. Never demonstrated that they were entitled to the suit land.

b. They never came to court with clean hands.

c. They were marred with non-disclosure of material facts and deliberate attempt to mislead court.

In view of all the above, they urged court to dismiss the Petition with costs.

III. The 1st Respondent Replying Affidavit.

31. On 18th February, 2020 the 1st Respondent while opposing the Petition dated 24th September, 2014, filed a 14 Paragraphed Replying Affidavit sworn by Dr. June Mwajuma, the Chief Officer Lands and Physical Planning dated even date. She posited that based on the advise by her Advocate the Petition was premature, misconceived, misled lacked merit, it was speculative and trying to evade eviction as envisaged by the *Public Health Act* hence ought to be dismissed with cost.

She held that the Petitioners had admitted that prior to the sub-division of the property originally No. 143/2 Section I Mainland North was privately owned, but eventually it was sub-divided to numerous portions with the approval of the defunct Mombasa County Council which were all proper and legal and title deed issued thereof as private properties she held that since the suit property remained to be private property and the Petitioner were not the registered owners, their occupants on it was unlawful, illegal and wrongful trespass.

She correctly held that the 1st Respondent were not the owners not have any claim over the suit property and then the fact they would be issuing business permits to the Petitioner's periodically did not confer any ownership to the property nor any right to transfer any interest over the land to the Petitioners and besides it had been issuing notices for the demolition of the said structures on the suit land. All done and acting under its legal mandate to regulate the use and development of land within its jurisdiction and its requirement to approve any building before its construction.

She asserted that the 1st Respondent never issued certificate of title deed as that responsibility was by the 2nd Respondent.

Finally, she refuted it that there was no infringement and/or breach of the fundamental rights by the petitioners as alleged perpetrated by the 1st Respondent and hence urged court to dismiss the Petition with costs.

VI Submissions.

32. On 19th January, 2022 while in the presence of all the parties herein, Court directed that each files their written submissions, on 23rd February, 2022 court confirmed all the parties had fully complied and a judgment date was reserved.

On 23rd February, 2022 all the Advocates were accorded ample time to orally highlight their written submission which they articulately did with great humility, diligence and devotion. Court sincerely express its deepest gratitude to them.

A. The Petitioners Written Submissions

33. On 4th February, 2022, the Learned Counsel for the Petitioner the Law firm of Messrs. Gikandi and Company Advocates filed their written submissions dated on the even date. Mr. Gikandi submitted by reiterating the contents set out in the Amended Petition dated 23rd March, 2021 and amplified through the three (3) affidavits sworn by Pamela Wanjiru, James Nyamasyo and James Kariuki all filed in court on 8th November, 2019. He submitted that from the evidence adduced and the Supporting Affidavit of David Syandi Kasanga the Petitioners produced documentary evidence including photographs whereby it indicated the Respondents had in one way or the other been fully aware of the presence and occupation by the Petitioners of the open space captured in the Petition Namely Plot Nos. 13636, 13638. 13640,13642 and 13643 which plots were originally part of the Plot then No. 143/2 sections I/MN The Plot was registered in the names of the Interested Parties.

34. He held that the Petitioners respectively carried on their businesses of a School, Selling Wines and Spirits and one part was used for recreation and meeting grounds. The Respondents had severally licenced some of the Petitioners to enable the said Petitioners to lawfully carry out their businesses. He opined that the 1st Respondent conceded that it issued notices to the Petitioners to vacate from the said property through notices.

He held that it had not been clear why the Interested Parties had never disclosed to the Honorable Court the Material facts that after allegedly buying the land in the year 2005 it was until 2006 that Petitioner moved in and started construction of the structure which was not truthful at all also the counsel wondered why no action was ever taken against the invaders either at the point of invasion they submitted that neither the Respondent not the Interested Parties had filed a Cross Petition seeking for orders for eviction, of the Petitioners or demolition of their buildings developed thereon. To him the occupation of Petition onto part of the suit land had been open and uninterrupted until they received the notices issued by the 1st Respondent on 2nd May, 2015. He argued that they had been public land and not private land and it was later on that the said open space was registered in the name of the 7th Affected Parties who proceeded to sub - divide it further to create the 6 sub-plots now registered in the names of the 1st to 6th Interested Parties. He submitted that the 7th Affected Party had not filed any affidavit to rebut the positive averments made by the Petitioners with regard to her acquisition of the said open space and her subsequent transfer of the six sub-plots to the 6 interested parties. Further, the 2nd Respondent had completely failed to file an affidavit to explain to court the genesis of the six (6) plots of land and that from the Certificate of title No. 8826 whereby the entries run from no. 11 and not the other entries Nos. 1 to 10 which the deponent has wilfully withheld from disclosing.

35. He argued that none of the Respondents or the interested parties have controverted the evidence by Petitioners to the effect that they entered a part of the open space and which was currently registered in the title deed by 1st to 6th Interested Parties and having entered it they started residing and carrying out their business activities thereon which were well known by the Government of Kenya and the County Government of Mombasa.

To buttress their point, the counsel relied on the decision of "*Timsales Limited –Versus- Harun Thuo Ndungu* (2010) eKLR." He rebutted the evidence adduced by the Respondents and the Interested parties to the effect that the suit land had been private land and never a communal nor public land. In saying so, the Learned Counsel held that on evidence was adduced to demonstrate the 6 sub-division were created from any other land other than an open space that had always been in existence.

Besides, the Claimant were already time barred by the provisions of Section 7 of the Limitation of Action Cap. 22 which required that a claim for recovery of land should be filed with 12 years. He held that the Interested Parties had admitted the Petitioner occupied land from the year 2006 yet none of the Petitioners had been occupying the suit property not filed a suit for the recovery of the suit land from the Petitioners, as such suit would be statutory barred by Section 7 of the Limitation of Actions Cap 22. Further, even after being served with the Petition in the 2014 they still never saw any need to have filed a Cross - Petition. His contention was, that whether the Petitioner were occupying private or public land was neither here nor there as the law had now developed to the extent that it recognized that even squatters had right that had to be respected and that such squatters could not be evicted without due process and that the same should be done in a civilized manner. On this point he relied on the decision of "*Kepha Omondi Onjuro – Versus - Attorney General & 5 Others* 2015 eKLR and *Port Elizabeth Municipality-Versus- Various Occupiers* (2005) (1) SA 217 (CC)"

36. He submitted that the Petitioners had invested a lot of finances to realize the business activities which are carried out on the suit property. Additionally, he opined that the Petitioners derived the means for their survival by carrying out the businesses that they operated, and hence stood a chance of being beggars.

His contention was that the Respondents and the Interested Parties had allowed the Petitioner to quietly and peacefully occupy and develop part of the suit property. They had issued them with permits and licences creating a classic case of estopel from acting as through the representation they had made either by their conduct and written contrary to the Provisions of Section 120 of the *Evidence Act* Cap 80. On this point he relied on the decisions of "*Morgate Mercontile Co. Ltd. –Versus- Twitchings* (1976) 1 Qb 225 and *John Mburu –Versus- Consolidated Bank of Kenya* (2015) eKLR"

Furthermore, he argued that the 1st Respondent had contended that the Petitioners had constructed on a road reserve and the notices issued to them were to the effect that they should demolish their structures.

He strongly opposed and was apprehensive on the illegal and forceable evictions likely to be caused by the Respondent taking that there was no court order, the same would traumatize the Petitioners having been in occupation for a long period, not having been accorded their national justice right to be heard before being condemned and it would create a negative socio political result – whereby them and their families would be rendered destitute as many of them would turn to other undesirable criminal activities in order to survive. He appealed to the Government of Kenya to step in and settle its people as they had done in the famous case of Witiki farm whereby the Government was compelled by the Circumstances to settle the squatters to avert a situation whereby eviction of invaders was likely to create serious socio political crisis.

37. He largely castigated the 1st Respondent and the Affected Parties conduct of wanting to evict the Petitioner from the suit land by issuance of 14 days notices and not the legal eviction court orders, and purporting to apply the *Public health Act* but clearly acting to protect the interest of the Interested Parties and Affected Parties – in other words wanting to use a short cut.

He urged Court to allow the Petition at least to the extent that the existing status quo on the suit property to be maintained together with costs.

B. The 1st Respondents Written Submissions.

38. On 12th August 2020, the Learned Counsel for the 1st Respondent the Law Firm of Kithi and Company Advocates filed their written submissions dated the same date. He submitted that the Petitioner filed by the Petitioners was a breach of the doctrine of Exhaustion premature for having failed to fully exhaust mechanisms provided for under the *Public Health Act* as the Petitioner's case there was an eminent threat of eviction on the basis of the notices issued by the 1st Respondent to one Ronald Musili. The Learned Counsel stated that a careful interrogation of the notice indicated that the 1st Respondent had inspected a building owned by the said Ronald Musili concluded that it was on a road reserve, the structure lacked an approval plan for the building and sanitary facilities. According to the Learned Counsel, pursuant to this Mr. Ronald Musili was asked to provide approved plans within 21 days, failure to which a complainant would be lodged before a Resident Magistrate for the enforcement of nuisance to prohibit recurrence in accordance with the Provisions of Section 120 of the *Public Health Act* whereby he provided the procedure to detail.

39. His contention was that the Petitioners had constructed illegal structures on the suit properties without proper approvals from the 1st Respondents and hence it caused them to be issued with Notice of demolition of structures considered to be on road reserve. According to the Learned Counsel the 1st Respondent was acting under its legal mandate to regulate the use and development of land within its jurisdiction and in particular its requirement to approve building before its construction.

To buttress on this point, he relied on the case of "Republic – Versus- Independent Electoral and Boundaries Commission & Another Ex - Parte Robert K. Nyange".

On the issue of the ownership of the suit property, the Learned Counsel submitted that the Petitioners themselves had conceded that the property prior to its sub-division was originally plot No. 143/2 Section 1 Mainland North which was privately owned. He held that the said property with the approval of the defunct Municipal Council of Mombasa sub-divided into several other properties. The said sub-division created therefrom, proper titles were issued by the 2nd Respondent and thus remained private properties and had never been converted and/or surrendered to either the 1st Respondent through the defunct Municipal Council of Mombasa or the Government of Kenya or any of the its agencies for purposes of public and communal exploit.

40. He argued that it was settled law that a certificate of title would be taken to prima facie ownership of property not unless the same was challenged on grounds of fraud and/or it was acquired un-procedurally or illegally. In the instant case the Petitioners had not made any attempt to challenge and prove the illegality of the titles held by the 2nd, 5th and 6th Interested Parties.

He argued that the contention by the Petitioners to the effect they had been issued with business licenses and/or permits to them translated to acquisition of Interests over the suit property did not in any way or form conform land ownership. To support him on this point he relied on the authority of "*Veronica Njeri Waweru & 4 Others – Versus- City Council of Nairobi & Others* (2012) eKLR"

He castigated the Petitioners for relying on the defence of Land Adverse Possession to attain title to the suit land in that they were contrary to the Provisions of Order 37 Rule 7 of the *Civil Procedure Rules* and Section 38 of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya – Land Adverse Possession was prescriptive in nature and the Petitioners could not claim the same when no court had conferred such ownership over the suit properties in them.

41. The Learned Counsel argued that the Interested Parties were the owner of the suit property to the relief sought from the Petitioner by virtue of the Provisions of Articles 40, 65 and 47 of *the Constitution* of Kenya, while the Petitioners were Licensees on the suit land.

In conclusion the Learned Counsel held that there was no infringement not violation of the fundamental rights of the Petitioners and urged court to find that the Petition lacked merit and should be dismissed with costs.

C. The 2nd, 5th and 6th Interested Parties Written Submissions

42. On 3rd August, 2021, the Learned Counsel for the 2nd, 5th and 6th Interested Parties the law firm of Messrs. Khalid Salim & Company Advocates filed their written submissions. Mr. Khalid Salim Advocate submitted that the petitioners had no title document to show that they own the suit property. He stated that the Petitioner claimed that the fact that the 1st Respondent had recognized their lawful existence on the property and had issued them with permits for their businesses it meant that they had accrued rights over the property and thus the only proof ownership they were able to produce was copies of business permits issued to them.

His contention was that as opposed to the above the 2nd, 5th and 6th Interested Parties who were registered owners of sub-division No. 13536 Original No. 8826/10 of sections I Mainland North CR No. 39143 Land Reference Nos. 13640 Section 1 Mainland North and Land Reference No. 13643 Section 1 Mainland North had produced copies of the Certificate of title deeds to that effect for the said plots. Further, the Advocate argued that they had also produced evidence that the properties were transferred to them on or about 21st September, 2005.

43. He cited the provisions of Section 26 of the *Land Registration Act* and held that a title could only be challenged instances where the proprietor acquired it through fraud or misrepresentation or through a corrupt scheme. He argued that the Petitioners had presented nothing showing any illegality, fraud or misrepresentation in the part of 2nd, 5th and 6th Interested Parties. He held that their titles were lawfully and procedurally acquired and thus deserved protection under the las. He reiterated that the issuance of business permits by the 1st Respondent did not confer any proprietary rights or ownership of the suit property to the Petitioners. It was only a licence for them to run their business on this point he relied on decision of Veronica Njeri Waweru (Supra) and *Amos Gikonyo Tununga – Versus - Dunacan Maingi* (2016) eKLR.

He argued that the Petitioners had admitted that the suit property was not public land but was initially owned by Kaldas Kanji and Company Limited and Twahir Mohamed and later acquired by Siada Twalib Mohamed Hatimy and thus the property had never been converted to public land.

With reference on whether the Petitioner had acquired the land by way of Land Adverse Possession for having been in the suit land uninterruptedly for a period of over twenty (20) years. He submitted for one to have acquired property by this doctrine, the claimant must be demonstration that there was open, continuous, notorious and uninterrupted possession for a period of at least twelve (12) years. Further, the claimant must prove they did not have permission to enter into the suit land. The Claimant was expected to furnish in court evidence to prove that the suit land where he/she was claiming adverse possession indeed belonged to the Defendant at least an extract of the title

deed attached to tell the history of the land. He argued that the Petitioners never produced any of this evidence and that they had never been in occupation for twelve (12) years as they were only in occupation from the year 2005. Besides no court had conferred any such right or ownership of the property on them. He held that they had never filed an application seeking for the land to be registered in their favour by way of land adverse as it was provided for under Order 37(1) of the Civil Procedure Rules 2010 and Section 38 of the Limitation of Action Act Cap 22. He held that they never made that prayer from their filed pleadings.

Finally, it was the Learned Counsel that non of the fundamental rights and freedoms of the Petitioners including right of property under Article 40, right to fair administration action, right to dignity and equal protection under the law, right to education and right to protection of economic interests were violated, threatened and denied which the Petitioner did not have.

44. His contention was that their claim that they had an interest to occupy and use the suit property fell as by so doing they were depriving the actual owners of the suit land their right to the property. He argued that they had no proprietary interest in the land and has no basis to be claiming that their rights under Article 40 had been violated had no basis as they never owned land in the first place and hence could not have been deprived of that which they had no right over. He further submitted that the Petitioner had not been deprived of their rights to fair administration action simply because the conversion of open space from public to private land never involved them as a matter of property having been the occupiers of the land did not arise at all no such a thing took place whatsoever. Besides, assuming the land was open and vacant did not make it public land.

Further, the fact that the 1st Respondent issued them with business permit did not confer them with ownership to the land and hence could not confer the ownership right to them thus one that they did not have in the first place. He reiterated there was no court order granting them right over the land through land adverse possession. they were illegal trespassers and occupiers and this could not be claiming violation of fait administrative action.

His contention was that the assertion that the Petitioners would be deprived their economic rights, be declared destitute and homeless and their rights to dignity and the rights of their children attending Precious Brown be violated due to the intended evictions could not be proved and hence remained unfounded before this court as there was no such evidence produced to this effect. On the contrary the legal counsel argued that its actually the right to property under Article 40 of *the Constitution* of Kenya for the Interested Parties that which was violated by the Petitioners through their illegal and wrongful trespass and occupation of the suit land it's the Interested Parties being the rightful and legal owner to the suit land who had the right of protection under the law and were suffering as they could not possess and enjoy their land.

In conclusion, the Learned Counsel reiterated that the property belonged to the Interested Parties, the land was private and not public and the Petitioners were illegal and wrongful trespassers and occupants and were the ones who had infringed the rights of the Interested Parties. For these reasons, they urged court to dismiss the Petition and award costs to the 2nd 5th and 6th Interested Parties.

VI. Analysis and Determination

45. I have keenly assessed all the pleadings filed in this Petition, the very articulate written and tendered oral submissions, the myriad of authorities cited, the provisions of *the Constitution* of Kenya, 2010 and relevant provision of the law.

In order to arrive at an informed, fair and just decision, this Honourable Court has framed the following four (4) salient issues for its determination. These are:-

a. Whether the filed the Amended Petition dated 23rd March, 2021 and amended on 25th march, 2021 by the Petitioners and meet the established threshold of a Constitutional Petition set up.

b. Whether the Affected parties and the 2nd, 5th and 6th Interested Parties herein were the absolute legal and registered owners to all that suit land herein.

c. Whether the parties herein are entitled to the prayers sought from the filed pleadings herein.

d. Who will bear the costs of the filed Amended Petition.

Issue No. 1. Whether the filed Amended Petition dated 23rd march, 2021 and filed on 25th March , 2021 by the Petitioners meet the established threshold of a Constitutional Petition set up.

46. Before this court arrives at its informed decision it is guided by the recognition of the fact that the constitutional provisions which are at the core of the Amended Petition must be thoroughly reviewed and fully appreciated within the constitutional jurisprudence and Constitutionalism and its value as a whole. The said set out provisions cited by the Petitioners are mainly under Articles 10, 27, 28, 40, 47 & 53 of *the Constitution* of Kenya. For clarity sake, I wish to expound on them thus:-Article 10 (2) sets out all the national values and principles of Government that binds all the State offices, State organs, public offices and all persons whereas they apply or interpret *the Constitution*;Article 27 enshrines the principles of equality and freedom from discrimination;Article 28 recognises the right to human dignity.Article 40 (1) provides the right for every person to acquire and own property at any part of the Republic;Article 46 provides that the right to consumer rights.Article 47provides for the fair administrative action andArticle 53 provides for the right of Children.

The Honourable court has also taken deep cognizance to the importance and sensitivities apportioned to land in this country. Indeed, land is a source of livelihood and very emotive. It is not a matter to treat so lightly but with great care and circumspect lest one is misunderstood and it leads to grotesque conflict which may even cause blood shed as it has happened before and quite often.

47. Therefore, no citizen is to be deprived off his land by the State Or any public authority against his wish unless expressly authorized by law and public interest.

As a matter of course, *the Constitution* of Kenya under Article

259 (1) provides a guide on how it should be interpreted as such:-

This Constitution shall be interpreted in a manner that:-

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.....”

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.

Further, it is important to fathom that *the Constitution* is “a living instrument having a soul and consciousness of its own” . It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

Based on the principles set out in the edit of The Court of appeal case of the *Mumo Matemu – Versus – Trusted 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 – Versus - 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 "*Thorp – Versus – Holdsworth* (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".

48. In application of these set out principles for filing a Constitutional Petition to this case, the honourable court is fully satisfied that the Petitioners herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Amended Petition against the Respondents, the Affected parties and the Interested Parties herein and pleading for the prayers sought.

Issue No. 2. Whether the Affected parties and the 2nd, 5th and 6th Interested Parties herein were the absolute legal and registered owners to all that suit land herein.

49. All said and done, under this sub heading, this court underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of *the Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the *Land Act* No. 6 of 2012 provides the said methods as follows:

S. 7 Title to land may be acquired through:-

i. Allocations;

ii. Land Adjudication process;

iii. Compulsory acquisition;

iv. Prescription;

v. Settlement programs;

vi. Transmissions;

vii. Transfers;

viii. Long term leases exceeding Twenty one years created out private land; or

ix. Any other manner prescribed in the Act of Parliament.

The Brief facts

50. In this case, the facts of the case briefly are as follows. The Petitioners on the one hand held that the suit land was an open and public land which was initially owned by Kalidas Kanji and Company Limited and Twahir Mohamed. The said Kanji and Twahir Sub-divided the said plot into various plots but left the middle section of the said portion of land as open land for the public benefit and communal use. According to them, having done that the said Kanji and Twahir relinquished any interest in the said property. They stated that they all had been occupying and using part of the said communal land for over twenty (20) years. For this reason they claimed title by way of land Adverse possession. They claimed to have set up various businesses such as schools, hotels and stores which provided them with their daily subsistence. To them the 1st Respondent had at all material times recognized their lawful existence as they had approved and granted them with single Business Permits for the purpose of carrying out lawful businesses thereon. Over the years, the 1st Respondent repeatedly received Single Business Permit application from the Petitioner, approved the same received money for it and issued the said Permits to them.

51. To them, all the businesses situated within the same location were their sources of subsistence whereas without them carrying out these economic activities the Petitioners would be forced to beg or resort to unorthodox means such as prostitution or crime to provide for their families. By the acts of commission by the 1st Respondent, it had created a reasonable and legitimate expectation that they would have rights to use and occupy the land. They stated that upon conducting official searches and it emerged that the open land/area that Kanji and Twahir had left for communal use had been transferred to one Saidia Twahir Mohamed Hatimy on 2nd November, 2000 and issued with a Certificate of Title deed No. CR. 33878 marked as NJ-a. The said Saidia transferred her interests thereon to Hatimy, to Mohamed Hatimy for a consideration of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/=) on 7th November, 2004 there was a court order in Misc. Civil Application No. 46 of 2002 revoking the title to the said Saidia and any other subsequent transaction. On 21st September, 2005 the said Saidia and/or Hatimy mysteriously managed to have the said property sub-divided into several sub-division of which 18 sub-divisions were transferred to the Affected Parties herein. The remainder of the Sub-division were retained by other persons and Mohamed Hatimy. They held that despite the said sub-division and transfers having purportedly taken place, the Petitioners enjoyed quiet and peaceful occupation and possession of the said property without any interference from any person. According to them, it followed that the Petitioner acquired ownership rights to the suit property under the Doctrine of Land Adverse Possession and/or prescriptive rights over the suit property on account of being in possession of the land without any interference from any person for over twenty (20) years. Their contention was that the Respondents were state offices whose authority was for the benefit of the public which was to be exercised in a consistent manner with the purposes and objects of the Constitutions manner with the purposes and objects of *the Constitution* of Kenya – which demonstrated respect for the people, bringing honor to the nation and dignity to the office they hold promoting public confidence integrity to the offices they hold under Article 73 of *the Constitution* of Kenya. They further opined that the Respondents decision making ought to be guided by objectivity impartiality and not influenced by favourism, improper motives or corrupt practices. Hence they held that to them the Respondent's decision to allocate the suit property and their action to effect sub-divisions and register transfers over the said property in favour of the Affected Parties in total disregard of the existence of the Petitioners amounted to breach of the Public Trust entrusted to them. They argued that the allocation of the open space to the Affected Parties was illegal and the Honorable Court should not allow the same to remain in place as the said illegalities constituted a breach of the Petitioners fundamental rights enshrined in *the Constitution* of Kenya. They held that in particular the 2nd Respondent purported to create a sub-division scheme of the suit property without taking into consideration the existence of the Petitioners

who had always been in actual possession and occupation of land. They purported to allocate the land which was an open space and being a public land as shown by the records at the land registry it was not available for allocation to individuals or private purposes. He argued that should the land have become available for allocation from public to private, then in all fairness and as provided for under Article 47 (1) of *the Constitution* of Kenya and the Fair Administration Action Act priority ought to have been given to the Petitioners who had been in physical occupation of the it for over 20 years.

52. They further contended that under the provisions of Article 27

of Constitution of Kenya 2010, the Petitioners were entitled to

equal protection and equal benefit of the law, Equality including

the full and equal enjoyment of all rights and fundamental freedom, women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres, state or any person should not discriminate directly or indirectly against another person's on any ground including sex, marital status, ethnic or social origin, disability or culture. He opined that the said intended eviction would economically cripple and thereby expose and reduce the Petitioners to a state of poverty, desperation and homelessness which would further violate their right to health, and life human dignity and security of person.

53. They cited the provisions of Article 53 of Constitution of Kenya where every child has the right to free and compulsory basic education and to be protected from all forms of violence. To him the intended capricious and illegal demolition of the said academic institutions would interfere with the Children's right to free and compulsory basic education. Besides, the 1st Respondent had the responsibility to ensure that all schools going children in the County of Mombasa receive the free and compulsory basic education. But he held in effecting the intended eviction the 1st Respondent would only be exposing the said children to other forms of violence which were frowned upon by the said Constitution of Kenya. They further made reference to the Provisions of Article 46 of *the Constitution* of Kenya, the Petitioner have the right to protection of their economic interests. The demolition of the school, hotels and stores would only impoverish them as their economic interests would be destroyed, and by uprooting them cause them to suffer irreparable losses as the Petitioners would have lost the only means that they had for their daily survival. Further, the children who attended the said school would suffer unimaginable losses as they would have lost their opportunity to study in a school of their choice. In the long run, they averred that in light of the foregoing circumstances they prayed for appropriate orders as sought from the Petition.

54. On the other hand the Respondents and the Interested Parties herein held that they were all the legal proprietors of suit property known as (a) 6th Interested Party – Land Reference No. Sub-Division No. 13536 (Original No. 8826/10) of Section Mainland North CR. No. 39143 (b) the 2nd Interested Party was the registered owner of Land Reference No. 13640 Section Mainland North and (c) The 5th Interested Party was the registered owner of Land Reference No. 13643 Section 2 Mainland North all situated in Kongowea in Mombasa. They annexed true and certified copies of the said certificate of Title marked as "AOA – 3" and "AOA - 4". They held that prior to the sub - division the parcels were Land Reference No. 8826 (Original No. 143/2) Section Mainland North which was owned by Saida Twahir Mohamed Hatimy. The 6th Interested party stated that he acquired the said property for valuable consideration paid to the then registered owner at a purchase price for a sum of Kenya Shillings One Thousand (Kshs. 1,000,000/=) and the same was transferred to him through a transfer dated 10th February, 2005 by Mohydaean Mohamed Hatimy – while the 2nd and 5th Interested Parties acquired their property through Transfer dated 10th February, 2005 and 18th April 2005 respectively.

They held that after the said Saida Twahir Mohamed Hatimy transferred her interest in Land Reference No. 8826 Section 1 Mainland North there was an endorsement in the title where sub-division of the suit property was allowed by the Defunct Municipal Council of Mombasa which issued a sub-division Certificate dated 19th August 1996 approving sub-division of the property into Land Reference No. 13630 to 13647. They on 9th August, 2016 conducted an official search at the Land Registry in order to ascertain the true ownership of the above mentioned parcel and the search confirmed they were the bona fide registered and true registered owner. To them from the time of purchasing the property in the year 2005 they had been in occupation of the whole portion of land measuring approximately 0.0156 Hectares until sometimes in the year 2006 when some of the Petitioners illegally invaded and trespassed into the suit land and commenced construction of their illegal structures therein. They held that the Petitioners had themselves expressly admitted in their Petition that they were and remained landless people a clear admission that they had no interest whatsoever in the suit land fare for being in occupation and possession wrongly, illegally and unlawfully of the suit land. It was after the Petitioners unlawfully, illegally and wrongfully trespassed and occupied into the Respondent's land that they commenced the illegal structures without their consent and approvals where they had been carrying their business activities. They further stated this land had always been private and never was it public or communal land as implied by the Petitioners without any basis and being unfounded whatsoever a fact which they admit from their own pleading's to wit the suit property was owned by Kalidas Kanji and Company Limited and Twahir Mohamed. They refuted the assertion by the Petitioners to the effect that the land was left or set aside for communal and/or public purposes. They denied there was any breach of fundamental rights. They asserted that the fact that the land remained open, vacant or undeveloped did not make or convert it to a public and/or communal land as there was no documentary evidence indicating the land was surrendered to either the Defunct Municipal Council of Mombasa or the court of Kenya or its agency for purposes of public or communal use. Nor was there such evidence to show that the petitioners were allocated, permitted and/or granted the right by any authority to use, process and/or occupy the said portion of land.

Therefore, their occupation and use of the land remain trespass, illegal and unlawful and an infringement of the Respondents fundamental rights and freedom. The right to protection of their property, equal protection of the law fair administration action and equality.

55. The Respondents and Interested Parties disregarded as misplaced fact to the claim held by the Petitioners that they acquired interest onto the parcel of land from them being frequently issued with business permits by the 1st Respondent. In saying so, they argued that the 1st Respondent had never had such interest of the land the same being in the legal preview of the 2nd, 5th and 6th Interested Parties and which had never been passed to the 1st Respondent. They held based on the legal principles of "Nemo dat quad non habet" meaning the 1st Respondent could not pass any interest of land to the Petition as they never had it in the first place.

They argued that granting of business permit was difficult, separate and distinct to passing the interest in land to another person and the same never validated their illegal use, occupation and ownership of the land.

With regard to the defence that the Petitioners acquired land by land adverse possession, the Deponent stated that the Petitioners had never been in occupation of the suit land for more than the prescribed period without any interruption and that there was no order from a competent court of law confirming the Petitioner ownership by way of adverse possession and in any case their annexed business permits were for the years 2011, 2012, 2013 and 2014 which proved that their occupation was as recent as six (6) years and where upon a period was interrupted from the notices issued to the Petitioners to vacate the suit land. From the legal notices issued, the Petitioners sought for time to cause proper registration of

the land from the government agencies an indication they were occupying land which was unregistered. He held that the sub-division of the parcel No. 8826 Section I mainland North and the transfer of the divided portion was proper, lawful, legal and procedural there was no illegality infringement or breach of the rights and freedom for the Petitioners.

56. They stated that they had suffered substantially and incurred huge financial loss and expenses trying to cause the Petitioners vacate the suit land and in prosecuting this Petition. As the registered owners, they had been paying rates annually and requisite fees to the County Government of Mombasa, they applied for the development plans and recovered the approvals. Indeed upon complaining to the County Director of Education Mombasa vide a letter dated 27th May, 2015, the 1st Petitioner was advised to re-locate the school t/a Precious Browned School to another area. I believe that is adequate on facts of the case.

57. In Kenya, by dint of Section 107 of "The *Land Registration Act*" of 2012, the law applicable to this matter here for title deeds that were issued in the years 2005 when the Certificate of Titles were supposedly issued to the Affected Parties and the Interested Parties was the Registration of Title Act, Cap. 281 (Now Repealed) and the relevant Sections 22 and 23 (1) of the RTA.

> " Section 22(1) "Whenever land comprised in a grant has been transmitted as provided, the registrar shall, on payment of the prescribed fee a certificate of title in favour of the proprietor....."

Section 23 (1) of the Act provides that:-

> " The Certificate of title issued by the Registrar to the purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the grounds of fraud or misrepresentation to which he is to proved to be a party. ....."

Nonetheless, the effect of the Registration of Lands is founded in the provisions of Section 24 of "The *Land Registration Act*' which provides as follows:-

> " Subject to this Act – The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenances thereto and;

To advance on this legal preposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be the "prima facie" evidence of the stated registration. The Certificate of Lease held by the land owner is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of "The *Land Registration Act*" No. 3 of 2012 provides as follows:-

> " The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever....."

This fact is strengthened by the following decisions - "ELC (Nku) No. 272 of 2015 (OS) – *Masek Ole Timukoi & 3 others – Versus- Kenya Grain Growers Ltd & 2 others* and "ELC (Chuka) No. 110 of 2017 – *M'Mbaoni M'Thaara – Versus- James Mbaka*. And in Civil Appeal 60 of 1992 – 'Dr. Joseph M. K. Arap Ngok –Versus- Justice Moijo Ole Keiwua' where courts has held that:-

'It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.'

58. Nonetheless, the main bone of contestation in this suit are four (4) fold, namely:- a). the allegations meted by the Petitioners that the suit property which was public and open land and which they had occupied and carried out businesses for their survival and livelihood had been illegally issued to the Affected Parties and Interested parties at their chagrin without considering them as a first priority b). the allegations that their were intentions of illegally evicting them from the suit land c). the assertion that they had acquired the title to the suit land based on the legitimate expectation created by the 1st Respondent by periodically issuing them with single business permits to carry on their business on the land, approved their development plans and the doctrine of land adverse possession having occupied and used the suit land continuously and interruptedly for over twenty (20) years and d). The claim by the Interested Parties of being the legal and absolute owners to the land and that single permits did not confer title to the land. Besides, they argued that the 1st Respondents were never the owners to the land and hence could never confer what they that they never held in the first place.

59. In order for this Honorable Court to effectively deal with the afore stated four (4) issues, I wish to cite the provisions of Section 26 (1) of the *Land Registration Act* Verbatim:-

> " The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

In the case of "*Joseph Komen Somek - Versus - Patrick Kennedy Suter* ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR - clearly spells out the purpose of above provisions of Section 26 (1) (b) is to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title or in this case Lease is doubtful suspect or obtained by fraud or forgery un procedurally, illegally or corrupt means or by mistake or omission as envisaged under the above Provision of Section 26 (1) of *Land Registration Act*, the Provisions of Section 80 (1) & (2) of *Land Registration Act* for the cancellation and rectification of the title comes to play – "*Peter Njoroge Nganga – Versus - Kenya Reinsurance Corporal Limited & Others*" ELC (Kjd) No. 204 of 2017."

Despite all these, the Court has also noted the contradiction meted out by the 1st Respondent and the Interested parties in their pleadings and through out the proceedings to the effect that the suit land was set aside for road Reserve. In that case, one wonders how the said land would be allocated to any other person. This would be an issue the Petitioners may want to consider picking up in future if they so desired to challenge the validity of the title deeds issued to the Affected parties and the Interested

Parties. But for the purposes of this proceedings we leave at that. I dare say no more. Additionally, I wish to dwell on the concept of bona fide innocent purchaser for value. The said concept has been well captured in the now famous case of "K*atende Haridar & Company Limited* (2008) 2 EA 173, where the Court of Appeal of Uganda held that:-

a. "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the properly offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki Vs. William Nyanzi*, High Court Civil suit number 434 of 1996, must prove that:-

b. He holds a Certificate of title;

c. He purchased the property in good faith;

d. He had no knowledge of the fraud;

e. He purchased for valuable considerations;

f. The vendors had apparent valid title;

g. He purchased without notice of any fraud; and

h. He was not party to the fraud.

Suffice it to say, the above legal position seem to be changing. In the case of "*Mwangi James Njehia & Another – Versus – Simon Kamanu*', Civil appeal no. 177 of 2019, the Court of appeal on this matter held:-

"We nonetheless wish to state that the law, including case law, is not static and the above requirement which were entered over twenty (2) years ago cannot be said to have cast in stone. We hold the vie that (e) above will need to be revisited and the word "apparent" be done away with altogether. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, in collusion of officers in the land registries, been transplanted at the Lands Office and intending buyers have duped to believe that such documents are genuine and on the basis they have 'Purchased' properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land registries at Nairobi....."

On the other hand, this Court recognises the fact that the title deeds being held by the Affected Parties and the Interested parties and the root of title and the process upon which they were acquired have been challenged by the Petitioners. This Court cannot just sit down and ignore these very pertinent issues raised by the Petitioners. In saying so, the Court wishes to rely on the Case of "Court of Appeal *Munyu Maina – Versus- Hiram Gathiha Maina* (2013) eKLR" where court held:-

> " When a registered property root of title is under challenge it is not sufficient to damage the instrument of title as a proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how the acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register..... however, When a registered property root of title is under challenge it is not sufficient to damage the instrument of title as a proof of ownership. It is this instrument of title that

is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how the acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register"

60. The dangling of the title deed does not confer legal ownership to the land particularly where the legality and the title is questioned and challenged as it is in this case. The Petitioners argued that the Principles of indefeasibility of title does not apply where the title was found to have been issued fraudulently, irregularly or through unlawfulness. Unfortunately, this Court reiterates that the Respondents nor the Interested Parties ever controverted nor rebutted this arguments or challenges meted out by the Petitioners by filling Cross Petitions. Taking that as in the case of the ordinary suits instituted through a Plaint under the *Civil Procedure Act*, Cap 21 and Civil Procedure rules, 2010, the Defence and Counter Claim is not available to the Respondents nor the Interested Parties herein under *the Constitution* Petition filing of Cross Petition is provided for under Rules 15(3) of "*The Constitution* of Kenya (Protection of Rights & Fundamental Freedom) Practice & Procedure Rules, 2013" (the Mutunga Rules) which spells out thus:-

> " The Respondent may file a Cross - Petition which shall disclose the matter set out in Rule 10 (2)"

As it is trite law parties are bound by their own pleadings an issue I have deliberated on to details below.

Issue No. 3. Whether the parties herein are entitled to the prayers sought from the filed pleadings herein.

61. Under this Sub – heading, this Honourable Court finds that the Petitioners are entitled to the relief sought. In saying so, the Court draws this legal preposition on the following grounds:- Firstly, on the contrary, none of the Respondents nor the Interested Parties have demonstrated any entitlement to their defence to the fact that they genuinely acquired and hence were the absolute owners and held original Certificate of Title Deeds to the suit land through a filed Cross Petition. Perhaps, the most appropriate means to demonstrate this would be by them filing a usual suit under the common law through a Plaint. They only vehemently mounted strong defences and that was all. Secondly, it is trite law on "the principle of the burden of proof" and as founded under Sections 107 and 108 of "The *Evidence Act*" Cap 80 that he who alleges ownership has to proof it by showing an original certificate of Title deed. None of the parties herein have been able to proof the allegation of fraud by filing a ground report by a Land Surveyor or an investigation agency or forensic document examiner, or a report from the Division of Criminal Investigation Office being the established expert on demonstrating the allegation fraud were produced nor summoned. Indeed, and notwithstanding the provisions of Article 159 (1) and (2) of *the Constitution* of Kenya, the rule of the parties are bound by their own pleadings come to play here. Under the provisions of Order 2 Rule 6 of the Civil Procedure Rules, 2010 parties are bound by their own pleadings. On this aspect, I have strongly relied on the case from the Malawi Supreme Court of Appeal – "*Malawi Railways Limited – Versus – Nyasulu* (1998) MWSc 3" in which the learned Judges quoted with the approval from an article by Sir. Jack Jacob entitled "The Present Importance of Pleadings". The same was published in 1960 where the author had stated as follows:-

> " As the parties are adversaries, it is left to each one of them to formulate 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 thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is bound by the pleadings of the parties as

they are themselves. It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by pleadings. 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 each event, the parties themselves, or at any 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.....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. In such an agenda, there is no room for an item called "Any other business" in the sense that points other than those specific may be raised without notice".

62. In addition to this issue, this Honourable Court has also relied onto another case from the Nigeria Supreme Court in the case of "*Adetoun Oladeji (NIG) Limited – Versus – Nigerian Breweries PLC* SC 91/2002 whereby Judge Pius Aderemi expressed himself as follows":-

> " .....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded"

It is based on this well founded legal reasoning that this Honourable Court found it rather difficult to consider the ostensible claim by the Interested parties to the ownership of the suit property merely advanced from filed defences and not properly pleaded unsustainable nor fathomable. They set the agenda and Court is bound by it.

Secondly, the claim of the land title claimed by the Plaintiff through the doctrine of Land Adverse possession is equally not attainable in law. Thy have not been able to support their claim of having been in occupation and used it uninterruptedly and continuously for over twenty years. Further, they have not demonstrated it, nor produced any Court order to this effect. They have also not shown an extract of the title deed of the owner of the suit land which are required by law under Order 37 of the Civil procedure Rules, 2010 and Section 38 of the Limitation of Actions, Act, Cap. 22 of the laws of Kenya. Definitely their claim on the ownership to the suit land on this ground is far fetched. I fully concur with the Interested Parties herein that ownership to the suit land through the acquisition of single business permits or approvals issued by the 1st Respondents is not founded in law as the 1st Respondent never had ownership to the suit land in the first place.

63. This Court reiterates that the 2nd, 5th and 6th Interested Parties failed to file a Cross Petition justifying their claim to the suit land. Thus, its trite law that they cannot be granted what they never sought. Furthermore, the Respondents argued that the Petitioners were not entitled to the land as they had constructed on a road reserve and the notices issued to them were to the effect that they should demolish their structures.

64. On the other hand, the Petitioners cannot be conferred land ownership through issuance of business permits /license and Land Adverse Possession which was never pleaded its prescriptive. The Honourable Court has been persuaded to cite an authority strongly relied on by both the Respondents

and the Interested parties herein, the case of "Veronica Njeri Waweru (Supra) where Court held, to wit that:

> " The Petitioners have readily conceded that they were in occupation of the public land, a road reserve, for the past ten years. They have licenses to operate businesses but have no proprietary interest in the land...."

Further, this sentiment were also expressed in another case cited by the Learned Counsel for the Interested parties of "*Amos Gikonyo Turunga – Versus – Duncan Maingi* (2016) eKLR where court held:-

> " With due respect to the Learned Magistrate, the issue of license by the local authority to operate a business within its jurisdiction does not, in itself confer any proprietary licence or ownership rights or interest in the property from where the licensee has been licensed to operate his business. Much as the Respondent may have been licensed to operate within the Council's Municipality during the years 2008 and 2009, it did not ipso facto follow that he "owned" only particular location in the municipality merely because he held single business permits for those particular years; it was not demonstrated, in any event, that a licence to operate a single business in any particular year or years entitled the holder thereof to such permits in subsequent years ad inifinitum"

For these reasons the best interest of justice, equity and conscience is to have the current status quo to be maintained. There should be no intended illegal or forceable evictions by any of the Respondents nor the Interested Parties of the Petitioners who have occupied and use the land for carrying out their businesses for their survival and subsistence. There is even a school on the suit land. I am reminded of Madan, JA (as he then was) in the case of "*Chase International Investment Corporation and Ano. – Versus – Laxman Keshra & Others* (1978) eKLR 143; 143 (1976 – 80) 1 KLR 891" to the effect that:-

> " If the circumstances are such as to raise equity in favour of the Plaintiff and the extent of the equity is known, and in what way it should be satisfied, the Plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the Judge is to pass through them undeterred".

65. I now turn to the issue of Conservatory orders sought by the Petitioners. It is trite law that in an application for Conservatory Orders, under Article 23 of *the Constitution* the Court is not invited to make any definite or conclusive findings of fact or Laws on the dispute before it because that duty falls within the jurisdiction of court which will ultimately hear and determine the substantive dispute in the main Petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it to determine whether the Applicant has made out a Prima facie case to warrant grant of a Conservatory Order. Secondly the court has the duty to determine if the Conservatory order is not granted, the Applicant will suffer prejudice and Thirdly, it is to be borne in mind that Conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the Court in the public interest "In the case of *Platinum Distillers Limited –versus- Kenya Revenue Authority* (2019) eKLR it held :- "The guiding principles upon which Kenya courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of *the Constitution* are settled. The law, as I understand it, is that in considering an application for Conservatory Orders, the court in not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the Petition. The jurisdiction of the court at this point in limited to examining and evaluating the material placed before it, to determine whether the Applicant has made out a Prima

Facie case to warrant grant of Conservatory Orders. the court is also required to evaluate the pleadings and determine whether denial of the Conservatory orders will prejudice the Applicant" The Law on Conservatory orders is now well settled in this jurisdiction and is backed up by myriad of authorities. For instance in the case of "*Centre for Rights Education and Awareness (CREAW) and Another –vs- Speaker of the National Assembly and 2 Others* [2017]eKLR the Court was emphatic that:-

> " A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation, are being violated or will be violated and that such violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition"

66. The instant Amended Petition by the Petitioners is brought under Articles 10, 27, 28, 40, 48 and 53 of *the Constitution* of Kenya and Rules 13, 19, 23 (1) & (2) & 24 of *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms Practice and Procedure Rules 2013). This court holds that the provisions of Article 23 (3) of the Laws of Kenya are explicit in that they clearly indicate that "In any proceedings brought Under Article 22 "a Court may grant appropriate relief; including (c) a conservatory Order.

And that Article 22(1) of Laws of Kenya equally explicit provides that "Every Person has a right to institutes Court proceedings claiming that a right or fundamental freedom in the Bill has been denied, violated or infringed or is threatened"

Further to the above, I have cited the matter of "*Simeon Kioko Kitheka & 18 Others –vs- County Government of Machakos & 2 others* [2018] (eKLR) where County Government of Machakos & 2 Others [2018]eKLR where Hon. Justice Odunga held:-"Article 23 of *the Constitution* does not expressly bar the court from granting conservatory orders where a challenge is taken on the Constitutionality of legislation. The only rider is that the case must be one of which falls under Article 22 of Laws of Kenya. This however does not mean that court ought to readily suspend legislation simply because a challenge has been made to a statute. I agree that power ought to be exercised very sparingly where the court is satisfied that it ought to be exercised. However, it can be exercised. Therefore whereas I agree that there is presumption of Constitutionality of statute that is a rebuttable principle. This was clearly appreciated in *Ndanabo –Versus - The Attorney General* [2001] 2EA 485 where it was held inter alia that in interpreting *the Constitution*, the court would be guided by the general principles that there is a rebuttable presumption that legislation is Constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction ....having passed the first hurdle, the second issue is whether the Petition has satisfied the provisions of Article 23 (3) (c) of Laws of Kenya Article 23 (3) (c) – provides that in any proceedings brought under Articles 22, a court may grant appropriate relief including a conservatory order"

67. The Proceedings under Article 22 of Laws of Kenya deal with the enforcement of the Bill of Rights. Therefore a strict interpretation of Article 23 (3) (c) shows that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of right has been denied, violated or infringed or is threatened. Therefore an Applicant for conservatory orders ought to bring himself or herself within the provisions of Article 22 of *the Constitution* of Kenya by pleading and establishing on a "prima facie" basis that his or her right or fundamental freedom in the Bill of Rights or those or of other persons have been denied, infringed or is threatened.

Article 165 and Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental freedom) Practice and procedure Rules 2013, (otherwise referred to "The Mutunga Rules") clearly grants this Honourable Court powers to hear and determine application for Conservatory orders or interim orders. In order to preserve and/or secure the subject matter Rule 23 of "the Mutunga Rules" Provide:-

> " Despite any provision to the contrary, a Judge before whom a petition under Rule 4 is presented shall hear and determine an application for conservatory order or interim order"

While still on this point, I hold that the Principles in regard to granting of interim orders or conservatory orders were clearly outlined by the Supreme Court in the case of "*Gatirau Peter Munya –Versus- Dickson Mwenda Kithinji & 2 Others* "Supreme Court Appel. No. 5 of 2014 [2014] eKLR, *Nubian Rights Forum & 2 Others –Versus- Attorney General & 6 Others* Nos. 56 of 2019 [eKLR] and *Board of Management of Uhuru Secondary School –Versus- City County Director of Education & 2 Others* [2015] eKLR.

Where in summary the principles were laid down as:-

> "That the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific rights or freedom in the Bill of Rights and whether if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory. Lastly, that the court should consider the public interest and relevant material facts in exercise its discretion whether to grant or to deny a conservatory order".

In the Amended Petition and applying the above principles, I find that the Petitioners herein have fully satisfied the aforesaid standards in regard to granting the Conservatory orders. They have demonstrated an arguable prima facie case with a likelihood of success and shown in the absence of the Conservatory orders they are likely to suffer prejudice by the forceable and illegal evictions from the suit land intended by the 1st Respondent and the Interested parties herein if the conservatory orders sought are denied and/or not granted hereof. The Petitioners have further met the second principles that granting or denial of the Conservatory orders would enhance the Constitutional values and objectives of a specific right or freedom, in the Bill of Rights.

68. Thirdly the Petitioners have demonstrated, if the Conservatory orders are not granted the Amended Petition or its substratum will be rendered nugatory and finally have demonstrated that public interest will be prejudiced by a decision not to grant the Conservatory orders sought. Thus, the Petitioners herein ought to be granted the Conservatory Orders as sought from the Amended Petition as already elaborately stated herein which is meritorious.

69. Finally, under this sub heading, this Honourable Court stresses that it has found it extremely difficult to comprehend the reason why neither the Respondents nor the Interested Parties never found it suitable to file a Cross Petition to both the Petition and the Amended Petition by the Petitioners despite of the cogent and valid arguments presented particularly on the validity of the title deed. I emphasise that it is now founded position of law on pleadings that Courts never grant what has not been pleaded by parties. For these reasons, the Honourable Court is left with no alternative but to conclude that the Petitioners are entitled to the prayers sought.

Issue No. 4 Who will bear the costs of the filed Amended Petition.

70. The issue of Costs is dependent on the discretion of the Court. The Provision of Section 27 (1) of the *Civil procedure Act*, Cap. 21 holds that Costs follow the event. By events, it means the outcome or results of any litigation process meted between parties in any proceedings.

In the instant case, the outcome is that the Petitioners have succeeded in securing the conservatory orders and sustaining the status quo to be maintained on the land until further notice.

For these reason, this being a matter of great public interest, for the sake of natural justice, equity and conscience all the parties will bear their own costs.

VII Conclusion & Determination

71. Ultimately, this Honourable Court having intensively and thoroughly deliberated on all the framed issues herein, it is the findings of this Honourable that taking that neither the Respondents nor the Interested Parties found it suitable to file a Cross Petition to both the Petition and the Amended Petition by the Petitioners, the pleadings and the prayers sought thereof remain uncontroverted nor rebutted and hence the same succeed accordingly. For avoidance of doubt, this Court makes the following orders:-

a. THAT the main Amended Petition dated 23rd March, 2021 and filed on 25th March, 2021 the Petitioners herein be and is hereby allowed whereby a conservatory order restraining the 1st and 2nd Respondents, the Affected Parties and the 2nd, 5th and 6th Interested Parties from interfering, entering upon, alienating, disposing, dealing in any way whatsoever with the land known as sub - division No. 13642, 13643, 13641, 13640, 13638, 13636 (part of the Plot of Land originally known as Plot No. 143/2) of section one Mainland North Plot of Land whose certificate of titles are held in the names of Ahmed Mohamed Musa, Irshad Islamic Institute, Amina Kusoma Bunu, Abdu Kassim Ahmed, Said Ali Swabu and Athman Omar Abdalla respectively.

b. THAT there should be no eviction of the Petitioners and their property unless one obtained by this Court pursuant to the Provisions of Section 152E of the *Land Act* No. of 6 of 2012.

c. THAT this being a matter involving great public interest each party to bear its own costs.

It Is So Ordered Accordingly

JUDGEMENT SIGNED, DATED AND DELIEVERED ON16TH DAY OF JUNE 2022.

HON. MR. JUSTICE L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT,

MOMBASA.

In the presence of:-

a. M/s. Yumna Hassan, court Assistant.

b. M/s. Kiptum Advocate holding brief for Mr. Gikandi Advocate for the Petitioners.

c. Non appearance for the 1st Respondent.

d. Non appearance for the 2nd Respondent.

e. Non appearance for the 1st & 4th Interested Parties.

f. M/s. Nafula Advocate holding brief for Mr. Khalid Salim Advocate for the 2nd , 5th and 6th Interested Parties.