



**Wainaina v Reuben Athman Dzuya & 22 others (Environment and Land Constitutional
Petition 48 of 2021) [2022] KEELC 3308 (KLR) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3308 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 48 OF 2021**

LL NAIKUNI, J

JULY 25, 2022

BETWEEN

FRANCIS WAKABA WAINAINA PETITIONER

AND

REUBEN ATHMAN DZUYA & 22 OTHERS RESPONDENT

RULING

1. In accordance with the direction made out by this Honorable Court on 15th December, 2022, for its determination herein are the two application filed by the Petitioners and the Respondents. They are to be decided simultaneously. These are the Notice of Motion applications dated 25th October, 2021 filed by the Petitioner/Applicant herein. It was brought under the provisions of Articles 20, 23 (3), 40 159 (2) (d) and 258 of the *Constitution* of Kenya, 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap21 of the Laws of Kenya and Order 40 Rules 1 and 51 Rules 1 of the *Civil Procedure Rules*, 2010.
2. The 1st to 20th Respondents are adults residing in Mombasa, the 21st Respondent was the Mombasa Chief Magistrate's Court, the 22nd Respondent was the Cabinet Secretary, Interior & Governmental Coordination while the 23rd Respondent is the Attorney General. The Petitioner contends that his right to property under Article 40, right to economic and Social rights under Article 43, his right to fair administrative procedure under Article 47, and his right to fair hearing under Article 50 of the *Constitution* have been violated. Alongside the Petition, the Petitioner filed a Notice of Motion Application seeking nine orders as stated herein below.
3. Whilst, the other Notice of Motion application is dated 10th November, 2021. It was filed by the Respondents herein under Order 40 Rule 7 & 51 Rule 1 of the *Civil Procedure Rules*, 2010 and Sections 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act*, 2010.



II. The Petitioner/Applicant's Notice of Motion application dated 25th October, 2021

4. Through the above stated application, the Petitioner/Applicant sought for the following orders:-
 - a. Spend;
 - b. That pending the hearing of this application "Inter Partes" this Honourable Court do issue temporary Conservatory orders staying the entire proceedings in the Chief Magistrate's Court Case MC ELC No. 66 of 2021 (OS).
 - c. That pending the hearing of this application "Inter Partes" this Honourable Court do issue an order of temporary injunction against the 1st to 20th Respondents restraining them whether by themselves, their servants and/or agents from entering, trespassing into, occupying, cultivating, developing, building, selling, disposing of and/or interfering in any way whatsoever with the Defendants' possession and quiet enjoyment of the suit property known as Land Parcel No. 391/II/MN, Title Number CR 1132 measuring 3.35 acres situated in the Utange Area of Kisauni Sub – County, Mombasa County.
 - d. That an order of recall of the entire proceedings and record in respect of Chief Magistrate's Court Case MC ELC No. 66 of 2021 (OS) to High Court be and is hereby issued for hearing and disposal or as the Court may direct.
 - e. That pending the hearing and disposal of the Petition herein and the recalled proceedings in Chief Magistrate's Court Case MC ELC No. 66 of 2021 (OS) in High Court an order of temporary injunction against the 1st to 20th Respondents restraining them whether by themselves, their servants and/or agents from entering, trespassing into, occupying, cultivating, developing, building, selling, disposing of and/or interfering in any way whatsoever with the Defendants' possession and quiet enjoyment of the suit property known as Land Parcel No. 391/II/MN, Title Number CR 1132 measuring 3.35 acres situated in the Utange Area of Kisauni Sub – County, Mombasa County.
 - f. That an order do issue directed to the OCS Bamburi Police Station to enforce the orders issued herein with immediate effect.
 - g. That Costs of this application be provided for.
5. The application is based on the grounds, testimonial facts and averments set out on the face of the 34 Paragraphed Supporting Affidavit dated 25th October, 2021 and sworn by Francis Wakaba Wainana, the Petitioner and twelve (12) annexures marked as "FWW – 1 to 12" annexed thereto. The Petitioner averred that he was the registered owner of all that parcel of land known as Parcel No. 391/II/MN, Title Number CR 1132 measuring 3.35 acres situated in the Utange area of Kisauni Sub – County, Mombasa County and he annexed a copy of the said title thereof marked as "FWW – 1" (hereinafter referred to as "The Suit Property"). He deposed that he acquired the said suit property from one Mr. Timothy Chopetta as freehold interest. The property boundaries were well marked with the main residential premises situated within a concrete stone/block perimeter wall and a farm extension whose boundary was marked by a hedge fence. He deposed that together with his family, worker and two other persons who recently rented out small portions for temporary use, he had been in occupation of the suit property since he purchased it in the year 1979. It was managed by his son Joram David Wainaina. He lived on the suit property.
6. He posited that while in active use of the said suit property, he used and charged it to the National bank of Kenya through a Charge dated 11th February, 2011 as security for a loan of Kenya Shillings One



Million Five Hundred Thousand (Kshs. 1, 500, 000.00) advanced to his company trading in the names and style of Kamau famous Distributors Limited and which had since been repaid though it was not reflected through a formal discharge. He testified that he had rented a portion of the suit property for a poultry structure to a one Mr. Ngundo Muli, a Pastor of Faith Christian Centre Fellowship, which he utilized for worship services and had been a resident there for a long time. Additionally, on the said suit property was another tenant – Agnes Otieng who was a poultry farmer and also lived within the same suit property. He deposed that he had buried some of his family members being his daughter Mercy Wanjiku who died on 5th May, 2005 and Berreta Shighadi Wanjiku, a niece who died on 24th August, 2014.

7. However, he deposed that on 10th May, 2021 he received a call from his son that unknown people had invaded the suit property. He came to learn that they were the 1st to 20th Respondents who had forcefully invaded the suit property, intimidated the son, the farm workers and other persons within the property with the aim of scaring them away and started putting up mud walled structures with intention of occupying, invading and grabbing the land. Further, they instituted vexatious proceedings against him. He deposed that his son and manager of the suit property reported the invasion to the police of 10th May 2021. On 12th May, 2021, the police visited the suit property and supervised demolition of two mud houses illegally put up by the invaders. He held that on 13th May, 2021 the 1st to 20th Respondents returned to the suit property in bigger numbers and further intimidated his family and workers. He deposed that when his manager reported the incident to the police again on 29th May 2021, he was informed by the police that there was a suit in court against him and hence they could not interfere. That was when he learnt of the civil suit - Mombasa Chief Magistrate's Court ELC No. 66 of 2021 (OS) (hereinafter, 'lower court case'). They were claiming title by way of land Adverse possession. He alleged that the Respondents were well known as professional squatters who invaded and forcefully grabbed people's lands in the name of claiming land Adverse possession. Indeed there were several court cases pending hearing and determination where they are involved.
8. The Petitioner deposed that through his advocates he filed a case and an application under certificate of urgency on 1st July 2021 the case in the lower court seeking orders of temporary injunction. He deposed that the application was certified as urgent but the ex - parte injunctive reliefs sought were declined. He deposed that the Magistrate directed that the application be served and heard inter partes on 15th July 2021. He further deposed that instead of conducting an inter partes hearing, the Magistrate directed that the application be canvassed by way of written submissions, and it be mentioned on 17th August 2021. The Petitioner deposed that due to the wastage of the suit property, he filed another application in the lower court case where he sought conservatory orders and for the court to visit the suit property. He deposed that the court declined to give the orders sought and it indicated that it was going on leave and set a ruling date for 27th September 2021. He deposed that the ruling was in abeyance as the same was to be given on notice.
9. The Petitioner deposed that the Magistrate acted whimsically, that he was driven by consideration other than the rule of law and due process and had aided in the suppression of the Petitioner's property rights. He further deposed that the Magistrate's conduct is a denial of fair procedure and threatens his right to property and the attempted seizure of the suit property is unlawful and unconstitutional. Lastly, the Petitioner deposed that the Magistrate's acts, conduct or omissions are not immune to sanction, review and reversion by this court and in the exercise of its original supervisory jurisdiction this court should recall the proceedings of the lower court case. He urged court to grant the prayers sought in the application.



III. The Replying Affidavit by the Respondents

10. On 9th February, 2022, the 1st to 20th Respondents herein opposed the application by the Petitioner filed a three (3) brief points Grounds of opposition dated 7th February, 2022. It stated that as follows:-
- a. That the application was misconceived and bad in law;
 - b. That the application was an abuse of the court process, fatally defective, wholly incompetent, frivolous, and scandalous.
 - c. That if the orders sought were granted, the 1st to 20th Respondents would be prejudiced.
- Thus, he urged Court to dismiss the application with costs.

IV. The Respondents' – Notice of Motion application dated 10th November, 2022

11. The second application is dated 10th November 2021, filed by the 1st - 20th Respondents. It was brought under the provision of Order 40 Rule 7 and 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 1A, 1B, 3A & 63 (e) of the Civil Procedure Act, Cap. 21. It seeks for the following orders:-
- a. That this Honorable Court be pleased to discharge and/or vary and/or set aside of the interim injunctive orders issued on 28th October 2021 and 2nd November 2021 respectively;
 - b. That in the alternative, there be an order of status quo in place of the interim injunctive orders.
 - c. That costs of this application be provided for.
12. The application was based on the grounds on the application and the 13 Paragraphed Supporting Affidavit of Reuben Athman Dzuyasworn and dated 10th November, 2021 and five (5) annexures marked as “RAD – 1 to 5” annexed thereto. He deposed that he was the 1st Respondent/Applicant herein and with the authority to swear and plead in the matter from the 2nd to 20th Respondents/Applicants herein. The Respondents averred that the Petitioner commenced this suit by filing a Petition and a Notice of Motion application to recall and/or stay another suit they had filed in the lower court seeking for orders of land adverse possession in respect of the suit property.
13. Upon service of the pleadings in the said case, the Petitioner/Respondent filed a Replying Affidavit against the suit and an application seeking injunctive orders on 2nd July, 2021. The Applicants filed a responding on 14th July, 2021 and after submitting, a ruling was to be delivered on 27th September 2021, and when it wasn't delivered, the Petitioner filed this instant Petition and application on 25th October 2021 seeking similar orders alleging that he was not served with pleadings. They deposed that on 28th October 2021 the Petitioner was issued with temporary injunctive orders staying the lower court proceedings. He deposed that the orders sought by the Petitioner were prejudicial to the 1st to 20th Respondents and specifically Order 7 which restrained the Respondents from entering, trespassing into, occupying, yet the Respondents were already in occupation of the suit premises.
14. He urged court that in order to preserve and/or maintain the suit property until the matter was heard and determined, the only justifiable order was for the maintenance of the status quo, which said order should be fair to both parties. They averred that the orders made on 28th October, 2021 should be set aside, discharged and/or varied and particularly to remove that was not meant to preserve the land but to evict them from the land. They averred that no prejudice would be suffered to the Petitioner but the 1st to 20th Respondents herein shall suffer irreparable loss and damage if this application was disallowed.



III. The Petitioner's Replying Affidavit to the Notice of Motion application dated 10th November, 2021

15. On 26th November, 2021, the Petitioner opposed the application vide a sworn 12 Paragraphed Replying Affidavit by Francis Wakaba Wainaina. He informed Court that he was the Petitioner herein and the Defendant in the lower court case was the Defendant which had been temporarily stayed by this Honorable Court. He deposed that he is a victim of brazen, violent and criminal invasion of private property that had resulted in massive and irreparable destruction of hard - earned property and development, and the Respondents' application was an abuse of the court process in a bid to subvert and overtake the rule of law and the course of justice. He deposed that the 1st to 20th Respondents were professional land grabbers who were out to manipulate the justice system.
16. He stated that all efforts by him to use enforcement agents established by law being the police to protect his private property were all frustrated by the Respondents herein. They did this through filing of court cases claiming land adverse possession, invading the land, playing victims and always brandishing court proceedings with lies to the police that they also had an interest on the suit property hence not to be interfered with as the matters were in court.
17. He proceeded to recount in details all what had been happening to him by the same 1st to 20 Respondents over the same suit property and the cause of action over the filed main Petition pending hearing and final determination before this Honorable Court thereof.

V. Submissions

18. On 15th December, 2021 while all parties were present in Court, they were directed to have the two applications – dated 25th October, 2021 and 10th November, 2021 respectively filed by the Petitioner and the 1st to 20th Respondents herein be disposed off by way of written Submission. Subsequently, on 23rd February, 2022 all parties complied and were granted some times to high light their filed submissions. Thereafter, the Honorable Court reserved a date for the delivery of ruling.

A. The Petitioner's Submissions

19. On 1st December, 2021, the Learned Counsel for the Petitioner the Law firm of Messrs. Mburu Kariuki & Company Advocates filed their written Submissions dated even date. M/s. Nduku Advocate for the Petitioner referred the court to the provisions of Articles 22, 23, 29, 31(b), 39(3), 40, and 165 of the Constitution of Kenya provided and submitted that this court should exercise its supervisory jurisdiction and recall the lower court file. The Learned Counsel further cited the case of "*Giella – Versus - Cassman Brown & Co. Ltd* (1973) EA 358 and submitted that the Petitioner was the registered owner of the suit property as per the attached copies of the title deed and the 1st to 20th Respondents were invaders who were infringing on his property rights.
20. She held that the Petitioner had already developed the property extensively through building of several structures on it and continuously lived on it with his family since the year 1979. He had inferred some of his family members when they died on the same land. The Learned Counsel also submitted that the Petitioner had provided ample evidence of the violent and forceful invasion on the property from 10th May, 2021. She indicated a lot of complaints had been lodged at the Bamburi police station who at first provided security and even saw to it that the temporary structures were demolished. Despite all this the Respondents had been resuming the construction and using the documents from the suit they filed in the lower court deceiving the police. She held that the lower Court had not been of assistance in protecting, preserving nor assisting the state of affairs for the suit land. It had failed to conduct a site



visit though directed to do so. On 28th September, 2021 when it was meant to have delivered a ruling, it did not happen. It from these series of frustration that compelled the petitioner to institute this Petition and on 28th October, 2021 they were granted conservatory injunction orders. The Counsel argued that the Petitioners and hence this court should grant them temporary injunction orders as sought. To buttress their argument, they relied on the decisions of Giella Cassman Brown case (Supra), *Mrao - Versus – First American Bank of Kenya Limited & 2 Others; Priscilla Musyoki Musembi – Versus – Fredrick Kinyanjui Ngozi* (2021) eKLR.

21. She advanced the argument that the Respondents were known to be professional squatters who played victims and moved around identifying which land to forcefully grab them and so did that which included the suit land which belonged to the Petitioner. She urged Court to stamp its authority and cut short this abuse of the Court process and unfathomable affront to the rule of law.
22. The Counsel contention was that the law applicable were Articles 22, 23, 29, 31 (b), 39 (3), 40, 50 & 159 (2), 165 (6) & 165 (7) of the *Constitution* of Kenya. In the final analysis, the Counsel held that this was a proper case for injunction and the prayers as sought should be granted accordingly.

B. The Respondents Submission

23. On 9th February, 2022, the Learned Counsels for the 1st to 20th Respondents herein the Law firm of Messrs. Kenga & Company Advocates filed their written Submissions dated 8th February, 2022. Mr. Kenga Advocate for the 1st to 20th Respondents submitted that the Petitioner sought for permanent injunctive orders because the Respondents were already in occupation of the suit and if the orders sought by the petitioners are granted, then it would mean that the respondents would have to be evicted. He submitted that the application by the Petitioner was premised on the provisions of Order 40 Rule 1 of the *Civil Procedure Rules*, 2010 on the one hand while the Respondents based theirs on the provision of Order 40 Rule 7 of the *Civil Procedure Rules*, 2010 seeking for the discharge, setting aside and/or variation of the ex – parte injunctive orders granted on 28th October, 2021.
24. The Learned Counsel averred that both applications should be for the maintenance and the preservation of the subject matter of the suit. However, the Respondent asserts that the Petitioner seeks for permanent injunctive orders as it intends to restrain the Respondents from entering, trespassing, occupying and/or trespassing on the land.
25. To him this meant simply eviction of the Respondents from the suit land yet they are the ones who are currently in physical and actual occupation of the suit land. In so doing, it would declare the claim by the Respondents nugatory. The Learned Counsel held the view that the legal purpose of the provision of Order 40 of the *Civil Procedure Rules* was to preserve or maintain the subject matter.
26. According to him, the Petitioner’s claim being a suit for protection of proprietary interest or right over the parcel of land required preservation and/or conservatory orders so that the subject matter was not wasted. Further, he informed Court that the suit filed by the Respondent in the lower Court sought for the ownership or proprietary rights over the same suit property. The Counsel contended that the Petitioner had not made a case for grant of temporary injunction as provided in “Giella – Versus - Cassman Brown (supra). According to him injunctive orders could only be issued when an Applicant proved a prima facie case with high probability of success against a Respondent being the first consideration. He argued that the application by the Petitioner would not suffer any irreparable damage if the orders were not granted and the balance of convenience tilted in favour of the Respondents. He prayed that the application by the Petitioner be dismissed with costs and allow the one by the Respondents with Costs.



VI. Analysis and Determination

27. I have carefully considered the two applications dated 25th October, 2021 and 10th November, 2021 by both the Petitioner and 1st to 20th Respondents herein the affidavits, the written submissions, the authorities, the relevant statutory and Constitution of Kenya provisions. In order to arrive an informed, just, reasonable and fair decision, the Honorable Court has framed the following issues for its determination. These are:-

- a. Whether from the filed Notice of Motion application dated 25th October, 2021 the Petitioner has met the fundamental threshold of granting temporary injunction orders sought against the Respondents over the use and title to the suit property.
- b. Whether the Petitioner is entitled to the prayers sought for the recalling of the lower Court file to this Court.
- c. Whether from the filed Notice of Motion application dated 10th November, 2021 the 1st to 20th Respondents are entitled to the prayers of setting aside, varying and/or discharging the orders granted to the Petitioners on 28th October, 2021 over the suit property.
- d. Who will bear the Costs of the two applications.

Issue No. a). Whether from the filed Notice of Motion application dated 25th October, 2021 the Petitioner has met the fundamental threshold of granting temporary injunction orders sought against the Respondents over the use and title to the suit property.

28. The law on temporary injunctions is now settled law as deduced from numerous case decisions. The gist of a temporary injunction is the preservation of the suit property pending disposal of the main suit. In addressing this, courts have set conditions to be fulfilled before the discretion of granting the temporary injunction is exercised. These are that the Applicant must show that there is a prima facie case with probability of success; that the Applicant might otherwise suffer irreparable damage which would not easily be compensated in damages; and, if court is in doubt, it will decide the question on the balance of convenience. See “Giella –Versus - Cassman Brown (Supra).

29. In addition, Order 40 of the Civil Procedure Rules (CPR) requires the existence of a pending suit. It provides that where it is proved to court that in a suit, the property in dispute is in danger of being wasted, damaged or alienated by any party to a suit, the court may grant a temporary injunction to restrain, stay, and prevent the wasting, damaging and alienation of the property.

It is now settled taking that the grounds for granting temporary injunction as set out in the Giella – versus - Cassman Brown case (Supra) are in sequential pattern. From the facts and the pleadings of this case and even what is still pending before the lower Court between the Petitioner and Respondents, the main bone of contention is on the ownership of the suit land. This is not a light matter at all. It calls for intensive adjudication through an elaborate full trial where all the empirical oral and documentary evidence has to be attested and adduced according for the Court to make a determination in the long run. Hitherto, the Honorable Court for good order has not deliberated on the ownership of the suit property at this stage as yet.

30. Thus whether the Petitioner/Applicant has or not “Prime facie” to the suit property which is the first ground for consideration in granting injunction order, this Honorable Court need not spend more time venturing into the other well - known two (2) grounds. But for the benefit of doubt, this Honorable Court holds that the Petitioner/Applicant is unlikely to suffer any irreparable damage to occur due to the ostensible invasion the fact that there is no prima facie case he cannot claim to suffer



any irreparable damage at all and hence even the balance of convenience tilts in favour of the 1st to 20th Respondents which argument this court fully agree with the Learned Counsel for the Respondents as they have failed to prove there is any right on their part which has apparently been infringed and which is incapable of being compensated by way of damages. In order to show irreparable harm, the applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. This position was upheld in the Court of Appeal Case of “*Kenya commercial Finance Co. Limited –Versus - Afraba Education Society* (2001) 1 E.A. 86 as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction isSequential so that the second condition can only be addressed if the first one is satisfied. The same position was upheld in Court of Appeal (Mombasa) No. 8 of 2015 – Hassan Huri –Vs- Abdulrazak Huri Ibrahim”,

31. The conundrum at this point is that if the orders of temporary injunction are granted the 1st to 20th Respondents who are in occupation of the suit property will have to be evicted at an interlocutory stage. It is never the intention of any court to evict parties at an interlocutory stage, as stated in *Yego – Versus - Tuiya & another* (1986) KLR 726 where the Court of Appeal held:-

“the order of the judge requiring the appellant to deliver up vacant possession of the land exceeded the terms of the Respondents’ application, and under the *Civil Procedure Rules* Order XXXIX Rule 1, this was not a proper thing to do.”

32. Therefore, in the given circumstances and interest of justice, equity and conscience, I have opted to preserve the suit land, maintain the status quo and not delve into whether the conditions under the *Giella – Versus - Casman Brown* (Supra) have been fulfilled or not. Parties should now endeavour to have the trial expedited.

For these reason the Honorable Court concludes that the application has no merit and therefore fails under this sub - heading.

IssueNo. b). Whether the Petitioner is entitled to the prayers sought for the recalling of the lower Court file to this Court

33. Under this sub – heading, the Petitioner also sought for orders that the lower court file be called by this court for purposes of reviewing the lower court’s orders issued. The Petitioner deposed that through his advocate, he made an application for temporary injunction and for the court to conduct a site visit but he was not granted ex-parte orders and the Magistrate is to deliver the ruling on the Notice. Should this court interfere with the magistrate’s discretion? I am reminded of the following rendition by Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Limited* [1985] E.A.:

“The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

34. It must be noted and appreciated that a Judge or Magistrate exercising judicial discretion bears the burden of accounting for their decision and in order to discharge this burden, the judge or magistrate ought to explain the basis of their decision. I say so because an unexplained award is a fertile ground



for judicial what can you do. This point was also put forth clearly in the case of “*Mbogo and Another – Versus - Shab* [1968] EA 93 at 96. The court affirmed as follows:-

“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”

35. The Magistrate in refusing to grant ex - parte interim orders is not capricious. The Petitioner further deposed that the ruling of the application was slated for 28th September 2021 but the same was not delivered and parties were informed that the ruling was to be delivered on notice. The Petitioner got frustrated, anguished and traumatized. Instead of exercising patience, the Petitioner filed this application on 25th October 2021. I must appreciate that the Petitioner might have been restless and desperate for a determination. However, these are not Cogent grounds for this court to recall for a file from a lower Court at all. I am of the view that the order to recall the lower court file because the magistrate exercised his discretion is premature. The Petitioner should have been patient taking into consideration the backlog of the judiciary among other factors that might hinder and challenge the expeditious disposal of cases. If this state of affairs was to be encouraged, then it would lead to what the English Philosopher Thomas Hobbes described as “Short, Nasty and Bruitish”!!! This has to be discouraged at all costs. A piece of free advise to the Petitioner – Patience pays! The Petitioner still has a legal right to appeal or review against the ruling in case he eventually got aggrieved. But clearly this did not happen. In the forgoing, I am compelled to dismiss the Notice of Motion application dated 25th October 2022 by the Petitioner for lack of merit.

Issue No. c). Whether from the filed Notice of Motion application dated 10th November, 2021 the 1st to 20th Respondents are entitled to the prayers of setting aside, varying and/ or discharging the orders granted to the Petitioners on 28th October, 2021 over the suit property.

36. Now onto the second application filed by the 1st-20th Respondents. The Respondents seek to discharge the orders of this court dated 28th October 2021 and 2nd November 2021 which stayed the proceedings in the lower court case.

There is no need of delving into the merits or otherwise of this application because the orders sought are spent after the determination of the application by the Petitioner.

VII. Conclusion & Determination

37. The upshot of the indepth analysis of all the framed issues herein, in conclusion this Honorable Court proceeds to make the following orders. These are:-
- a. That the two applications dated 25th October, 2021 and 10th November, 2021 filed by both the Petitioner and the Respondents herein be and are hereby dismissed for lack of merit with no orders to Costs.
 - b. That the status quo be maintained meaning no further constructions, charging, leasing, demolition or destruction of the suit property and no further by any parties herein until the main Petition is heard and determined.
 - c. That an order that with immediate effect the interim orders of stay of the Chief Magistrate (Mombasa) Court case No. 66 of 2021(O.S) granted by this Court on 28th October, 2021 be



and is hereby vacated, lifted and /or set aside. Thus, the Lower Court and the parties to be at liberty on how to continue dealing with that matter thereof.

- d. That for the sake of the expedient disposal of the main Petition dated 25th October, 2021 to be fixed for hearing within the next ninety (90) days from today. There shall be a Mention date on 12th October, 2022 for conducting a Pre – Trial Conference and taking of further direction on the disposal of the Petition.
- e. That in the meantime all parties to fully comply by:-
 - i). The 1st to 20th Respondents herein be and are granted 21 days leave to file and serve their Replying Affidavit to the Main Petition.
 - ii). The Petitioner herein be and is hereby granted 14 days leave to file and serve further affidavit, if need be, from the new and legal issues raised by the 1st to 20th Respondents hereof.
- f. That each party to bear their own costs.

RULING SIGNED, DELIVERED AND DATED THIS 25TH DAY OF JULY 2022

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

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:

- a. M/s. Yumnah Hassan, Court Assistant.
- b. M/s. Nduku Advocate for the Petitioner.
- c. Mr. Kenga Advocate for the 1st to 20th Respondents

