Kahia Transporters Limited v Cabinet Secretary, Ministry of Lands & Physical Planning & 4 others; Lola & 227 others (Proposed Interested Parties) (Environment and Land Constitutional Petition 11 of 2022) [2022] KEELC 2562 (KLR) (18 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2562 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 11 OF 2022

LL NAIKUNI, J

JULY 18, 2022

BETWEEN

KAHIA TRANSPORTERS LIMITED ..... PETITIONER

AND

CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING ..... 1ST RESPONDENT

CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

LAND REGISTRAR, KWALE ..... 3RD RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .. 4TH RESPONDENT

DIRECTOR OF SURVEY KENYA ..... 5TH RESPONDENT

AND

LOLA LUGWE LOLA & 227 OTHERS ..... PROPOSED INTERESTED PARTY

RULING

The Preliminaries

1. By way of a Notice of Motion application dated and filed on March 17, 2022 two hundred and twenty-seven (227) Proposed Interested parties to this Honorable Court applied with intention on being joined as parties in this suit. The Application was brought under the provisions of Article 25(c) and 50 (1) & (2) of *the Constitution* of Kenya.

2. The Application was brought under a certificate of urgency sworn by Kinyua Kamundi, an advocate of the High Court of Kenya stating that it was urgent on the grounds that this court gave ex - parte orders on March 15, 2022against 228 persons who were not named in the Petition. Therefore, his

contention was that the Honorable Court therefore was misled into violating the inviolable right to be heard guaranteed by the provisions of Article 25(c) and 50(1) of *the Constitution* of Kenya.

3. Thus, for these reasons, the orders granted by this Court on that date affecting the Interested Parties were null and void under the provision of Article 2(4) of *the Constitution* hence the court was obligated to declare them as being null and void and proceed to henceforth to set them aside. The contention by the Learned Counsel was that all along during the pendency of this suit, the Petitioner knew of ownership to the suit property in issue and the existence of the Interested Parties as it named Lalo Lugwe Lalo and 227 others among persons to be served with the Petition. In summary, he submitted that this was sharp practice and a fraud meted by the Petitioner upon the Court and the Interested Parties respectively.

II. The Intended Interested Parties Case

4. The Proposed Interested Parties herein, more specifically through the Application are seeking for the following orders:

    a. Spent.

    b. That to be enjoined as Interested Parties in the suit

    c. That pending the hearing and determination of this application the orders given on March 15, 2022 and issued on March 16, 2022 be suspended or stayed.

    d. That the orders given on March 15, 2022 be declared to be null and void, to have been procured fraudulently being based on a forged and incompetent lease and Certificate of Title and be set aside as a matter of urgency.

    e. That the Petitioner's Notice of Motion application dated March 15, 2022 be heard by the ELC in Kwale on March 28, 2022 when Kwale ELC will be dealing with Petition No. 15 of 2022 in which the Petitioner is a party litigating upon the same property.

    f. That the costs of this Application be paid by the Petitioner in any event.

5. As indicated, the Application was brought under a certificate of urgency sworn by Kinyua Kamundi, an advocate of the High Court of Kenya whereby he deponed that the court had no jurisdiction to issue orders against "Third Parties" whom the Petitioner knew but whom they willfully and on purpose excluded from the Petition so as to steal a match and deeply embarrass the court. It was wrong for the court not to have directed service of the Petition upon persons who would be most affected by the ex - parte orders. He asserted that all judges of the Environment and Land Court exercise concurrent jurisdiction and a judge of court cannot sit on appeal and overrule the decision of another judge of the same court. The same matter had been dealt with by the Honorable Lady Justice Matheka in ELC Petition No. 46 of 2019.

6. He deponed that the Petitioner had sought similar orders against the Interested Parties in Petition No. 46 of 2019 but its application was dismissed on January 19, 2022. The court ought not to have heard the Petitioner's application dated March 15, 2022 and ought not to have granted Ex - parte orders in the absence of any explanation as to why the Application had not been filed for two months after similar application was dismissed by the Honorable Lady Justice Matheka. The suit premises were situated within the locality of the County of Kwale. The Petitioner was a party to another Petition pending in Kwale ELC scheduled for highlighting of submissions on March 28, 2022. The Petitioner avoided filing the Petition in Kwale ELC because it knew that the judge in Kwale ELC, being seized of a similar

matter by the Petitioner over the same subject matter would not have granted ex - parte orders. By filing this Petition in Mombasa over a property in Kwale the Petitioner was engaged in forum shopping.

7. The Petitioner ought to have drawn the attention of this Court to the documents it relied upon purporting to be a lease and a grant issued by the Government and if the Court's attention had been drawn to those documents the court would immediately have realized that the Certificate of Title No. CR72836 relied upon by the Petitioner was a forgery. The Petitioner purported to have acquired it that upon a transfer registered on May 15, 2017 while the four (4) persons who allegedly transferred the property to the Petitioner were themselves registered as proprietors in on 7th February, 2019, two years after they transferred the same property to the Petitioner. The Petitioner could not have acquired the property from the original "allottees" before those allottees themselves had acquired it.

8. He deponed that the court had been used as an instrument for perpetuation of forgery, uttering false documents, perjury and multiple other offences. No court should permit its process to be used for that purpose and so when it discovers that it has unwittingly facilitated fraud it ought to undo or reverse that facilitation. He informed Court that the whole of the Maji ya Chumvi Land Adjudication section was initially Trust land before the promulgation of the new Constitution whereby it became community land under the new Constitution. His contention was that at no time did any part of Maji ya Chumvi belong to the government and the Government therefore had no capacity to issue a Grant to the Petitioner or its predecessors in the purported title.

9. He deponed that without prejudice to the position that the Grant was a forgery, the court should have taken cognizance that the lease dated February 5, 2019 purportedly signed by one F. N. Oraro on behalf of the Chief Land Registrar which generated a certificate of Title dated February 7, 2019 signed by the Registrar of Titles were null and void. He drew Court's attention to the provision of Section 23(2) of the *Land Act*, 2012 whereby a grant of public land shall only be made in the name of the National Land Commission. Thus, where it was not sealed by the National Land Commission, thus it ought to be declared null and void.

10. He deponed that this court was misled by ground (ii) of the Certificate of Urgency into issuing ex - parte orders on behalf of unnamed squatters thereby exposing the Interested parties into a dispute with unidentified persons. This court having been informed by the Petitioner of an application in the court of Appeal No. E009 of 2022 by the Petitioner's proxies, it ought not to have interfered with the processes which were pending before the Court of Appeal. He held that whereas the Court of Appeal never issued any interim or ex - parte orders, this court fell into grave trap and committed an error by doing yet, he stressed the court of Appeal had declined to do so. The title had already been issued and the court could not undo what had already been done consequent upon orders of the same court. It was fair and just that the court proceeds to set aside orders obtained by reason of gross abuse of its process and based on forged documents so that the court does not seem to be facilitating and perpetuating crimes. Thus, it was his assertion that the orders granted on March 15, 2022 be suspended and that the application be heard by the Honorable Lady Justice Addraya Dena, the ELC Judge at Kwale on March 28, 2022 alongside the Kwale ELC Petition No. 15 of 2022 (formerly Mombasa ELC Petition No. 28 of 2019).

11. At this juncture, it is imperative for this Honorable Court at this stage deliberate briefly on an issue it has found rather intriguing from the filed pleadings herein. The Court wishes to graphically point out that in so far as the Application was concerned, non of the 228 persons who moved the Court had been enjoined as interested parties herein. They were not supposed to be referred to as the Interested Parties as yet but either as Proposed or Intended interested parties or Applicants. It would, therefore, be a major misnomer and misleading to keep on referring to them as Interested Parties before the pending application had been determined on either way - whether or not they were to be joined as

such. It did not matter at all whether they believed they were bon fide Interested Parties or not. Their interest 'in the subject matter was to be ascertained first and they met the settled legal threshold or criteria of joinder before they would be treated and referred to as Interested Parties. It was not that simple nor an automatic right. By all means, this should be by the permission of the Court upon being formally moved and satisfied that they met that legal trajectory for joinder. It was immaterial, without substance and irrelevant what they referred themselves from their filed pleadings. Suffice it to say, it would be advisable for any counsel or applicant to draw always pleadings bringing out that state of affairs clearly - proposed Interested Party (ies) which this Court, notwithstanding the reference from the filed pleadings will consistently continue using until otherwise stated.

12. Be that as it may, the Application was supported by the 12th Paragraphed affidavit sworn and dated March 17, 2022 by the 53rd Proposed Interested party, Duncan Mdzomba Nyawa. It was sworn on his own behalf and that of all the two hundred and twenty-eight (228) Proposed Interested Parties. The Application is based on the grounds, testimonial facts and averments as listed and set out on its face. In summary, they are that this court gave ex - parte orders against the 228 persons who were not named in the Petition and the court therefore was misled into violating the inviolable right to be heard guaranteed by the provisions of Article 25(c) and 50(1) of *the Constitution* of Kenya. For that reason, the orders given on that date affecting the proposed Interested parties were null and void under Article 2(4) of *the Constitution* and thus the Court was obligated and obliged to declare them as null and void and to set them aside. The Petitioner knew the proposed Interested Parties ownership of the property in issue as it named Lola Lugwe Lalo and 227 others among the persons to be served with the Petition. This was sharp practice and a fraud upon the court and the proposed Interested Parties.

13. The Deponent reiterated that the court had no jurisdiction to issue orders against "Third Parties" whom the Petitioner knew but whom the Petitioner excluded from the Petition so as to steal a match and deeply embarrass the court. It was wrong for the court not to have directed service of the Petition upon the persons who would be most affected by the Ex - parte orders. The Proposed Interested party averred that other judges of the Environment and Land Court exercised concurrent jurisdiction. That a Judge of the court could not sit on appeal and overrule the decision of another Judge of the same Court. The Deponent brought to the attention of the Court the fact that the same matter had been dealt with by the Honorable Lady Justice Matheka in ELC Petition 46 of 2019. The Petition had sought similar orders against the Proposed Interested Parties in Petition No. 46 of 2019 but its application was dismissed on January 19, 2022. The court ought not to have heard the Petitioner's application dated March 15, 2022 and ought not to have granted ex - parte orders in the absence of any explanation as to why the Application was not filed for two months after a similar application was dismissed by the Honorable Lady Justice Matheka.

14. The Proposed Interested party deponed that the suit premises were situated in the County of Kwale. Additionally, the Petitioner was a party to another Petition pending in Kwale ELC scheduled for highlighting of submissions on March 28, 2022. The Petitioner avoided filing this Petition in Kwale ELC because it knew that the judge in Kwale ELC, being seized of a similar matter by the Petitioner over the same subject matter would not have granted the ex - parte orders. By filing this Petition in Mombasa over a property in Kwale, the Petitioner was engaged in forum shopping.

15. The Petitioner ought to have drawn the attention of this Court to the documents it relied upon purporting to be a Lease and a Grant issued by the Government and if the Court's attention had been drawn to those documents the Court would immediately would have realized that:-

    i. The Certificate of the Title No. CR 72836 relied upon the Petitioner were a forgery.

ii. The Petitioner purported to have acquired that property upon a Transfer registered on May 15, 2017 while the four persons who allegedly transferred the property to the Petitioner were themselves registered as proprietors in on February 7, 2019, two years after they transferred the same Property to the Petitioner. The Petitioner could not have acquired the property from the original "allottees" before those allottees themselves acquired it.

iii. The court had been used as an instrument for perpetuation of forgery, uttering false documents, perjury and multiple other offences. No court should permit its process to be used for that purpose and as soon as it discovers that it has unwittingly facilitated fraud it must undo or reverse that facilitation.

iv. The whole of Maji ya Chumvi Adjudication section was Trust Land before the new constitution and became community land under the new Constitution. At no time did any part of Maji ya Chumvi belong to the Government and the Government therefore had no capacity to issue a Grant to the Petitioner or its predecessors in the purported Title.

v. Without prejudice to the Position that the Grant is a forgery, the court should have Notice as well that the Lease dated February 5, 2019 purportedly signed by one F. N. Oraro on behalf of the Chief Land Registrar which generated a Certificate of Title dated 7th February, 2022 signed by the Registrar of Titles were null and void. Under the Section 23(2) of the *Land Act*, 2012 a grant of public land shall only be made in the name of the National Land Commission on behalf of the National or County Government and shall be sealed. The documents purporting to be a Lease and a Grant were not made in the name of the National Land Commission and were therefore null and void.

16. The Proposed Interested Party deponed that this court was misled by Ground number (ii) of the Certificate of Urgency into issuing ex - parte orders on behalf of unnamed squatters thereby exposing the Proposed Interested Parties into a dispute with unidentified person. This court having been informed by the Petitioner of an application in the Court of Appeal No. E009 of 2022 by the Petitioner's proxies ought not to have interfered with processes pending in the Court of Appeal. The Court of Appeal did not issue any interim or ex - parte orders and this Court fell into grave error by doing that which the Court of Appeal had declined to do.

17. The Proposed Interested Party averred that the Titles have already been issued and the Court cannot undo what has already been done consequent upon orders of the same court. It is fair and just that the court must set aside orders obtained by reason of gross abuse of its processes and based on forged documents as that the Court does not seem to facilitate and perpetuate crimes. It was his conclusion that the orders given on March 15, 2022 be suspended and that the Application be heard by the Honorable Lady Justice Addraya Dena in Kwale on March 28, 2022alongside Kwale ELC Petition No. 15 of the 2022 formerly Mombasa ELC Petition No. 28 of 2019.

III. The Response by the 4th Respondent

18. The 4th Respondent, filed their response through a 12th Paragraphed Replying Affidavit sworn on May 10, 2022 by Purity Wanjiru Mwangi who is the Assistant Director of Land Adjudication and Settlement. She averred being competent to swear the Affidavit on behalf of the office hereunder. She stated having read and understood the Notice of Motion and Petition both dated March 15, 2022 together with the Supporting Affidavit thereto sworn by Osman Ahmed Kahia dated March 15, 2022 too as forwarded to their offices by the State Counsel in conduct of this matter.

19. She deponed that an introduction on the history and creation of Maji ya Chumvi adjudication section and brought to the attention of the Court the Civil Case No. ELC (Mombasa 46 of 2019; Lalo Lugwe Lalo & 227 others – Versus - Farida Koroney & others which was a matter filed in this court herein over the same suit property and in which both parties herein are unaware of. She deponed that in the above mentioned matter, the director himself and herself; the 4th Respondent swore and filed two Affidavits in which the history of the Maji ya Chumvi Adjudication section was clearly explained. She adopted and relied in all the contents contained in the two affidavits. Evidenced and annexed an annexture marked as "PWM-1"

20. She further deposed that the Land Adjudication and Settlement Department had fully completed the ascertainment of rights within the Maji ya Chumvi Adjudication section and all the required process were followed as required by the provisions of the relevant law – "The *Land Adjudication Act*, Cap 284". To date, four hundred and fifteen (415) Adjudication records had been forwarded for registration leaving five (5) which were still awaiting production of some mandatory accompanying documents and information. For instance, there was lack of second names on individual parcels, missing copies of Certificates of Registration for institutional titles and so forth. The lack of these information barred any of their registration from taking place whatsoever.

21. She deponed that further to the above-mentioned history and creation of the Maji ya Chumvi Adjudication Section and in response to the contents averred under Paragraphs 11,12 and 13, it is proper to note that the department only issued one Certificate of Finality after the completion of the Land Adjudication process and program. The said Certificate of Finality was referenced as ADM/1/4/53/14 and dated 27th November, 2018. Enclosed and marked as exhibit "PWM – 2".

22. She further averred that the Department took the responsibility and owned up the letter dated October 31, 2018. However, the said letter was proper to note that it was not a Certificate of Finality as was being misconstrued. Instead, it was a forwarding letter of the Adjudication documents and records by the County Land Adjudication Settlement Officer to the Director of Adjudication and Settlement for onward transmission to the Chief Land Registrar for Title Registration. Enclosed and marked as exhibit as "PWM – 3" was a copy of the said letter.

23. It was her averment that the adjudication program of the area was done after a clearance was sought from the senior planning records office Nairobi where the whole extent of Land was still indicated as Trust Land free of any encroachment or encumbrances. She stated that they were therefore not aware of any double allocations or registration of Titles in Maji Ya Chumvi as alleged in the Petition. It was her contention that the Petitioner needed to instead prove how he acquired and registered the Leases in a trust land. She stated that was their belief that the application dated March 15, 2022 and specifically Prayers numbers 2 and 3 together with the court orders issued on March 16, 2022 were null and void and served no purpose at all as they were already overtaken by events. She emphasized in saying so that, and as already indicated above, their department had been in compliance with the court orders dated July 21, 2021 and subsequent orders issued on January 19, 2022 issued by this same court which led to completion of the process and subsequent issuance of titles to the residents of Maji ya Chumvi adjudication section. Therefore, the orders stopping issuance of titles was clearly coming out late in the day way after the titles had already been issued. Annexed and marked as Exhibit "PWM-4" and "PWM – 5".

24. She concluded by praying that the said orders dated March 15, 2022 be set aside as it could not be executed or complied with since it was already overtaken by events whereby the titles had already been issued to the respective owners. She further stated that the further pray for the Petitioner to be put to

strict proof on how he acquired the Lease Title in an adjudication were failure to which the Petition should be dismissed with costs.

IV. Submissions

25. On May 4, 2022, while in the presence of all parties in Court, they were all directed to dispose off this application by way of written submissions. Eventually, they all complied by filing their written submission on June 17, 2022 while the Petitioner/Respondent filed theirs on June 10, 2022.

A. Interested Parties' written submissions.

26. The Learned Counsel for the Intended Interested Parties, the Law firm of Messrs. Kinyua Kamundi & Muyaa Advocates filed their written Submission. Mr. Kinyua Advocate submitted that the Notice of Motion application dated 17th March, 2022 was founded on the 11 grounds stated thereon which were verified by the supporting affidavit sworn by Duncan Mdzomba Nyawa on the same date. He noted that Prayers no. (a) and (b) of the Notice of Motion were already spent. Prayer (c) was for stay or suspension of the orders given on March 15, 2022 while prayer (d) was to declare that the orders given on March 15, 2022 were procured fraudulently being based on a forged and incompetent Lease and Certificate of Title and to set them aside. He argued that Prayer (e) was spent as the Petition was already transferred to ELC Kwale. Prayer (f) was that cost of application be paid by the Petitioner. The court file was send back to the ELC Mombasa for the disposal of prayers (c), (d) and (f).

27. He submitted that he relied on those grounds, the affidavit and the replying affidavit by Purity Wanjiru Mwangi, the Assistant Director of Land Adjudication and Settlement sworn and filed on May 10, 2022. To that affidavit was annexed a Replying Affidavit in Petition No. 46 of 2019 sworn by Kennedy Githunguri Njenga, Senior Deputy Director, Land Adjudication and Settlement. He also relied on that replying affidavit too where in paragraph 4 of that affidavit, Mr. Njenga identified the boundaries of the land comprising Maji ya Chumvi Adjudication Section.

28. He submitted that the first issue to be addressed was the geographical location of Maji ya Chumvi Adjudication Section. In paragraph 11(c) of the Replying Affidavit sworn by Osman Ahmed Kahia on April 14, 2022the Petitioner stated that there were no evidence that Maji ya Chumvi Adjudication was once a Trust land prior to promulgation of the new Constitution. By legal Notice no. 170 of 1972 the Minister for Lands applied the *Land Adjudication Act* to Trust land situated within the central and interland divisions of the then Kwale Administrative District now known as Kwale County. Maji ya Chumvi sub-location was in Chengoni Location, Kinango Sub - County, in Kwale County. Maji ya Chumvi was not on the beach like Diani or Msambweni. Iit was in the interland and touching Mombasa - Nairobi Highway. Paragraph 11(c) of the Petitioner's replying affidavit was therefore informed by ignorance. Mr. Kennedy Githunguri Njenga, Senior Director of Land Adjudication and Settlement in his affidavit referred to above, assisted the court greatly by locating on the ground where Maji ya Chumvi Adjudication fell. There could be no doubt that Maji ya Chumvi Adjudication section was in the interland of Kwale County and was trust land until adjudication was concluded.

29. The Learned Counsel submitted that the undisputed facts brought out in the Notice were as follows; that the persons that sold the property to the Petitioner purported to have acquired a leasehold from the government on February 5, 2019. The transfer of the property to the Petitioner was registered on May 15, 2017. According to the Learned Counsel this was an impossibility. When faced with these facts the Petitioner stated that May 15, 2017 was a typo. He argued that it could not be a typo because it was handwritten. He submitted that it could also be seen in the Memorandum to the Certificate of Lease that there were special conditions contained with Lease No.1653192342. He contended that there couldn't be a valid title in Kenya containing cancellations. The Cancellation itself was not initialed

and when one looked at the lease it was seen there were some words which were written below the words "common seal of the Lessee was affixed in the presence of". He submitted that they knew that the Lessees were natural persons and not a limited liability company. He also directed the court to see that the lease was a forgery, someone made a photocopy of a lease, cut off the name of a limited liability company and left it blank. The lease was drawn by the Land Registrar, signed and sealed by him. He stated that he submitted that he had no capacity to do so.

30. The Learned Counsel referred Court again to the lease that the Petitioner relied on. On the front page of that lease below were the words "Lease" it could be seen the sentence "this lease is issued pursuant to the transitional provision in Section 160 and 161 of the *Land Act* and Section 108 of the *Land Registration Act*". The issue was disposal of alleged Government Land and not registration. Section 108 of the *Land Registration Act* was therefore irrelevant. Under the provision of Section 160, the powers to make regulations or to prescribe anything were conferred upon the National Land Commission and the Cabinet Secretary. There was no power in that section to make any/ regulation or to prescribe a procedure whereby a Land Registrar or the Chief Land Registrar can dispose of public land.

31. The Learned Counsel submitted that Maji ya Chumvi adjudication section was part of land previously categorized as Trust Land. The Government never owned Trust Land. If the Government issued any Grant over any portion of land located within Maji ya Chumvi sub-location/Maji ya Chumvi Adjudication Section to the persons who purported to have transferred it to the Petitioner the Grant was null and void. The Government could not dispose of land that it never owned. No Petition or application based on such Grant could be entertained by any court.

32. The Learned Counsel submitted that Osman Ahmed Kahia swore a supporting affidavit on March 15, 2022 in support of the Motion of even date that led to the issuance of orders sought to be nullified or set aside. To that affidavit he annexed a report from his surveyor, Edward Kiguru, Land Surveyors, concerning a Topo – Cadastral survey in which the surveyor was tasked with locating boundaries and beacons and showed parcels of land in Maji ya Chumvi Adjudication Section. He also obtained the Registry Index Map for Kwale/Kinangi/ Maji ya Chumvi Adjudication Section. He observed that there was overlapping between the Petitioner's alleged property and parcels numbers 2,4,5,6 and 7 in the Maji ya Chumvi Adjudication Section. The last thing he observed in his report was that the principle or practice of excluding already surveyed and registered properties at the declaration stage of Maji ya Chumvi Adjudication Section was not adhered to or respected leading to the encroachments of parcels which had been identified. Those parcels were according to the surveyor located in Maji ya Chumvi Adjudication Section. There could be no doubt therefore that this was an issue the Petitioner or its predecessors should have taken up with the Adjudication Officer and should have appealed up to the Cabinet Secretary under the procedure provided for in the *Land Adjudication Act*. It was now well established that litigants should exhaust statutory alternative remedies before approaching the courts.

33. The Learned Counsel submitted that a grave injustice that was visited upon the 228 Applicants that they represented was clearly determinable from the survey report that was commissioned by the Petitioner which was annexed to the Petitioner's affidavit in support of the interim orders. According to that survey report the plots in Maji ya Chumvi that are alleged to overlap the Petitioner's purported land are Plot Nos. 2, 4, 5, 6 and 7. The Counsel brought to the attention of the court that in the Affidavit there was the Adjudication Records for the entire Maji ya Chumvi Adjudication Section containing 430 titles or plots. The Counsel wondered and a issue to be pondered by Court - if only 5 plots affected or overlapped the Petitioner's alleged property why did the Petitioner seek and obtain orders affecting the whole 430 plots. The current position was that there were court orders against persons with whom the Petitioner had not complained at all and they had found it extremely difficult to explain to the villagers at Maji ya Chumvi that there were court orders against properties miles away

from the property the Petitioner claimed to own. On this ground alone the Learned Counsel submitted that the court should set aside those orders as there could no longer be any justification to maintain them.

34. The Learned Counsel submitted that the appeals procedure in the *Land Adjudication Act* was available in various stages of the adjudication process. Under the provision of Section 7 by an Arbitration board to hear questions arising in an adjudication section with regard to surveys. The Court cannot take the place or assume the jurisdiction of an arbitration board. The power of the Adjudication Officer to hear and determine any Petition respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer and any objection to the adjudication register submitted in accordance to Section 26. The alleged overlapping was a survey and demarcation issue. The Petitioner could not turn a Judge into a surveyor or an adjudication officer. He further submitted that the power of an adjudication officer under Section 10 in all claims made under that statute relating to interests in land adjudication area. The particular powers of an adjudication officer stated under Section 11 of the Act. Under Section 12(2) of the *Land Adjudication Act*, Cap. 284 provided that any proceeding conducted under that statute by the Adjudication Officer or by any officer subordinate to him for that purpose is a judicial proceeding. The Petitioner or its predecessors did not make any claim as required under Section 13. The duties of the demarcation officer and surveyor officer under Sections 15 and 16 of the Act. Keeping in mind the alleged overlapping of land in an adjudication area. The particular powers of a demarcation officer are under Section 18. Duties of recording officer and functions of the committee under Sections 19 and 20 of the Act. The Act also provides for the decisions of the committee and the powers of adjudication officers under Section 21, functions of Arbitration Board under Section 22, objection to Adjudication Register under Section 26 and appeals to the Minister under Section 29 and his decision was final.

35. The Learned Counsel submitted that the only jurisdiction the Court would have is to hear appeals against decisions of the Cabinet Secretary. That jurisdiction could not be enlarged by filing a Petition to the Court way out of time. The ELC was being asked to perform the functions of the Cabinet Secretary and the ELC must decline that invitation. He referred the Court to the case of "*Jose Estates Limited – Versus - Muthumu Farm Limited & 2 others* [2019] eKLR, the Court of Appeal expressed serious doubts whether a Judge had jurisdiction to nullify a Letter of Consent of the Land Control Board outside the procedure expressly set out in Sections 11 and 13 of the *Land Control Act*, Cap. 302 and went ahead to hold that if the judge exercised such jurisdiction, it would be in vain. All parties agree that this dispute arises out off adjudication exercise that was concluded with the Certificate of Finality. There was no appeal within the procedure provided for in the *Land Adjudication Act* which the Learned Counsel has referred to above and it would be in vain for the ELC to interfere with that certificate. In summary the orders that were impugned were null and void according to that authority. The ELC had simply no jurisdiction to hear or grant the application for interim orders.

36. The Learned Counsel contended that without prejudice to the above and assuming (without determining) that the Petitioner's alleged parcel of land was Government Land it was not in dispute that the Grant was issued by the Chief Land Registrar to 4 individuals by way of a Lease dated February 5, 2019 and registered in the Land Registry at Mombasa on February 7, 2019. That was nearly ten (10) years from the effective date of the new constitution and seven (7) years from the commencement date of the *Land Act*, 2012. The Petitioner maintained in paragraph 11(c) that the land belonged to the Government and that the Government had the right to issue the grant.

37. The Learned Counsel argued that under the provision of Section 23 (2) of the *Land Act*, 2012 every Grant of Public Land shall be made in the name of the National Land Commission on behalf of the National or County Government as the case may be and shall be sealed. The Grant the Petitioner

relied upon was as aforesaid a Lease dated February 5, 2019 for 99 years with effect from November 1, 2012. The commencement date of the *Land Act* was May 2, 2012. It was issued by one F.N.Oraro for the Chief Land Registrar. It was neither issued nor sealed in the name of the National Land Commission. The Applicable and decisive law on the question who had the power, jurisdiction and capacity to dispose of public land was therefore under Articles 62, 63 and 67 of *the Constitution* of Kenya together with section 23(2) of the *Land Act*, 2012. That person, body or entity was the National Land Commission and not the Chief Land Registrar.

38. The Learned Counsel averred that the function of a Land Registrar was to register an instrument relating to the disposition of an interest in land and not to dish out public, community or private land. Violation of Section 23(2) of the *Land Act* was so rampant that the Cabinet Secretary for Land and Physical Planning was compelled to publish Legal Notice No. 262 in Kenya Gazette Supplement No. 234 of 31st December, 2021 reminding all persons that the power to issue leases and licenses is exercised in terms of Section 23(2) of the *Land Act*, 2012. Whether or not there was a previous Legal Notice No. 106 of 2019 which she revoked, that Legal Notice would itself have been a nullity because under *the Constitution* and section 23(2) of the *Land Act*, 2012 only the National Land Commission can exercise that power. He submitted that the court's duty in these circumstances was well defined and no extensive arguments were called for or necessary. The Grant by way of a lease was issued in 2019 by a person other than the National Land Commission and is therefore null and void. The Petition and the application based on that grant are therefore incompetent.

39. The Learned Counsel further submitted that the court had additional duty under Article 3 and 10 of *the Constitution* to respect, uphold and defend *the Constitution*. The People of Kenya through *the Constitution* conferred the power for the disposition of public land upon the National Land Commission and not the Chief Land Registrar. Parliament conferred that power upon the National Land Commission and not the Chief Land Registrar. There was in fact no land in Kenya classified as "Government Land". It was in fact incorrect for the Petitioner to allege that any land in Kenya belongs to the Government. The Government of the Republic of Kenya did not own any land. Government changes sometimes every 5 years. Under Article 61 of *the Constitution* all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals and was classified as public, community or private. The obligation to respect, uphold and defend *the Constitution* requires the orders obtained to protect property acquired in violation of *the constitution* be set aside. Under Article 2(4) of *the Constitution* the alleged grant violates Chapter 5 of *the Constitution* and is therefore null and void.

40. He submitted that the Petitioner while alleging that the land allocated to those who sold it to him is Government land now stated that in paragraph 11(d) that the Letters of Allotment were granted "much earlier" than November 1, 2012 and therefore section 162 of the *Land Act*, 2012 (savings and transitional provisions) applies. He submitted that they have not been shown a copy of the alleged Letters of Allotment. But even if there were any such letters of allotment, the effective date of the grant of the leasehold interest is November 1, 2012 which brings it within the New Constitution and the *Land Act*, 2012.

41. The Learned Counsel submitted that assuming (without deciding) that there were Letters of Allotment issued prior to October, 2010 (effective date of the New Constitution) would those letters have indicated a future commencement date or would they had postponed or delayed the commencement date of the lease by 9 years to 2019? For the Petitioner to availed itself of Section 162 of the *Land Act* (savings and transitional provisions) it should have shown a grant, a lease or Letters of Allotment predating the new Constitution and the *Land Act*, 2012. The lease and the Certificate of Title it relied on were dated February 5, 2019 and February 7, 2019 respectively. The lease could only

have been granted by and under the seal of the National Land Commission. He averred that he did not think the court should waste its resources on a Petition that was heading nowhere. He stated that the court's duty to respect, uphold and defend *the constitution* cannot be reconciled with orders given to protect and invalid grant that was issued in violation of the same Constitution. The Petition was incompetent and the Application that led to the impugned orders is similarly incompetent and those orders ought to be set aside as a matter of right.

42. The Learned Counsel opined that all the 5 Respondents in the Petition were represented by the Attorney General. They had disowned the Petitioner's alleged title and had required him to explain how he acquired a leasehold interest in the year 2019 from the Government over Trust Land in an adjudication area which had already become private land after the Certificate of Finality. The Petitioner was perhaps confusing the word "adjudication" with the phrase "settlement scheme". Maji ya Chumvi is not a settlement scheme as it has never belonged to the Government. Even in settlement schemes by which the state settled its citizens in Public Land the Chief Land Registrar had no authority to issue any grant or to allocate any public land. That power under the old Constitution was vested in the Settlement Fund Trustees. In paragraph 8 of the replying affidavit by Purity Wanjiru Mwangi, the Assistant Director of Land Adjudication and Settlement sworn on May 10, 2022 the Respondents explained that the whole of Maji ya Chumvi was still indicated as Trust Land. This was true up to the point at which the Certificate of Finality was issued. After titles were issued and registered there can be no talk of Trust Land in Maji ya Chumvi.

43. The Learned Counsel submitted that there were consent orders endorsed by the court in Petition No. 46 of 2019. Could a Judge of concurrent jurisdiction set those orders aside or interfere with those orders in a subsequent Petition by a party who participated in the earlier Petition and lost? There was only one question to be asked and answered in determining the application. If the court knew on March 15, 2022 what it now knows, would it have granted those orders? If the answer is in the negative, then the orders given on that date ought to be set aside. The Application was founded on the fact that the Court was misled in issuing those orders. The application was criticism against the Petitioner. He stated that one could see some sharp practice in the Petition that was drawn to be served upon his clients even though they are not named in the Petition in any capacity and although the orders sought were directed at them. The Petitioner should not have sought or obtained orders against persons he had not named and the point that the court had no jurisdiction against persons he had not named and the point that the Court had no jurisdiction against persons before it is well taken. He urged the Court to reconsider that the Petitioner's complaint was alleged overlapping by 5 plots but the Petitioner sought and obtained orders affecting 430 plots without offering to the Court any explanation why. He urged the court to allow the application with costs.

IV. Petitioner/Respondent's Written Submission

44. The Learned Counsel for the Petitioner the Law firm of Messrs. Omwenga, Mogaka & Mabeya Advocates submitted that the Petitioner was the Respondent in respect to the Interested Parties' application dated March 17, 2022. He stated that they wished to submit to the said application. He held that the Interested Parties did file an application dated March 17, 2022 barely 2 days after filing of the Petitioner's Application dated March 15, 2022. The said Interested parties' application was filed even before the Petitioner's application had been served upon any of the Respondents. The Interested Parties curiously had not explained to the court how they came to know that the Petitioner had filed the said Application on the March 15, 2022. The Interested Parties are seeking inter alia the following orders in their application

    i. Already dealt with

ii. Already dealt with

iii. Pending the hearing and determination of this application the orders given on 15th March, 2022 and issued on March 16, 2022 be suspended or stayed.

iv. The orders given on March 15, 2022 be declared to be null and void, to have been procured fraudulently being based on a forged and incompetent lease and Certificate of Title and be set aside as a matter of urgency.

v. The Petitioner's Notice of Motion application dated March 15, 2022 be heard by the ELC in Kwale on March 28, 2022 when Kwale ELC will be dealing with Petition No. 15 of 2022 in which the Petitioner is a party litigating upon the same property.

vi. The costs of this Application be paid by the Petitioner in any event.

The Interested Parties' Application is supported by the Affidavit of Duncan Mdozomba Nyawa sworn on the March 17, 2022 together with one (1) Exhibit.

45. The Learned Counsel submitted that the Interested Parties' application was opposed vide the Replying Affidavit of Osman Ahmed Kahia sworn on April 14, 2022 together with exhibits. Briefly the Interested parties had averred *inter alia* that:

a. The interested parties were not named parties in spite of being affected by the orders of March 15, 2022.

b. The Petitioners' title was a forgery.

c. The suit property was a Trust Land latter community land but not government land.

d. The Petitioner's title was not issued by the National Land Commission.

e. The Petitioner misled the court as a result the court erred in issuing the interim orders.

f. The orders given on 15th March be set aside since they were based on forged documents.

g. The orders of the 1March 5, 2022be suspended and the matter to be heard by the Kwale ELC Court alongside with Kwale ELC Petition No. 15 of 2022 on the March 28, 2022.

h. That the titles to the land had already been issued hence the orders granted were overtaken by events meaning there was nothing to stay.

The above was the brief summary of the Applicants' case. The 4th Respondent had supported the Interested Parties' application and opposed the Petitioner's application by a replying affidavit of one Purity Wanjiru Mwangi sworn on the May 10, 2022 which inter alia state that:

i. That the adjudication process was complete save for only five titles which are not ready. A certificate of finality was issued way back in November 2018.

ii. That the titles had been forwarded to the 2nd Respondent for registration.

iii. That they were not aware of double allocation.

iv. That the Petitioner's application had been overtaken by events.

v. That the court orders in ELC No. 46 of 2019 had been finally completed with.

vi. Petitioner's orders of March 15, 2022 be set aside.

46. The Learned Counsel submitted that on the other hand the Petitioner had averred in its Replying Affidavit "*inter alia*" that:

    a. That prayer "b" could be granted but prayers "c" and "f" were opposed.

    b. The interested parties had failed to disclose how they got the information of the filing of the Petitioner's matter when no service had been done by the March 17, 2022, the service of the order and pleadings were done upon the Respondents on March 18, 2022 and March 23, 2022.

    c. The interested parties were not parties in this matter because the Petitioner's case against the Respondents. They invited the court to look at the prayers in the Petition.

    d. That its factual that there were more three (3) 3rd Parties these included the 1157 3rd Parties but not the Applicants only as averred.

    e. The Petitioner's attempt to be enjoined in Petition No. ELC 46 of 2019 was opposed and indeed on 19th January 2022, the Hon Judge advised the parties to file a fresh suit.

    f. The Petitioner denies to have been a main party in Kwale ELC Petition No. 15 of 2022 and its not forum shopping.

    g. The Petitioner denies its title to be forgery and averred the date of May 15, 2017 was a typographical error since all the transfer registered documents were for May 15, 2019 and it acquired the same from the registered owners hence a purchase for value without Notice. None of the makers and or signatories of its title have made or filed any affidavit to confirm its title documents were forgeries and or fraudulently obtained.

    h. The Petitioner was not a party in Civil Appeal No. E009 of 2022.

    i. No evidence that the 3rd Respondent had issued any title deeds to any parties so far.

    The above is a brief summary of the Petitioner's Reply to the Interested Parties' claim.

47. The Learned Counsel submitted that briefly the Petitioner averred that it had a strong case against the Respondents and even the Interested Parties on the grounds inter alia that it's the registered owner of Plot No. CR 72836, LR 32095 and LR 37122 which were issued titles much earlier that of the intended 3rd Parties' titles. It was illegal and unlawful for the Respondents to issue other sets of titles to properties which already had titles. The 2nd set of titles were being issued illegally whereas the Petitioner had titles over the same set of property. The Respondents had no right to allocate or adjudicate the property which had already been given titles to the Petitioner. The 2nd set of titles did not follow the due process hence the reason for double allocation; hence that 2nd process must be stopped and or cancelled through a court process. Some titles were issued illegally on July 5, 2018, long before the certificate of finality that was issued on October 31, 2018, hence the whole process by the Respondent was illegal and unlawful and hence the need to reject the Interested Parties' application herein. In light to the above it was right and proper to stop the process till the Respondent sought out the issues by cancellation of the titles which had been issued over the Petitioner's property and the ones not affected can be issued to the owners.

48. The Learned Counsel submitted that the main question was whether the Interested Parties were entitled to prayers C, D, E and F of their application dated March 17, 2022 and they submitted in respect to the same. The Petitioner submitted that the Prayer "c" of the Interested Parties' application could not be issued because the Interested Parties had not demonstrated how the orders given on March 15, 2022 and issued on March 16, 2022 would adversely affect them and or why the same should be

suspended or stayed. The order that was issued was directed to the 1st, 2nd and 3rd Respondents and its servants and or agents from effecting any further issuance of title deeds to 3rd Parties in respect to Maji ya Chumvi Adjudication Section which would affect possession, occupation and ownership of all those parcel of land known as Plot CR 72836, Plot No. LR 32095 and 37122 Kwale. There was no evidence produced by the Interested Parties to demonstrate how the suspension and or stay of the interim orders granted herein would help them in the cause and further that the suspension and stay of the orders would not render the Petitioner's application and Petition nugatory taking into account this Honourable Court through another suit advised the Petitioner to file a fresh suit to champion its rights. To buttress their case, they relied on the case of *Shanzu Investment Limited – versus - Commissioner of Lands* (1993) eKLR where the court said:

> " the court has a very wide discretion under Order 10 Rule of the Civil Procedure Rules, 2010 and there are no limits and restrictions on the discretion of the trial court except that if a judgment is varied must be done on terms that are just."

49. The Learned Counsel submitted that for the court to suspend and or stay its orders there must be very good grounds and or evidence to persuade it that those orders given must be suspended and or stayed. It's the Petitioner's submission that the Interested Parties had not discharged that burden. The Petitioner averred that the orders granted were properly granted and were based on the clear evidence that was adduced before it demonstrated that the Petitioner deserved the Orders sought. Hence it's the Petitioner's submission that those orders ought not be suspended and or stayed as per the Interested Parties' request. On this point, they relied on the provision of Section 107 of the *Evidence Act*, Cap. 80 that states that;

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

ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

50. The Learned Counsel also relied on the case of *Jennifer Nyambura Kamau – versus - Humphrey Mbaka Nandi* (2013) eKLR, that states that:

> " The appellant's other contention is that no handwriting expert was called to verify the signature on the transfer form and the one on the application form for consent of the Land Control Board. Counsel for the respondent submitted that in as far as the respondent's case goes; the respondent had testified that he neither signed the transfer form nor did he sign the application form for consent of the Land Control Board. The respondent submitted that the oral and direct evidence that he did not sign these forms was proof that he did not sign the forms and this fact was corroborated through comparison of the respondent's signature as contained in his national identity card and the documents submitted by Mboi Kamiti Farmers Company Limited. We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The

appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side."

51. The Learned Counsel submitted that in respect to prayer "d" the Petitioner submitted that no order for declaration ought to issue to declare the orders of March 15, 2022to be null and void for reason to have been procured fraudulently and on being based on forged and incompetent lease and certificate of title and hence be set aside as a matter of urgency. The Petitioner had demonstrated and or explained exhaustively on paragraph 11 of the Replying Affidavit by clearly showing that Title No. 72836 was not a forgery and produced a copy of duly registered transfer which clearly showed that the same was registered on May 15, 2019 and not May 15, 2017, which was a typographical error. The Petitioner's title was authentic and none of the government officials who signed his title documents have sworn any affidavit to allege that the Petitioner's title deed was a forgery and or it was fraudulently obtained.

52. The Learned Counsel submitted that they invited the Court to make a finding that the Certificate of Title of the Petitioner herein who was from a purchase of land for value was a prima facie evidence that the Petitioner is the Proprietor of the said title(land) was absolute and indefeasible owner with all the title, right and interest vested in it and subject to the encumbrances, easement, restrictions and conditions contained in the Certificate. Thus, according to the provision of Section 26 (1) of the *Land Registration Act*, it could not be challenged except;

    a. On ground of fraud or misrepresentation to which the Petitioner was proved to be a party.

    b. If the title was acquired illegally, unprocedurally or within a corrupt scheme.

53. The Learned Counsel submitted that the Petitioner had been a purchaser for value it could not be said that it fraudulently acquired the title. In any event the Interested Parties had not proved any fraud, forgery and or mistake by omission and or commission on the part of the Petitioner in respect to the title deed. Hence, the allegation that the Petitioner's title being a forgery and or procured fraudulently was farfetched and had not been proved. No evidence had been produced to confirm any of those allegations, especially from markers of the documents, none of the makers or signatories of the title documents had denied through an Affidavit that the Petitioner's title documents was a forgery and or it was fraudulently obtained as alleged, hence the court should decline Prayer no. "D" by the Interested Parties. To back their arguments, they relied on the cases of:

    a. *Equity Bank of Kenya & Another – versus - Chief Land Registrar & Another* [2018] eKLR that stated with approval the case of *Mary Ruguru Njoroge – versus - Samuel Gachuma Mbugua & 4 others* (2014) eKLR, the court held that:-

> "....It is however upto the party seeking rectification to prove to the court's satisfaction that there has been fraud or mistake in the registration. In my view the mistake referred to under section 80(1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name...The Court too has powers to order the rectification of the title or register in appropriate circumstances...Registration vide the said section refers and include a title or entry in the registry or on the title itself."

    b. *David Peterson Kiengo & 2 others – versus - Kariuki Thuo* [2012] eKLR that stated;

> In my view, this statement of the law suggests the prima facie resolution of the case: in as long as, at this stage, it cannot be demonstrated otherwise, the assumption is that David Peterson Kiengo; Nkiiri Victor Michuri; and Kenakena Investments Ltd on the one han; and Foundation on the other are bona fide purchasers for value

without Notice. They had no obligation to go beyond the register to investigate Njendu's title and satisfy themselves of its validity. They did their bit.

c. *Mohansons (Kenya) Limited – versus - Registrar of Titles & 2 others* [2017] eKLR its highlighted paragraphs in pages 5/8 and 6/8.

d. *Jonah Omoyama – versus - Bonface Oure & 2 others* [2021] eKLR its highlighted in paragraphs in pages 1/3 and 2/3.

54. The Learned Counsel submitted that the Interested Parties had not annexed the Pleadings in the alleged case of Kwale Petition No. 15 of 2022 to demonstrate who were the parties and which prayers being sought in that Petition and if the same were similar with the instant case. The Petitioner had averred that it was not a main party in that matter and in any event it was only an Interested Party and the issues there were not similar to the ones in this case. The law was clear the parties who alleged must demonstrate and or proof its allegations that indeed they averred ELC Petition No. 15 of 2022 and this matter were the same and the issues were the same and indeed the two matters ought to be heard together. The Interested Parties had not proved the same nor had they given this Honorable Court sufficient materials to enable the court make an informed decision on the matter. To buttress the issue of transfer they relied on the case of *Victoria Katuku (Suing as the Legal Representative of the Estate of Eunice Mueni Muthamba – Versus - Jessinkay Enterprises & 2 Others* [2017] eKLR that cites the approval the Ugandan High Court case of *David Kabungu – versus - Zikarenga & 4 others* Kampala HCCS No. 36 of 1995 the court exercising discretion on a request for transfer of suit in circumstances similar to the *Civil Procedure Act* had this to say:

> " Section 18(1) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even 'Suo moto" by the court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction ..... It is a well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused. Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer could be refused....."

55. The Learned Counsel submitted that the Petitioner averred that the Interested Parties had not discharged the burden to demonstrate the reasons why this Petition and Kwale ELC Petition No. 15 of 2022 should be heard together. In any event the orders sought could issue because it had been overtaken by events since the orders sought were that "the Petitioner's Notice of Motion Application dated March 15, 2022 be heard by the ELC Kwale on March 28, 2022 when Kwale ELC would be dealing with Petition No. 15 of 2022 in which the Petition was partly litigated upon the same Property". They

submitted that the said order had been overtaken by events and could not issue. The Court never issued orders in vain.

56. The Learned Counsel submitted that having demonstrated that Prayers no. "c, d, and e" could not issue consequently the Interested Parties' prayer for costs under Prayer "F" could not issue except the costs should be awarded to the Petitioner. To buttress this point, they relied on the case of *Party of Independent Candidate of Kenya & Another – versus - Mutula Kilonzo & 2 others* (2013) eKLR which cited with approval the words of Murray CJ in *Levben Products – versus - Alexander Films (SA) (PTY) Ltd*1957 (4) SA 225 (SR) at 227 that:

> "It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial judge is given discretion...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

57. In conclusion, the Learned Counsel urged the court based on the above submissions, the law, the authorities, evidence and facts of the matter to dismiss the Interested Parties' Application dated March 17, 2022with costs to the Petitioner.

B. The State Counsel's Written Submissions

58. With tremendous humility and respect, the State Counsel filed a very brief written Submissions but to me extremely cogent on the subject matter before this Honorable Court. The Learned Counsel stated that this court had issued an order without knowing that ELC Court No. 2 had also issued a contrary order.

59. Nonetheless, and this was really the roller coaster – "the order of this court had since been overtaken by events as the Land Adjudication process had ended and the title deeds been issued' (Emphasis is mine). She stated that she had instructions from the 4th Respondent and she needed 7 days to file replies supporting the Notice of Motion Applications. The issues in the Notice of Motion applications were very distinct from those in the Petition. In the Notice of Motion it was about the surveys while in Petition the Petitioner alleges it is for double allocation of the title.

VI. Analysis and Determination

60. I have carefully considered the Notice of Motion Application dated March 17, 2022, the Supporting Affidavit thereof; the replying affidavits, the written submissions filed herein, *the Constitution* and the case law relied on by the respective parties. I have also given due consideration of the law. In order to arrive at a just, fair, reasonable and informed decision, I have condensed the following four (4) salient issues for determination by the Honorable Court. These are:-

    a. Whether the Intended Interested Parties have sufficiently demonstrated that they have met the fundamental prerequisites of being considered as interested parties and hence should be joined in this suit.

    b. Whether the application meets the threshold to cause review, setting aside, staying and/or suspending its orders issued on 15th March, 2022.

c. Whether this court has jurisdiction to handle a matter touching on the Land Adjudication process as set out under the *Land Adjudication Act*, cap. 284 of the Laws of Kenya.

d. Who will bear the Costs of the application.

Issue No. a) Whether the Intended Interested Parties have sufficiently demonstrated that they have met the fundamental prerequisites of being considered as interested parties and hence should be joined in this suit.

61. The starting point in determining this Application is the definition of an interested party. Who is such a person? It is noteworthy that there is no definition of an Interested Party in any of the parent enactments in Kenya except in the *Supreme Court Act*, No. 7 of 2011. It is given also in the Supreme Court Rules of 2012 made under the Act as they provide for the practice in that apex Court.

62. I will turn to these provisions shortly. In regard to legislation that creates the other courts below the Supreme Court, there is none that has the term but there is only one definition thereof that has been captured in subsidiary legislation: *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which I will hereafter refer to as the "Mutunga Rules". The Rules were Gazetted on June 28, 2013 vide Legal Notice No. 117. It would appear that the wisdom of the Committee that made the Rules was to minimize the injustice that had, for long before the promulgation of the 2010 Constitution, permeated the justice system in Kenya by way of denying persons who had interest in judicial or tribunal proceedings, the right to be enjoined thereto through the bar of lack of locus standi.

63. The above notwithstanding, it is common sense to expect that for one to be enjoined in certain proceedings, those proceedings have to be pending before the court. In *Leonard Kimeu Mwanthi – versus - Rukaria M'twerandu M'iringu; Nathaniel Kithinji Ikiugu & 4 others (Intended Interested Parties)* [2021] eKLR, Justice L. Mbugua stated that "A party claiming to be enjoined in proceedings must have an interest in the pending litigation..." In other words, the proceedings should still be alive in the court: they could be at the nascent or other stages but must be alive. In *Central Kenya Ltd. – Versus - Trust Bank & 4 others*, CA No. 222 of 1998 the Court, in discussing the issue of joinder of parties, held that "We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (*supra*) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings... that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.". Thus, where litigation has come to an end or put in another way, the court has become functus officio, a person wishing to be enjoined to the proceedings will not succeed in his quest.

64. The meaning of (a court becoming) *functus officio* has been rendered in *Telkom Kenya Limited – versus - John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* (2014) eKLR as follows "The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit based decisional re-engagement with the case once final judgment has been entered and a decree there on issued....". Therefore, where a party seeks to alter the merits of the judgment of the court with issues that are sought to be introduced by the proposed interested party, the court will be extremely hesitant to venture into that 'mine' field. Thus, it will not grant the proposed party opportunity to be part of the long gone proceedings because its purpose shall have been served.

65. The Rule 2 of the Mutunga Rules defines an interested party as "a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation." It also gives the definition of a person to mean both a natural and juristic person. It does so by defining that person as "an individual, organisation, company, association or any other body of persons whether incorporated or unincorporated." It means that by the reference to an "individual" in the definition, which term by the ordinary grammatical meaning is rendered a single human being as distinguished from a group, it therefore includes adults and children. But one should not ignore the procedure of how children are represented in suits if they are (to be) parties.

66. The definition above should be looked at widely as to encompass anyone including governments both central and county ones, and any statutory bodies since they fall under the last category of the laundry list given in the definition. The list is not exhaustive: for one to fit in it only behooves him to satisfy the criteria for enjoinment to any proceedings as an interested party. The determining basis for joinder would be the establishment of a link between the substratum or subject matter of the proceedings at hand and a direct interest by and prejudice to a person seeking leave of the court to be enjoined as an interested party.

67. The Cambridge Dictionary (online) defines an interested party as "any of the people or organizations who may be affected by a situation." The term is defined in the LexisNexis Website as "any person (other than the claimant and defendant) who is directly affected by the claim." It has been stated further in the Website that a person will be directly affected by the claim if he or she will be affected by the grant of a remedy in the proceedings. The *Black Law Dictionary* 9th Edition at Page 1232 defines an interested party as "A party who has a recognizable stake (and therefore standing) in the matter." It also defines a "Necessary Party" as "a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings."

68. In *Judicial Service Commission – versus - Speaker of the National Assembly & another* [2013] eKLR, the High Court stated that the interested party "...is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favourable to his stake in the proceedings." In Trusted Society of Human Rights Alliance – Versus - Mumo Matemo & 5 others [2014] eKLR, at Para 18, the Supreme Court defined the term as "...one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."

69. The above definition has the same import and content as the definition in the *Supreme Court Act*, Act No. 7 of 2011 and the Rules made thereunder. Section 23 of the Act provides that:

> "(1) Any person entitled to join as a party or liable to be joined as a party in any proceedings before the Court may, on Notice to all parties, at any stage of the proceedings, apply for leave to intervene as a party.
>
> "(2) An application under this Rule shall contain information on-
>
> (a) the identity of the person interested in the proceeding;
>
> (b) a description of that person's interest in the proceeding;
>
> (c) any prejudice that the person interested in the proceeding would suffer if the intervention were denied; and

(d) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties".

70. The Rule 25 of the *Supreme Court Rules*, 2012 then provides that:

" 1)A person may at any time in any proceedings before the Court apply for leave to be joined as an interested party.

"(2) An application under this rule shall include-

(a) a description of the interested party;

(b) any prejudice that the interested party would suffer if the intervention was denied; and

(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties".

71. The provisions cited above rhyme well with the definition in Rule 2 and process contemplated by Rule 7 of the Mutunga Rules. They (the numerous definitions above) lay the basis for this court determining whether or not the Applicants in the present Motion have brought themselves within the ambit of making a successful application for joinder as interested parties. In the case of "*Joseph Njau Kingori – versus - Robert Maina Chege & 3 others* [2002] eKLR Nambuye J (as she then was), gave the guiding principles to be followed where there is an application to enjoin an intending interested party in a suit. They are that:

" .....(1) He must be a necessary party;

(2) He must be a proper party;

(3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff;

(4) The ultimate order or decree cannot be enforced without his presence in the matter;

(5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit". The features given by Justice Nambuye fuse into the definitions given. The definitions and provisions sit well with the principles that were set out by the Supreme Court in the Muruatetu Case (referred to below) regarding the what a party has to satisfy in order for him to be enjoined as an interested party in any proceedings.

72. For clarity purposes, this court refers to the case of *Baluram – versus - P. Chellathangam & Ors* on 10 December, 2014 where the Supreme Court of India defined both a "necessary party" and "proper party." It stated as follows:

" A 'necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a 'necessary party' is not impleaded,

the suit itself is liable to be dismissed. A 'proper party' is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made."

73. Further the Court is persuaded by the findings in the case of *Moses Wachira – versus - Niels Bruel & 2 others* [2015] eKLR wherein the Court quoted the Supreme Court decision in *Communications Commission of Kenya and 4 others v Media Services Limited & 7 others* Petition No. 15 of [2014]eKLR where the Court pronounced itself on who an Interested Party is and held as follows:

> " In determining whether the applicant should be admitted into these proceedings as an interested party, we are guided by this Court's decision in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:
>
> "An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly in the case of Meme – Versus - Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:
>
> (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
>
> (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
>
> (iii) Joinder to prevent a likely course of proliferated litigation.
>
> We ask ourselves the following questions:
>
> a) what is the intended party, state and relevance in the proceedings and
>
> b) will the intended interested party suffer any prejudice if denied joinder.?"

74. In this instant case, the court has already held that the Applicants are a necessary party as they have interest over the property, no prejudice would be occasioned if the Applicants are made a party. This court proceeds now to consider the second issue for determination before it in order to answer fully the first one.

75. There is a difference between the meaning, process and act of joining a party to a suit whether as plaintiff or defendant from that of joining an Interested Party to an existing suit. The former is the only one governed by most of the first part of Order 1 Rule 10(2) of the *Civil Procedure Rules*, 2010. At the relevant part the Sub-rule provides that:

> " The court may at any stage of the proceedings, either upon or without the application of either party,...order that...the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

76. It is this court's opinion that the term "addition" herein referred to relates to only to where the court issues an order to have that person included as a plaintiff or defendant. This is because an interpretation of the phrase when read disjunctively imports the idea. In that case, a party can apply for leave to add such persons whose presence will be vital in order to determine effectually the real issues in controversy. But the part of the provision that extends to cover the enjoinment of persons as interested parties is the last part of the phrase thereof that states:- ".....or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit." This phrase gives the court a wide path to including persons as interested parties in suits. Moreover, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), making reference to Order 1 Rule 10(2) of the Indian Civil Procedure which is similar in all fours with Kenya's, state that:-

> " The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties." The Court of Appeal has agreed with this interpretation in the case of "JMK – Versus - MWM & another [2015] eKLR. This has also been followed by the persuasive authority of Temple Point Resort Limited – Versus - Accredo A G & 5 others [2018] eKLR.

77. The phrase is (to be) governed by a special procedure whose legal stem is the Mutunga Rules of 2013. Were the two processes similar, there would have been no need to give the definition of an Interested Party in Rule 2 and the procedure in the provision in Rule 7 of the said Rules to amplify how a proposed interested party can be brought into proceedings.

78. Rule 7 provides for two ways in which a person may be enjoined in proceedings as an interested party. Sub-rule 1 envisages a situation where the person moves the court. The said sub-rule provides as follows: "A person, with leave of the Court, may make an oral or written application to be joined as an interested party." In that case, he has to be granted leave of the court first before applying to be joined. Sub-rule 2 refers to where the court is of the view that it would be in the interest of an individual that he be enjoined to proceedings as an interested party. In that case the court will, Suo motto, make an order for the person to be enjoined.

79. It should not be lost to anyone that for a proposed interested party to actively participate in proceedings, Rule 7 Sub-rule 1 envisages a two-tier process. First, the proposed interested party should seek leave of the court. Although the Rule provides for an application of such nature being made orally or writing, the Supreme Court has held, and for good reason, that the Application should be made formally. This was stated by the Court in the Muruatetu case (referred to hereinbelow).

80. The principles set out in Paragraph 37 of the case of *Francis Karioki Muruatetu & Another – versus - Republic & 5 others*, Petition 15 as consolidated with 16 of 2013 [2016] eKLR form the gravamen of the elements applicable where a party seeks to be enjoined in proceedings as an interested party. They are that the Applicant(s) must show:

(i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

(ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

(iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.

81. Have the Applicants met the above conditions:- First, the court needs to determine whether they have a direct interest or stake in the proceedings. The Interested parties purport that they have titles to the said piece of property.

82. In the case of *Judicial Service Commission – versus - Speaker of the National Assembly & Another* [2013] eKLR the court, referring to the definition as given in the Mutunga Rules and reproduced above stated that:

> "...an interested party ..... is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."

83. From the foregoing, it is definite that an interested party is a person or a legal entity that is would be directly affected by the decision of a case either determined before a tribunal or a court of law especially if it is determined in favour of the adversary.

84. Have the interested parties demonstrated that they have an identifiable stake in these proceedings. A cursory perusal of the members list confirms that the intended interested parties appear in the list. This clearly indicates that they have a legal stake in these proceedings since they have a duty to protect their proprietary interests over the suit land. Indeed the Respondents acknowledge that the proposed interested parties have interests in the property in dispute. Their point of departure is that these interests would be protected by the defendants.

85. By any chance that the Petitioner is granted the sole right to proceed with the case, or so to say, to the exclusion of the proposed interested parties and they fail to adduce evidence or conduct their case properly and they lose, what shall happen to the proposed interested parties' interests" They will go up in flames with the inadequacies of the Respondents. Therefore, this court is of the view that there will be real prejudice that the proposed interested parties stand to suffer should they not be enjoined. This court is duty bound to, in the interest of justice, offer a chance to persons, however many they be, to be heard. This is in line with the principles of natural justice. Their joinder would enable them have their day in court to ventilate their issues.

86. Further, the orders sought in the Petition if allowed as against the Respondents will adversely affect the interests of the proposed interested parties. These parties might not have the chance to be heard if they are not enjoined at this stage. The Petitioner on the other hand have not demonstrated any prejudice they would suffer if the orders sought are not granted.

87. Lastly, the next issue is whether or not the Applicants have set out their case and/or submissions it intends make before the Court and shown that their case is not replica of what other parties have before the Court. Their ownership of the parcels they occupy, if any and if proved to be true, is not subsumed in the proprietary rights of the parties in the suit. This is a case set out clearly.

88. Therefore, I am satisfied that the proposed interested parties have met the threshold set out in the Muruatetu case (*Supra*). In considering whether or not to allow the prayers sought, this Court is enjoined to consider whether the prayers are couched in the manner that they would, if granted, give the proper result and finding of the Court. I have considered the wording of prayers 3 and 4 of the Notice

of Motion. In my view, one replicates the other in part while the other one is mixed up with obvious processes which if blanketly ordered by this Court as sought presently or prayed would easily distort the entire litigation process in this suit. At this point I once more reiterate, as I have stated in other decisions elsewhere, that counsel and drafters of pleadings would do well to pay singular attention to the manner in which they draft their documents. This seems not to be the case in regard to the prayers I have considered above, and they have presented difficulty to me. Ordinarily, it is not the duty of the court to craft prayers, that is to say, the final orders or decree for parties, especially where they are represented by counsel.

89. Thus, in the interest of justice, proceed to allow the Application in terms of the two prayers (summarized) that the law permits me at this stage to do. Thus, I grant leave to the Applicants to be enjoined as Interested Parties in this suit. As to whether they decide to participate in the proceedings fully or not it is not a matter of the court to order or enforce. It is up to them. Similarly, subsequent filing of pleadings and documents by the parties is dependent on many factors which are not open to the Court to assess compliance thereof at this stage.

Issue No. b). Whether the orders issued on 15th March, 2022 should be Set aside, Varied, suspended or stayed.

90. This Court having allowed Prayers "a" and 'b" of the Application dated March 17, 2022 in the manner stated immediately above, it now considers Prayers 'C" and "D" of the application thereof. The prayer is to the effect that the Orders of this Court issued on March 15, 2022 be reviewed and that the Court grants the (proposed) Interested Parties a chance to file their response to the Petition and written submissions thereto. One would have to first understand what the Orders of March 15, 2022 were. On the said date this Court ordered that the Application by the Petitioner was urgent and that pending the determination and hearing of the application there be a conservatory order issued prohibiting, inhibiting and restraining the 1st, 2nd and 3rd Respondents, by themselves, their servants and agents from effecting any further issuance of Title Deeds to 3rd Parties in respect to Maji ya Chumvi Adjudication Section, dealings, disposing of, auctioning or in any manner interfering with the Petitioners' possession, occupation and ownership of that parcels of land known as Plot No. CR. 72F836, Plot No. LR. 32095 and 37122, Kwale.

91. Without going to the merits or otherwise of the prayer, this court needs first to determine whether or not the prayer is competently before it. This is because once the competency of a party to move the Court is established it gives the basis for the court to exercise the jurisdiction that both *the Constitution* and statute give it. It is upon that appreciation that the merits will be the next issue to go into. From the very onset, this Court has taken cognizance that the prayer was made at the same time the Proposed Interested Parties sought to be given leave to be enjoined in the suit. That is un-procedural. No legal cure, including Articles 40, 48 and 50 of *the Constitution* that the Applicants called to their aid, and 159 (2) (d) which parties often resort to when they gasp for breath in the weakness of their cases and arguments, or Sections 1A, 1B, 3A and 100 of the *Civil Procedure Act*, Cap. 21 can be of any avail. Praying for anything more than seeking leave to be enjoined is putting the cart before the horse. Before leave is granted to a party to be enjoined, one has no more to say or pray to a court than that "I need leave". As far as the Court is concerned, until today through this ruling, the Applicants seeking for this orders were still not yet admitted or joined as parties to the matter.

92. Unless otherwise stated, this Court finds that the prayer was sought by a stranger and without any Locus standi (Legal capacity) to the proceedings as at the time the prayer was made. It has been pointed out that for a proposed interested party to participate in any proceedings in a suit he has to make three pertinent steps which arise from a two-tire process: he has to seek leave of the court first which, if

granted; he then files the requisite documents to come on record as an interested party, and then make the necessary applications or Motions that he would like the court to hear him on.

93. In the instant case, and based on the prayers no.....of the application dated March 17, 2022, the proposed interested parties sought for leave to be joined in the proceedings. They were still proposed Interested Parties. Before being enjoined they sought the prayer in question. Certainly, they ought to have held their horses until leave had been granted. This prayer was sought prematurely and is therefore incompetent before the Court. Supposing the court were to grant this prayer at this stage, on whose account other than a stranger in the proceedings or on what basis" By granting leave, the Court has only pronounced itself in a manner similar to saying thus "you are free to be enjoined in the suit." Have they been enjoined". Certainly not. Granting such a prayer would be taking a step in a vacuum. What if they do not take the step to be enjoined yet the court shall have granted the prayer". That would be chaotic. It would led to what the famous English Philosopher Thomas Hobbes described as "Short, Nasty & Brutish"!! to say the every least. Thus, it goes without saying that I must decline to allow the prayer. In the given peculiar circumstances, I dare not address myself on the legal jurisprudence nor ratio with regard to granting review, setting aside and variation of Court orders under the Mutunga Rules nor Section 80 of the *Civil procedure Act*, Cap. 21 and Order 45 (1) of the *Civil Procedure Rules*, 2010. Assuming for the sake of argument that was the case, this Court still fails to appreciate the - discovery of new and important matter or evidence which after the exercise of due diligence, was within the knowledge or could not be produced by the Applicants at the time when the Decree from the of March 15, 2022 was passed or on account of some mistake or error apparent on the face of the record or for any sufficient reason causing this Court to grant an order of review, setting aside or variation of its orders of 15th March, 2022. The orders sought appear to be urging this Court sit as an appellate organ on its own orders. Far from it. On this aspect I have heavily relied on the decision of the Supreme Court of India in the case of "*Ajit Kumar Rath – versus – State of Orisa*, 9 Supreme Court Cases 596 at Page 608. had this to say:-

> " The power can be exercised on application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier; that is to say the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason".....means a reason sufficiently analogous to those specified in the rule..."
>
> Further, in the case of "Nyamongo & Nyamongo – Versus – Kogo" (2001) EA 170 discussing what constitutes an error on the face of the record, the Court rendered itself as follows:-
>
> " An error apparent on the face of the record cannot be defined or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably in the original record is a possible one, it cannot be an error apparent on the face of the record even though another

view was possible. Mere error or wrong is certainly no ground for review though it may be one for appeal....."

IssueNo. c). Whether this court has jurisdiction to handle a matter touching on the Land Adjudication process as set out under the *Land Adjudication Act*, Cap. 284 of the Laws of Kenya.

94. The legal issues of jurisdiction of Court is now settled and extrapolated in the celebrated "locus classicus" case of Owners of the *Motor Vessel "Lillian S" – Versus - Caltex Oil (Kenya) Ltd* (1989) KLR 1 where the Court stated that:

> " Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

95. The Learned Counsel for the Interested Parties submitted that the appeals procedure in the *Land Adjudication Act* is available in various stages of the adjudication process. Under section 7 by an Arbitration board to hear questions arising in an adjudication section with regard to surveys. The Court cannot take the place or assume the jurisdiction of an arbitration board. The power of the Adjudication Officer to hear and determine any Petition respecting any act done, omission made or decision given by a survey officer, demarcation officer or recording officer and any objection to the adjudication register submitted in accordance to section 26. The alleged overlapping is a survey and demarcation issue. The Petitioner cannot turn a judge into a surveyor or an adjudication officer. He further submitted that the power of an adjudication officer under section 10 in all claims made under that statute relating to interests in land adjudication area. The particular powers of an adjudication officer stated under section 11. Under section 12(2) of the *Land Adjudication Act* any proceeding conducted under that statute by the Adjudication Officer or by any officer subordinate to him for that purpose is a judicial proceeding. The Petitioner or its predecessors did not make any claim as required under section 13. The duties of the demarcation officer and surveyor officer under section 15 and 16. Keeping in mind the alleged overlapping of land in an adjudication area. The particular powers of a demarcation officer are under section 18. Duties of recording officer and functions of the committee under section 19 and 20. The Act also provides for the decisions of the committee and the powers of adjudication officers under section 21, functions of Arbitration Board under section 22, objection to Adjudication Register under section 26 and appeals to the Minister under section 29.

96. The provision of Section 29 of the *Land Adjudication Act* provides as follows: -

> "(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—
>
> (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and
>
> (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.
>
> (2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall—

(a) alter the duplicate adjudication register to conform with the determinations; and

(b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly."

97. It is clear from the above provisions that there is a procedure to be followed when one wants to deal with land adjudication process. From the pleadings and the submission, undoubtedly, the Land Adjudication process was successfully undertaken as per the set out procedures herein matters. Indeed, all the title deeds have been issued apart from the five cases due to a few administrative aspects and hence completed. In the words of the Counsels in unison and I quote them verbatim ".....the process and the orders of this Court issued on March 15, 2022 are null and void as they have been overtaken by events.....". It is a case of bolting the stable after the horses have already left. I fully concur with the Learned Counsel for the Proposed Intended Parties to the effect that this Court is not dealing and may not deal on any matter pertaining to the Land Adjudication process as there are abundant dispute resolution mechanisms provided by the Act unless with a Consent from the Director of Land Adjudication Officer under Section 30 of the Act. Besides, the provision of Section 29 of the Act brings to a finality to any such litigation. The only exception to this rule where the High Court comes in as an arbiter on matters of Land Adjudication is under the Judicial Review process to grant prerogative orders of Certiorari, Prohibition or mandamus if the adjudication process is found to have been undertaken capriciously, discriminatively, with biasness, unreasonably, unfairly, Ultra Vires, and in bad faith by any of the Public officers entrusted in managing the process.

98. The Petitioner brought this Petition under Article 258 of *the Constitution* and Rules 23 and 24 of the Protection of Rights And Fundamental Freedoms And Enforcement of *The Constitution*. It has been noted that the Applicant's were not party to these matters and the issue on jurisdiction was only addressed in passing in their grounds supporting the Notice of Motion application and a bit on the submissions. The State Counsel emphatically submitted that the orders given on the 15th March 2022 have been overtaken by events and do not hold waters any more. The parties can properly address the court on this issue now that all the necessary parties to the Petition are on board.

99. This Court is guided by the Supreme Court in the case of *Republic – versus - Karisa Chengo & 2 others* (Supreme Court Petition No. 5 of 2015) 2017 eKLR, the Supreme Court delivered itself as follows:-

> " Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from *the Constitution* or legislation.....
>
> In addition to the above, we note that pursuant to Article 162(3) of *the Constitution*, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and ELRC as stated above. From a reading of *the Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not

imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court."

Therefore, based on the reasoning made out here, this Court has jurisdiction to hear and determined this matter.

VI. Conclusion & Disposition

100. Ultimately, the upshot of the indepth anaylsis of the framed issues herein, based on the verbatim averments and submission of the State Counsel to the effect that the Land adjudication process for the Maji Ya Chumvi area had already been completed and already the title deeds issued thus the Court order of March 15, 2022 was overtaken by events. This Court should never bee seen granting orders in vain merely for academic discourse. Thus, on preponderance of probability, this Court now proceeds to make the following orders. These are

a. That a declaration be and is hereby made to the effect that this Honorable Court has Jurisdiction to hear and determine the broad issues hereof which are not on the Land Adjudication process of Maji Ya Chumvi Adjudication Section and it shall proceed to do so accordingly.

b. That an order be and is hereby made that this Honorable Court outrightly declines to Set aside, Vary or Review its Court Orders granted on March 15, 2022 on grounds that the application made by the Applicants herein on that aspects lacks any tangible merit to warrant the said orders being granted. It is clear that the Petition was properly instituted.

c. That an order be and is hereby granted that the 228 persons who ideally are adversely affected by the Issues in this Petition be and are hereby forthwith joined as parties in the Petition. Thus, the Petitioner be and is hereby granted 14 days to amend the main Petition accordingly.

d. That pursuant to this, the Petitioner be and is hereby directed to forthwith serve the Interested parties with all the pleading filed in this suit within the next fourteen (14) days from the date of this ruling.

e. Thatfor expediency sake, and due to its complexities, this matter to be heard and determined on priority basis through both the affidavits and adducing of "*Viva Voce*" evidence before this Honorable Court on October 6, 2022. In the meantime, Parties are granted 21 days leave to file and serve each other any other relevant documents they intend to rely on during the hearing.

f. That the costs of this Application shall be in the Cause.

Its is so ordered accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 18TH DAY OF JULY 2022

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

ENVIRONMENT & LAND COURT AT MOMBASA.

In the presence of:

M/s. Yumna Hassan, Court Assistant.

Mr. Abaja Advocate holding brief for Mr. Omwenga Advocate for the Petitioner.

No appearance Advocate for the Respondent.

M/s. Muyaa Advocate holding brief for Mr. Kinyua Advocate for the Interested Parties.

Mr. Asige Advocate for the Interested Parties.