



**Said v County Government of Mombasa; Sutton Holdings Limited  
(Interested Party) (Environment and Land Constitutional Petition 37  
(E04) of 2020) [2022] KEELC 13288 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13288 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 37 (E04) OF 2020**

**LL NAIKUNI, J**

**SEPTEMBER 28, 2022**

**IN THE MATTER OF: ARTICLES 1 (1) (2) (3) (A), (B), 2 (4), 10, 19, 20, 21, 22, 23, 40, 47, 48,  
165 (3) (D) (II) (III), 238, 244, 258 (1), 259 (1) (3) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

**IN THE MATTER OF: LAND ACT NO. 6 OF 2012**

**AND**

**IN THE MATTER OF: ILLEGAL, FRAUDULENT AND UNJUSTIFIABLE  
DEALING AND DEMOLITION OF PROPERTY BETWEEN PLOT  
NO. 1501/MN AND PLOT NO. 21152/1/MN BAMBURI MOMBASA**

**BETWEEN**

**ABDULLAHI OMAR SAID ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... RESPONDENT**

**AND**

**SUTTON HOLDINGS LIMITED ..... INTERESTED PARTY**



## JUDGMENT

### I. Introduction

1. This judgement is for the determination by this honorable court. It pertains to the instituted issues founded in constitution petition dated October 28, 2020 by the petitioner herein. The petition was filed in court on the same date by the petitioner. It was brought under the dint of articles 1(1) (2), (3) (a), (b), 2 (4), 10, 19, 20, 21, 22, 23, 40, 47, 48, 165 (3) (d) (ii), (iii), 238, 244, 258 (1), 259 (1) (3) of the Constitution of Kenya 2010, provisions of Fair Administrative Action Act 2015, Land Act No 6 of 2012 and the Land Registration Act No 3 of 2012. Upon service the respondent and the interested party herein filed their replies dated December 8, 2020, December 13, 2021 and December 13, 2021 respectively. Subsequently, directions were granted to have the petition be disposed off by way of affidavits and the honorable court reserved a date for delivery of the judgement.

### II. The Petitioner's Case

2. The petitioner has sought for the following reliefs:-
  - a. A declaration that the petitioners was the rightful, legal and beneficial owner of all that parcel of land known as land reference No MN/1/1502/R measuring approximately 45ft by 72ft which lies between plot No 1501/I/MN and plot No 21152/I/MN ("suit land").
  - b. A declaration that the petitioner's fundamental right and freedoms as enshrined under articles 40, 47, 48 and 60 of Constitution of Kenya 2010 had been contravened and infringed upon by the respondents herein.
  - c. A declaration that the respondents action of demolition of the premises erected on the suit land was illegal, unlawful, wrongful and an infringement and violation of the petitioner's constitutional rights to property.
  - d. A conservatory order restraining, prohibiting and stopping the respondents jointly and severally, their agents officers and any person acting under them from entering upon or trespassing, encroaching, constructing any structures, offering for sale, selling, disposing of charging, subdividing, dealing alienating, occupying, managing letting or otherwise using, residing and remaining or representing themselves as the registered owners of the property or in any way whatsoever from interfering with the petitioners proprietary rights including the right to quiet possession and enjoyment over the suit premise.
  - e. An order of *mandamus* directed to the NLC to register and issue the title to the suit property.
  - f. An order for compensation to be directed towards the respondents to compensate the petitioner for infringement of the petitioners constitutional rights and freedoms and illegal occupation and construction on the petitioner's suit land.
  - g. This honorable court do grant any other appropriate relief and do make such further or other orders and to give such further directions as it may consider appropriate for the purpose of enforcing or securing the enforcement for the



provisions of articles 1(a), (2), (3) a), (b), (4) (b), 2 (4), 6 (1) (2) 10, 165, (3) (d) (ii), (iii) 238, 244, 258 (i) and 259 (1) (3) of the Constitution and any other articles of the Constitution in relation to the petitioner in this petition.

h. Costs of this petition.

2. The petition is premised on the grounds, testimonial facts and the averments of the 47 paragraphed supporting affidavit of Abdullahi Omar Said sworn and dated on October 28, 2020, and the twenty (20) annexures marked as “AOS -1 to 20” annexed thereof. He deponed that he was an adult male of sound mind and the petitioner herein. He informed court being the beneficial owner of all the suit property where he had been in occupation from the year 2016 to date and where he constructed commercial premises. He had obtained all the relevant permits from all the authorities for purposes of the construction.
3. He averred that sometimes in the year 2017, he made a formal application to the National Land Commission to be considered for the allocation of the suit property taking that the said access road had become redundant, not in use and not being serviced. He deponed that pursuant to the afore stated application the then chairman of the National Land Commission, Prof Mohamed A Swazuri sent a notice by way of a letter dated January 20, 2017 addressed to the chairman of the lands administrative committee to consider his application for the allocation of the subject property.
4. On April 11, 2017, the National Land Commission addressed the aforesaid letter to the county executive committee of the respondent and county co - ordinator – National Land Commission requesting the said offices to confirm that the subject property was not required for use of any purpose. On July 20, 2017, the chief officer lands, planning and housing of the respondent did a letter to chief officer transport & infrastructure of respondent requesting them to look into the application and he confirmed that the access road was not being in use.
5. He posited that on October 30, 2017 the chief officer, department of transport infrastructure and public works of the respondent responded to the above mention correspondences and further the chief officer land planning and housing of the respondent wrote a letter dated November 20, 2017 addressed to the National Land Commission recommending the allocation of the subject land to the petitioners. By this time, the petitioner had fully developed on it a permanent building he averred that, indeed the county surveyor of the respondent had in the year 2016 prepared a report with the conclusion that the house had not blocked anybody access. Nonetheless, another survey was undertaken by the regional surveyor, coast wherein through a letter dated August 7, 2018 which again recommended that the title of the subject property be issued in favour of the petitioner. He however stated that on October 10, 2020 the respondent without due regard to the petitioners interest over the subject property, the petitioner consent express and contrary to their constitutional right to property, illegally, unlawfully and wrongfully trespassed on the premises and proceeded to demolish the structure erected on the suit land as shown in the annexures marked as “AOS – 11 and 12” respectively. He reported the incident to Bamburi police station and was issued with an occurrence book No 13/10/10/2020 – annexed as “AOS – 13”. He then instructed his valuer to undertake an assessment of the damage caused and prepared a valuation report and which was done with a report dated October 13, 2020 – valuing it at Kenya shillings three million two hundred thousand (Kshs 3,200,000/=) - the valuation report is annexed and marked as “AOS – 14”. By this time, he has obtained approvals from the relevant authorities and attracted tenants onto the already developed permanent premises thereof.
6. He held that the action by the respondent was illegal and being trespass on his property. He reiterated having been a beneficial and rightful ownership to the property for over four (4) years. He had heavily and extensively invested and maintained the premises. He had been in continuously and



uninterruptedly been in occupation of the suit land from the time he took possession onto the following constitutional and legal assertions-

- (a) The respondents had a legal responsibilities thrust upon them by virtue of the provision of article 10 of Constitution of Kenya.
- (b) The action by the respondent was illegal and in contravention of Constitution of Kenya.
- (c) The respondent acted arbitrarily, in oppressive capricious manner contrary to the Constitution and law.
- (d) The respondent were in clear violation of the petitioner's fundamental rights and freedom as enshrined in Constitution of Kenya particularly the right and equal treatment to private property.
- (e) The respondent made a mockery of the principles rules and rationale for the requirement of the rule of law under article 10 of Constitution of Kenya.
- (f) The respondent violate the provisions of article 47 of Constitution of Kenya not being treated in a lawful efficient and fair process and article 40 of Constitution of Kenya where he requires protection to enjoy his right to property and article 47(i). whereby all these rights have been violated by the irrational, unreasonable and high handed acts of the respondents. The respondent never sought without any claim from any public utility or body until the year 2020 when the respondent invaded it. From the time they demolished the structure he suffered tremendous loss and damage over the investment having brought down the entire structure. He posited that his constitutional right to property was violated. He felt there was an ulterior motive to remove him from the suit land and allocate it to the owner of the adjacent property who had shown some interest to it.

7. He deposed that the respondents action attempting to have the structure demolished started way back in the year 2016 – as shown from a letter marked as “AOS – 15” dated November 2, 2016.

6 (a) In order to validate the claim that the respondents were working in cohost with the owners of the adjacent property to the suit land to grab the petitioner's land and allocate it to his neighbors he produced statements written by Mr Karim Amiral Jaffer Mohamed of November 15, 2018. It was made in a complaint lodged by him in a criminal case filed at the Shanzu Law Court being CR No 1702 of 2018 – the summary of the statement was that.

- (a) He worked at a Petro City Petrol Station as a manager employed by Aman Kurji. On November 9, 2018 he received a call from him and asked to destroy a wall for the petitioner as he Mr Kurji wanted to grab the plot – fraudulently.
- (b) He went to the county offices to seek protection. He confessed.

8. The petitioner stated that owing to this statement his advocate wrote a letter dated February 15, 2020 to the DPP recommending the prosecution of the said Aman Kurji. The said prosecution was recommended by the DPP through their letter of April 3, 2018 and by DCI dated March 29, 2019 all annexed herein and marked as “AOS 18” and “AOS – 19” respectively. Thus he averred that the respondents actions were of sabotage against the petitioner.

He held that despite infringing on his rights the respondents had proceeded to collect and receive proceeds for the approvals issued to him being a sum of Kenya shillings five hundred & fifty nine thousand five fifty (Kshs 559,550/=) as fees for construction permits and licences. He averred that the subject property was not public property having been allocated to him by the NLC with the consent,



approvals and authority of the respondent and the fact that he had continuously and uninterruptedly taken possession of the property.

9. Based on the legal advice granted to him by his advocate on record, for an order of demolition before undertaking it and which to date has not been secured from any competent court of law.

Finally, the deponent stated that he was apprehensive that if the orders sought herein were not granted then the respondents would continue with their illegal and unconstitutional activities. He urged court to grant the reliefs sought as set out in the body of the petition.

### **III. The Replying Affidavit by the Respondent.**

11. On March 8, 2022, the respondents while opposing the petition filed a 22 paragraphed replying affidavit sworn by Paul Manyala – the Director Physical Planning and an officer of the respondent dated March 7, 2022. The deponent also annexed six (6) annexures marked as “PM - 1 to 6” annexed hereto. He averred that there were several inconsistencies and misleading information by the petitioner as pertaining to the suit property. He held that the petitioner had come to court with unclean hands for the following reasons:-

- (a) The petitioner constructed a building without approvals and there was a clear admission of this – under paragraph 8 of the petition. Furthermore, the Petitioner was charged in the Chief Magistrate Court – criminal case No M5997 of 2016 for the illegal construction.
- (b) The National Land Commission on the contrary to what the petitioner was alluding to in his petition had declared the construction over the utility land as illegal and confirmed the plot as a road reserve/service lane. Thus, through a letter dated March 16, 2017 and marked “PM - 2” had recommended that urgent action be taken by the commissioner to ensure that the building was brought down and the status of the said land reverted to a road reserve/service lane.
- (c) The petitioner misrepresented to the respondents and acquired approvals over a piece of land that he did not own or had any proprietary rights.

12. He informed court that the respondent upon being alerted by the interested party and other residents of the petitioner causing construction of another permanent development on the site land after misrepresenting to the respondent he was issued with an enforcement notice dated September 16, 2020 marked as PM -3.

He informed court that prior to issuing the enforcement notice, the respondent had intensely consulted other relevant agencies including the department of lands and physical planning and the office of the county attorney. Indeed, *vide* a letter dated August 28, 2020 the department of Transport and Infrastructure of the respondent through the county attorney confirmed that indeed the petitioner constructed on a road reserve which had to be left open and improved for public use.

13. The deponent further informed court that the respondents department of physical planning land and housing having been tasked to carry out a survey, it prepared a survey report and whose contents is clear that indeed the petitioner had blocked an access road by constructing an illegal structure.

The county attorney convened a hearing involving the petitioner and the interested party an opportunity to be heard. But the petitioner was not able to prove his case as he never had any ownership documents to support his illegal and irregular development. He only produced approvals which the deponent stresses were acquired through misrepresentation of the respondent. He emphasized that for any approval of a development certain condition ought to be fulfilled these were:-

- (a) Notification of the county government within 48 hours prior to commencing of construction.



- (b) Erecting of a bill board indicating approval plan numbers, the name of the developer, consulting planner, architect and engineers must be placed at site before any construction begin.
  - (c) Not constructing part of public land earmarked for repossession. Private land with ownership disputes of which the petitioner failed to fulfill the said condition. He emphasized that the petitioner knew that the land on which he was constructing was an access road but proceeded to cause the development on it. Indeed, according to the deponent the petitioner was trying to illegally acquire a piece of land meant for the general public – an access road.
14. He stressed that it was only National Land Commission which could allocate public land and not the respondent. He pointed out there were instances thereupon public land could be allocated as per the provision of section 12 of the Land Act and the petitioner in the instant case never fell under any of those categories. He further stated that the respondent had the legal mandate for planning and development of the country enshrined in the fourth schedule of Constitution of Kenya together the Physical and Land Use Planning Act. The same provisions of the law gave the respondent powers to enforce and remedy any illegal development within its jurisdiction.
15. In conclusion, the deponent averred that the petition herein did not meet the threshold test for the prayers sought herein to be granted consequently, the petition herein ought to be dismissed with costs to the respondent and the land repossessed for public use.

#### **IV.The Replying Affidavit by the Interested Party**

16. On March 7, 2022, the interested party filed while opposing the petition filed by the petitioners filed a 27 replying affidavit sworn by Aman Kurji and dated February 25, 2022 and three (3) annexures marked as “AK – 1 to 3” annexed hereto. He deposed that it was the interested party who was the *bona fide* owner of the parcel of land known as CR No 64897 land reference MN/1/21152 and plot No 1501/1/MN situated next to the subject property herein being plot No MN/1/1502/R being a public access road within Bamburi county. He deposed that the alleged illegal structures that encroached on the property of the interested party and the public access road were also subject to a decided case being Chief (Mombasa) Magistrate’s Court criminal case No 5997 of 2016 – Mombasa County v Abdullahi Omar Said whereby the petitioner was convicted for the offence of developing structures without first obtaining development permission contrary to the provisions of section 30 (1) as read with section 30 (2) of the Physical Planning Act cap 265 of the Laws of Kenya.
17. Based on the advice by his advocates, the deponent argued that the orders and remedies sought by the petitioner lied on ordinary civil law and not in a constitutional petition as envisaged by him as no single constitutional issues arose from the said cause of action. Hence, he argued that based on the principle of “constitutional avoidance” this court would not determine this petition which was disguised as a constitutional issue. He emphasized that the compensation sought by the petitioner for the loss and damage of his property would have been raised in an ordinary suit and not a petition. He stressed that the crux of the petition was wrongful, forcible entry trespass and squatting on public land which issues according to the deponent never raised any constitutional issues or interpretation of the Constitution. Therefor the demolition of the illegal structures by the respondent was within their legal right.
- He further advanced an argument that the petitioner was neither the beneficial owner nor the registered owner of the suit land as the same was being set aside as a public access road and not a single documentation conferring ownership to the petitioner had been produced before this court.



18. He informed court that the petitioner had been at loggerhead with the county government for breaching by – laws requiring permission to be sought before carrying out any construction on any property within the jurisdiction of Mombasa. He reiterated it as it was grossly misleading by the petitioner that he owned the suit property – he had no documents to that effect. He stated that an application to the various department and entities and in particular the National Land Commission for allocation of land never by itself conferred exclusive proprietary rights on the suit property. Thus he could assume proprietary rights before the process of allocation was finalized and a title had been issued. Therefore, he averred that the petitioner remained a squatter, an invader and a trespasser on the suit property. He stressed no constitutional right to property could arise where no ownership had been confessed.

He informed court that regarding the statement made by a Mr Karim Amiral Jaffer Mohamed implicating the interested party of any wrong doing had since been recounted through a letter dated December 11, 2020 by the interested party’s advocate marked as “AK - 3” the having been made through pressure and coercion.

19. He argued that this petition could not be construed as a proceeding under sections 12 to 26 of the [Land Act](#) No 12 of 2012 and its enabling regulations being [Land \(Allocation of Public Land\) Regulation 2017](#) and hence the issue at hand was whether this honorable court would derive the mandate or jurisdiction to hasten or ratify the procedure as prayed by the petitioner herein.

He further contended that this court could not make declarations or compel the National Land Commission or any other relevant body for the private benefit of the petitioner who had by filing this petition abandoned the statutory provided procedure and was asking the court to acquire and allocate the suit property on its behalf.

20. In summary, the interested party opined that the petitioner had no *locus standi* to bring this matter because there was no proof of ownership of the suit property and the prayers sought asking the court to declare him the owner of the subject property was not within the powers of this court. Therefore, he urged court dismiss the petition with costs.

#### **IV. Further Affidavit by the Petitioner**

21. On April 21, 2022, the petitioner filed with the leave of court granted on March 8, 2022 while responding to the issues raised by the respondents and the interested parties from their filed replies through affidavits both sworn on March 7, 2022 and February 25, 2022 by Mr Paul Manyala and Aman Kurji respectively. He held that pursuant to the directions from the criminal case MCCR No M5997 of 2016, he applied for approvals from the respondents to develop the land and was granted the approval. By the time the respondent caused demolition the petitioner had approval issued by the department of lands planning and housing in form PPA - 2.

22. He further argued that the letter dated March 16, 2017 – annexure “PM – 2” was already overtaken by events and time and furthermore it was not addressed to him nor brought to his attention. He wondered if at all the National Land Commission had reneged on its promise to allocate him the suit land then they should have informed him in order to dislodge the legitimate expectation he had. He reiterated that his decision to proceed on with developing the suit land was based on a lawful expectation that the respondent would stick to its word and uphold the development approval it earlier issued. Additionally, he refuted having been served with the enforcement notices marked “PM - 3” nor was invited by the county attorney for a hearing as alleged as the said hearing only took place between the county attorney and the interested party. He opined that failure to serve notice unto the developer



contravened the provision of section 72 (1) of the Physical and Land Use Planning Act No 13 of 2019 as it was all intended to deny him a fair hearing and provision of article 47 of Constitution of Kenya.

He averred that the document marked as “PM - 5” by the respondent as contrasted with the annexures marked as “AOS - 9” produced by the petitioner had been altered, forged and/or redacted as to conceal the last paragraph of the report. It was his contention that the development on the disused access road had not blocked access to any surrounding plots and therefore was no need to issue any enforcement notice at all. He held that this was the second time the respondent was causing the demolition of the development on the suit land the first one having been on December, 2021. He informed court having engaged firm of land valuers – White Africa Valuers Ltd. Who tendered their report and valuation on total loss suffered at a sum of Kenya shillings seven million five hundred thousand (Kshs 7,500,000/=). He reiterated being a beneficial owner to the suit property having taken possession and had legitimate expectation that this application to the National Land Commission would be considered and approved.

23. The petitioner averred that he had continuously, peaceful, quiet occupation and possession of the suit property since the year 2016. The petitioner developed it by putting up commercial premises as an investment. Pursuant to the judgment in the criminal court case Mombasa No M5997 of 2016 he duly complied and applied for the requisite approvals and permits which were duly granted by the respondents and other government agencies.

The petitioner’s claim was for vindication of his rights under articles 40, 47, 48 and 60 of the Constitution of Kenya. The claim was premised on the basis that the respondent unreasonably and without lawful justification demolished his commercial premises on the suit land.

On the other part, the respondent averred that the petitioner had illegally developed public land. Therefore, it had been within its mandate to demolish the said structures.

The interested party had little to add to the dispute herein as it appears to be supporting the respondents case while challenging the petitioner’s entitlement to the suit land.

#### **IV. Submissions**

24. On the diverse dates of March 8, 2022 and May 11, 2022, while all the parties were present in court they were granted time to file their written submissions. However, it appears it’s only the petitioner who fully complied whereby clearly both the respondent and the interested party forfeited their rights. Pursuant to that the honorable in the given circumstances will proceed to render its judgment accordingly as scheduled while relying on the filed pleadings.

#### **A.The Written Submissions by the Petitioner**

25. On April 21, 2022 the counsel for the petitioner the law firm of Messrs Lumatete Muchai & Company Advocates filed their written submissions dated April 13, 2022. Mr Kazungu advocate commenced his submissions by expounding on the brief facts and the reliefs sought by the petitioner herein. He further submitted under the following aspects.

Firstly, he contended that the petitioner had demonstrated that his fundamental rights and freedom under the bill of rights particularly under articles 40, 47, 48 and 60 had been violated as pleaded. By stating so he held that the Respondents act of demolishing the petitioners premises on the suit land without notice violated the provisions of articles 40 (3) and (4) of the Constitution of Kenya as pleaded under the averments under paragraphs 26, 27 and 28 of the main petition.

Relying on the principles enshrined in the now famous case of *Anarita Karimi Njeru* (supra) & *Trusted Society of Human Rights Alliance* (supra), They submitted the petitioner had demonstrated



and pleaded with reasonable and mathematical precision that indeed his fundamental rights and freedom had been violated, infringed and/or threatened.

Secondly, the learned counsel submitted that the respondent thwarted the petitioner's lawful/legitimate, expectation that it would have a quiet and peaceful possession of the suit land. He stressed that both the respondent and National Land Commission blatantly violated the petitioner's rights to legitimate expectation and contrary to the provisions of article 20 (1) and (2) and 40 of the Constitution of Kenya, on the rights to entitlement and ownership of the suit property proceeded to act in contravention with the letter dated November 8, 2017 and marked as "AOS-8" which stated that there would be no objection to the allocation of the land to the petitioner.

26. Therefore, based on this, the counsel submitted that later on the letter dated March 16, 2017 produced by the respondent – marked "PM - 2" only served to betray the incongruence of the respondent's actions. To buttress its point on legitimate expectation created by the National Land Commission and the respondent he relied on the Supreme Court of India decision of "J.P. Bansal v State of Rajasthan & another" (supra) and Sitanoi Limited (supra).

Thirdly, the counsel held that the petitioner was entitled to the orders sought from the filed petition. He sought support from the decision of "Kenya Human Rights Commission and another v Own Government Organizations Coordination Board and another" [2018] eKLR & the provision of article 23 of the Constitution of Kenya"

In conclusion, the learned counsel urged court to allow the petition by granting the reliefs sought thereof.

#### **A.The Written Submissions by the Petitioner**

27. On April 21, 2022, the learned counsel for the petitioner, the law firm of Messrs Lumatete Muchai & Company Advocates filed their written submissions dated April 13, 2022. Mr Lumatete submitted that the petitioner was resident of the courts of Mombasa. He was the legal and beneficial owner of all that parcel of land known as the suit land.

Briefly, he stated the reliefs the petitioner was seeking from court. He also provided a summary of the facts of the case. The learned counsel submitted on the following three (3) issues: -

Firstly, he held that the petitioner had demonstrated that his rights and fundamental freedom under the bill of rights particularly under the provisions of articles 40, 47, 48 and 60 of the Constitution of Kenya had been violated as pleaded. Based on the history of the dispute showing precision the actually of the issues deemed unlawful and infringing his constitutional right to ownership of the suit property. Particularly, the respondent act of demolishing the petitioners premises on the suit property without notice violated the provisions of articles 40 (3) and (4) of the Constitution of Kenya, 2010 as pleaded under the paragraphs 26, 27 and 28 of the petition.

28. He submitted that it was now a well-developed principle that is constitutional litigation, a party that alleged violation of his or her rights must plead with reasonable precision in regard in the manner in which there had been such alleged violation. To support this point, they relied on the principles laid in the case of "Anarita Njeru Karimi v Republic" (1976 to 80) IKR 1272 and "Trusted Society of Human Rights Alliance v Attorney General & others" petition No 229 of 2012.

The learned counsel stressed that the petitioner had established "a *prima facie*" case that met the substantive test down from the case of *Trusted Society case* (Supra).

Secondly, the learned counsel contended that the respondent and the National Land Commission thwarted the petitioners lawful/legitimate expectation that it would have made a quiet and peaceful



possession of the suit property. He held that in blatant violation of the petitioner's rights to legitimate expectation and contrary to the provision of articles 20 (1) and (2) and 40 of the Constitution of Kenya, arising out of the rights to entitlement and ownership of the suit property, proceeded to act in contravention with the letter dated November 8, 2017.

Furthermore, the learned counsel submitted that the letter produced by the respondent only served to betray the respondent in actions. To counter this issue, he cited the authority of Supreme Court of India J.P Bansal v State of Rajasthan & Another, appeal (civil) 5982 of 2001 with approval in Sitawi Limited v National Land Commission – Nairobi & 2 others (2020) eKLR to the effect that the decision of the respondents recommending and issuing a no objection to the allocation of the suit property to the petitioner, gave rise to the petitioner holding a legitimate expectation that ultimately the property would be allocated to him. He held that it was on that premise that the petitioner pursued approvals for developing the property.

Thirdly, the learned counsel contended that the petitioner sought various orders against the respondent as highlighted herein. The petitioner's prayers were all premised under article 23(3) of the Constitution of Kenya which granted this court authority with respect to the bill of rights.

In conclusion, the counsel urged the court to allow the petitioner and be award damages for the violation of the petitioner's rights.

## **VI. Analysis And Determination**

29. I have keenly assessed all the pleadings filed herein by all the parties with regard to the filed petition by the petitioner hereof. These are the affidavit in support of the petition, the replying affidavit, the supplementary affidavit by the petition, the written submissions the cited authorities thereof, the relevant provisions of the Constitution of Kenya, 2010 and the statute thereof.

For the honorable court to arrive at a fair, just, reasonable and equitable judgment in this matter, the honorable court has condensed all the issues into the following salient aspects for considerations: -

- (a) Whether the filed petition by the petitioner has met the laid down fundamental threshold of a constitutional petition by a party.
- (b) Whether the parties in this matter conducted themselves as required by the provisions of the law in with regard to the conferring the ownership, rights interest and title to the suit land vis-à-vis the principles of legitimate expectation is concerned
- (c) Whether the parties herein are entitled to the reliefs sought from the filed petition and pleadings hereof.
- (d) Who will bear the costs of the petition?

### **Issue No. (a) Whether the filed Petition by the Petitioner has met the laid down fundamental threshold of a Constitutional Petition by a Party.**

#### **Brief Facts:-**

30. Before embarking on the analysis of the issue under this sub-heading it's imperative that the honorable court extrapolates on the brief facts of this matter. From the filed pleadings and inferring facts surrounding the case hereof, it's not in dispute that the suit land is a parcel of public land but disused access road sometimes back the petitioner made a formal application to the National Land Commission the statutory body with the legal mandate and custody of all the public land in the Republic of Kenya to be allocated it for causing development on it. Evidently, there was exchange of



numerous correspondences between the National Land Commission and the petitioner. They also roped in the respondent as the suit land fell within its jurisdiction. From the face value, it appeared almost obvious that the National Land Commission would allow the petitioner possession and hence eventual ownership. Based on this high expectation reasons well known to himself he undertook to cause development of permanent structures for commercial premises there. These actions seemed to have displeased some residents including the interested party who is an owner of land adjacent to this. Resultantly, they lodged a complaint with the respondent who filed a criminal case against the petitioner. On June 28, 2016 the Chief Magistrate Court ordered that the petitioner fully complies and seeks approval for the requisite approval and permits from the respondents. Further, it was from this court's direction that the petitioner hastily did cause to regularize on this legal anomaly by applying for the approvals for the constructions of the already constructed permanent structures onto the suit land. The respondent herein duly granted the said approvals to the petitioner.

It is later on, that the respondent claimed it was misrepresented to have issued the said approvals. It is the National Land Commission *vide* a letter dated March 16, 2017 seemingly by recanting its earlier position on the allocation of the suit land declaring the allocation illegal and urging for the demolition of the structure. It's on the strength of this letter that the office of the county attorney claims to have held a hearing out with the parties and later on the demolition of the structure on the land ensued. It's from this action of omission and commission that led the petition to institute this petition. That is adequate on the facts.

31. Now turning to the issues under this sub-heading , it is now well established and as per the legal dictum founded in the now famous case of "*Anarita Njeru Karimi* (supra) as extensively cited by the learned counsel for the petitioner, all constitutional petitions must demonstrate with exact and mathematical precision whether it raised issues which are so insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation of the fundamental right and freedom alleged. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that given proper notice to the respondents about the nature of the claims being made so that they may adequately prepare their case.
32. In the instant case, the petitioner holds that he applied to be allocated the suit land being a public land from the National Land Commission and *vide* a several correspondences, in particular the one dated November 8, 2018 – marked as "AOS-8" created high hopes that the application would be considered to his favour. All along the respondents whose jurisdiction the land falls were fully involved in this process and hence were aware. Upon apply and being granted approvals and permits by the respondent he commenced and completed construction of a permanent structure on the land. However, without serving him any legal notice, the respondents on October 10, 2020 proceeded to demolish the said structure causing the petitioner substantial loss and damage thereof. As a result, the petitioner instituted this suit holding that the acts by the respondent of demolishing his structure was blatant violation of the provisions of article 40 (3) and (4) of the Constitution as pleaded under paragraph 26, 27 and 28 of the petition. He further avers that his fundamental right was violated to legitimate expectation created by the National Land Commission contrary to the provisions of article 20 (1) and (2) of the Constitution of Kenya arising out of the right entitlement and ownership of the suit land whereby it proceeded to act in contravention with the letter of November 8, 2017 stating that there was no objection to the allocation of the land to the petitioner. He strongly held that the contents of the letter dated March 16, 2017 produced by the respondent was a betrayal of the legitimate expectation created by the National Land Commission.



33. The petitioner, has held that he was never accorded an opportunity to be heard and fair hearing by the respondent – contrary to the principle of natural justice. Although the respondent insists a hearing of the parties was held through the office of the county attorney, the petitioner has insisted it's only the interested party who was invited and hence participated in the said session. This court would give the petitioner a benefit of doubt as empirical evidence such as minutes or proceedings of the meeting has been adduced by any of the parties. To this end he held his fundamental right under article 47 of Constitution of Kenya and the provision of the Fair Administrative Action Act were infringed accordingly.

Indeed, these are weighty issues and ought to be deliberated and adjudicated by this honorable court accordingly.

34. Nonetheless, the honorable court has taken cognizance of the strong and extension submission by the respondents and the interested party to the effect that the petition filed by the petitioner lies in ordinary civil law and cannot be in a constitutional petition as no constitutional issues have been raised. They have concluded that under “the principle of constitutional avoidance”, this honorable court will not determine this petition which according to them is disguised as a constitutional issue yet the matter can be determined in an ordinary suit. Far from it. The truth of the matter and based on issues raised were the petitioner has a *prima facie* case that meets the substantive test laid down in the above cited cases *Anarita Njeru Karimi and Trusted Society case* (supra) and thus categorically disagree with the assertion by the respondents and the interested party.

**Issue No. (b) Whether the Parties in this matter conducted themselves as required by the provisions of the law in with regard to the conferring the ownership, rights interest and title to the suit land vis-à-vis the principles of legitimate expectation in concerned**

35. From the filed petition and the filed pleadings by the parties, the issue under this sub heading is the most challenging one from the filed petition. To begin with, the fundamental and undisputed issue is that the suit land is public land with the initial purposes of a road reserve. It falls under the statutory jurisdiction of the respondent. From the inferences and surrounding facts, the road, had become disused and as a result of this, the petitioner applied from the National Land Commission to be allocated. It is instructive to note that by this time he had already caused some development of permanent structures onto the land. Based on this application, the commission *vide* a letter dated January 20, 2017 wrote to the respondent inquiring whether the land was available for allocation to the petitioner. Evidently, upon receipt of the correspondence from the NLC, the respondent conducted due diligence on the legality and the actual situation of the suit land from within its own various departments internally. Eventually, through a letter by its chief officer of the department of Lands, Physical & Planning dated July 20, 2017, the respondent confirm that the road was no longer in use. Through the respondent's letter of November 8, 2017 addressed to National Land Commission marked as “AOS - 8” reads:-

“Please refer to your letter Ref NLC/Mombasa/01 dated April 11, 2017 on the underlined subject. Attached please find the comment from the officer in charge of roads that affirms that the permanent house on the disused road reserve does not block access to any of the adjoining plots.

Therefore it is recommended that there is no objection for allocating the land to Mr Abdullahi Omar Said who said has fully developed (sic) permanent building .....



36. This position was further confirmed by the land surveyor by the respondent in its surveyors report marked as “AOS - 9” of the petitioner bundles to wit:-

“The house has not blocked anybody access as those houses build on plot No MN/I/1501 have access within the plot and house built on plot MN/1/3286 use from access”.

From the above assertions, two (2) sticky issues come to fold. First, having stated this, did it mean that the respondents had conferred the suit land to the petitioner and secondly, what was the effect of this communication from the provisions of article 67 (1) and (2) (a) to (h) and (3) of *Constitution of Kenya, 2010*. Under part iii - and sections 20 to 36 of the *Land Act* No 6 of 2012 and sections 5 (1), (a) to (h) (2) (a) to (f) and 14 (1) (2), (3) (4) (5) (6), (7) (8) and (9) of the *National Land Commission Act* No 5 of 2012 it is only the National Land Commission as statutory created legal entry that has the legal mandate to deal and confer grants to public land.

37. In the instant case, the suit land being public land, the respondent is devoid of such legal powers. Indeed, from the numerous communication held between the respondent and the National Land Commission, the respondent only made a recommendation in form of no objection for the petitioner to be granted ownership to the suit land as the permanent structure he had already constructed had not blocked access to any of the adjacent plots. From the onset, it will be pointed out that the respondent never at all conferred any ownership of the suit land to the petitioner herein. The respondent acted legally upto this point.
38. However, the only major hitch here and this court would want to agree with the petitioner was that indeed the respondent created the legitimate expectation upon the petitioner that he would be considered for the allocation of the plot. It's instructive to note that by this time the petitioner had already constructed a permanent building on the public land, no doubt based on the impression or *carte blanche* accorded to him by the respondent and what these correspondences were attempting to do was to a correct a wrong that had already been committed – a case of putting a cart before the horse.
39. The court proceeds to observe several exposes emanating thereafter. Firstly, the National Land Commission never seem to have responded to the above letter by the respondent dated November 8, 2017. On the contrary it appears, the National Land Commission had already stated its legal position *vide* a very comprehensive letter on the subject matter dated March 16, 2017, marked as “PM - 2”.
- Secondly, from the above letter by the National Land Commission, they have emphatically stated that the suit land is reserved for public –road reserve intended to serve plots Nos MN/1/21152 and MN/1/1502 from the letter National Land Commission has noted that the petitioner had started construction works on it which was illegal and hence they recommended that the structure be demolished.
38. Initially, it has been observed that the suit land had on July 2, 2012 had been allocated to Mr Abdalla Joseph Muthemba and Mr Ali Rashid Suleiman on a Temporary Occupation Licence (TOL) by the municipal council of Mombasa for purposes of storage/yard on condition that they should not use the TOL to lay claim on ownership to it.
39. Thirdly, clearly, the owners of the adjacent plots had been complainant for not getting access to their plots due to the construction works. This culminated into a criminal case being lodged against the petitioner before the Shanzu Chief Magistrate Court. From here onwards, this court has found the unfolding events rather disturbing and mind boggling. To begin with, on June 28, 2016 the Chief Magistrate Court rather than finding him liable and hence ordering a demolition of the structure which



was on the road reserve, on the contrary, it ordered that the petitioner fully complies and seeks approval for the requisite approval and permits from the respondents. Further, it was from this court's direction that the petitioner hastily did cause to regularize on this legal anomaly by applying for the approvals for the constructions of the already constructed permanent structures onto the suit land. Ironically, to worsen the already worse matter, the Respondent herein rather than challenging this decision by preferring an appeal to the superior courts or other appropriate legal entities available they graciously and gladly duly granted the said approvals to the petitioner. It is later on, that the respondent without any justifiable or good reasonable cause or prove that they so casually claimed it was misrepresented to have issued the said approvals. In my view, this is just a lame duck excuse and should not be tolerated at all. Indeed, it is the National Land Commission *vide* a letter dated March 16, 2017 that seem to rescue the day. Although this letter appears to be recanting its earlier position on the allocation of the suit land declaring the allocation illegal and urging for the demolition of the structure. It's on the strength of this letter that the office of the county attorney claims to have held a hearing out with the parties and later on the demolition of the structure on the land ensued. The petitioner vehemently denies having been invited nor attended such a session. Indeed, there were no records in form of minutes or proceeding notes to show that indeed this meeting took place if at all. It's from this action of omission and commission that led the petition to institute this petition.

Fourthly, by the time the above criminal case was lodged, the petitioner and in his own admission had not obtained the pre requisite statutory approvals and permits from the respondent and NEMA for the permanent building which was already on fully constructed. He only hastily dashed to apply and was issued valid approvals by the respondent. Indeed, the petitioner admits to this fact as graphically stated under paragraph 4 of his further affidavit:-

“That pursuant to the verdict in Mbsa MCCR No M5997 of 2016 delivered on June 28, 2019, I hastily applied for regularization and sought approvals from the respondent to develop the subject land, which approvals from respondent was granted as evidence by annexure “AOS - 2” of my supporting affidavit”

40. Clearly, the petitioner had already breached the law by causing construction of a permanent building without obtaining the full compliance. By this stand-alone fact is adequate to penalize the petitioner.

Fifthly, notwithstanding the above pronouncement by this court on the respondent, still the position taken by the respondent on this matter is rather bizzare and wanting. It is a case of blowing hot and cold air here and there. They started the fire then pretends to be putting it off. All along the petitioner commenced and completed the construction of a permanent structure onto the suit land, got tenants to occupy it to capacity and even would be remitting rates to them all under their implied consent and knowledge. All this time, they never raised any red flag nor served him with any legal notice restraining him to stop or of intention to evict and demolish it. On the contrary, it is them who first wrote to the National Land Commission recommending that the petitioner be conferred the plot while they were very much aware this land was for purpose of service as a road reserve to other adjacent plots.

41. Additionally, although they claim to have used an enforcement notice served on the petitioner, which he vehemently denies, none has been attached but after the decision by the Chief Magistrate Court, this proceed to issue a valid approval by the department of Lands, Planning and Housing in form PPA-2 stamped on January 31, 2020. Unfortunately, it's the same respondent that again turns around and state that they were misrepresented to have issued this approval. This is incredible to say the least and they have to bear liability for the loss and damages caused to the petitioner. This being a second demolition caused by the respondent, the petitioner retained the services of land valuers trading as Messrs “Elite Africa Valuers Limited” who prepared a report and valuation on a total loss suffered at



Kenya shillings seven million five hundred thousand (Kshs 7,500,000/=). Arising from all this poor and conduct of omission and commission by the respondent, I am of the strong view that indeed, the respondent by all means fueled the situation by creating the legitimate expectation onto the petitioner encouraging him to continue doing what he did as he was under the illusion and rightfully so that the respondent were sanctioning it. The respondent should never be made to escape this liability – the made the bed, they must lay on it. Hence, they should be made to bear the costs and compensate the respondent adequately.

**Issue No. (c) Whether the parties herein are entitled to the reliefs sought from the filed Petition and pleadings hereof.**

42. Under this sub-heading, from the provision of articles 62, 67 and 68 of the Constitution of Kenya, 2010 and section 14 of the National Land Commission Act, No 5 of 2012 clearly provide that all public land fall under the purview of the said and not any other entity. The National Land Commission through its letter of March 16, 2017, marked as annexure “PM – 2” of the respondent’s documents graphically stated that this suit land was a road reserve for purposes of the access service and use by other persons residing within the adjacent plots. It held that the petitioner who had no valid and prerequisite approvals and permits from the relevant agencies National Environment & Management Authority (NEMA) proceeded on to construct a permanent structure on it. It strongly recommended for its demolition. The respondents were compelled by law to demolish the structure.

It’s the respondent who encouraged the petitioner to have assumed he could be considered for the conferment to the ownership of the plot. The respondent not only made a recommendation of the petitioner to be allocated this Plot to the National Land Commission but also issued him with valid approvals to undertake construction. They are estopped from denying that fact. By so doing, the respondent created legitimate expectation and from the words of the case of *J.P Bansol* supra cited by the learned counsel for the petitioner to wit.

“The basic principles in it’s branch relating to “legitimate expectations” were enunciated by Lord Diplock in *Council of Civil Service Union and others v Minister for the Civil Service* [1985] AC 374 (408-409) it was observed in that case that a legitimate expectation to arise, the decision of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn”

43. In the instant case the decision made by the respondent to recommend and issue a no objection to the allocation of the suit land to the petitioner gave rise to the petitioner holding a legitimate expectation that ultimately the property would be allocated to him and it was on that premise that the petitioner pursued approvals for developing the property. Its action to demolish the property thwarted the legitimate expectation. All said and done, this court cannot confer any ownership of property to anyone. Taking that it has been found here that the petitioner had no proprietary rights over the suit land being public land intended for a road reserve, the argument advanced and the relief sought for trespass action ostensibly meted by the respondent herein does not stand any test of sound legal standing as founded under the Trespass Act or any other provision of the law the day. The definition and the legal connotation on the concept of “trespass” and “continued trespass” as now reproduced herein below:-



According to the 10<sup>th</sup> Edition of the *Black Law Dictionary* trespass is defined as follows:-

“An unlawful act committed against the person or property of another especially wrongful entry on another’s real property.

*Clark Lindsell on Tort* 18<sup>th</sup> Edition on page 923 defines trespass as “Any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the plaintiff to proof that the defendant invaded his land without any justifiable reason”

continued trespass is defined as

“A trespass in the nature of a permanent invasion on another’s rights such as a sign that overlaps another’s property’s.

Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.

44. Under the provisions of the *Trespass Act* cap 403, trespass is described as “any person who without reasonable excuse enters or remains upon or erects any structure on or cultivates or tills or grazes stock or permits stock to be on the private land without the consent of the occupier thereof shall be guilty of an offence. Further in *Clark & Lindsell on Tort* 16<sup>th</sup> Edition paragraph 23-01 It states that :- day to day as long as the trespass continues”
45. It must fail on arrival.

#### **Issue No. (d) Who will bear the costs of the Petition?**

46. The issue of costs is the discretion of court. The *Black Law Dictionary* defines “cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The proviso under the provisions of section 27 (1) of the *Civil Procedure Act*, cap 21 holds that costs follow events. It is trite law that the issue of costs is the discretion of courts. In the case of “*Reids Hewett & Company v Joseph* AIR 1918 cal 717 & *Myres v Defries* [1880] 5 Ex D 180, the House of the Lords noted:-

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

47. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in the instant case is the petitioner from the filed constitution petition herein has partly succeeded in their cases. The costs of the suit should be borne by the respondent herein.

#### **VI. Conclusion and Disposition**

48. Consequently, upon engaging into the in-depth and elaborate analysis of the framed issues herein, this honorable court now proceeds to make the following orders in this judgment. These are:-



- a. That a declaration be and is hereby made that the suit property is public land under the provisions of the law article 62 (1) (a) to (n) of Constitution of Kenya, part iii and sections 20 to 36 of the Land Act, No 3 of 2012 and sections 5 and 14 of the National Land Commission Act No 5 and should be set aside for purposes intended us of a road reserve.
- b. That a declaration be and hereby made that the petitioner had not yet been conferred with the legal ownership in any form to the suit land and hence none of his fundamental rights and freedom under articles 40, 47, 48 and 60 of the Constitution of Kenya would have been contravened, denied, infringed, violated and infringed.
- c. That a declaration be and is hereby made that the action by the respondent to cause the of demolition of the premises belonging to and erected by the petitioner on the suit property was legal, lawful and rightful as directed by the National Land Commission.
- d. That an order be and hereby made that notwithstanding order ( c ) above, the respondent herein are found liable for creating legitimate expectation and issuing valid approvals leading the petitioner to construct the said structure on the suit land.
- e. That an order be and is hereby made directed to the respondent compelling her to make, full, just, adequate and prompt compensation to the petitioner for any the loss and damages incurred as pleaded.
- f. That the alleged claim by the plaintiff emanating from any action of the alleged trespass by the defendant herein is unmeritorious and hence disallowed.
- g. That the costs of this suit to be borne by the respondent herein.

**JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA ON THIS 28TH DAY OF SEPTEMBER..OF 2022**

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

**ENVIRONMENT & LAND COURT AT**

**MOMBASA**

**In the presence of:-**

- a. Mr. Buko & Mr. Omar, the Court Assistants.**
- b. Mr. Kazungu holding brief for Mr. Lumatete Advocate for the Petitioner.**
- c. Mr. Tajbhai Advocate for the Respondent.**
- d. Mr. T. Mutungi Advocate for the Interested Party**

