Taireni Association of Mijikenda v County Government of Kwale & 3 others (Environment & Land Petition E006 of 2024) [2025] KEELC 3275 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3275 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT & LAND PETITION E006 OF 2024

LL NAIKUNI, J

APRIL 3, 2025

BETWEEN

TAIRENI ASSOCIATION OF MIJIKENDA ..... PETITIONER

AND

COUNTY GOVERNMENT OF KWALE ..... 1ST RESPONDENT

THE KWALE COUNTY LAND ADJUDICATION OFFICER . 2ND RESPONDENT

LAND REGISTRAR MOMBASA ..... 3RD RESPONDENT

THE HON ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

I. Introduction

1. The Honourable Court was tasked with determination of a Notice of Motion application dated 28th August 2024. It was filed by Taireni Association of Mijikenda, the Petitioner/Applicant herein against the 1st, 2md, 3rd & 4th Respondents herein.

2. Additionally, the 1st Respondent raised an objection in form of a Notice of Preliminary Objection dated 28th October 2024 opposing the said application and and seeking that the entire Petition be struck out for allegedly being defective.

3. The court will render its verdict on the two pleadings consecutively in this omnibus Ruling.

II. The Petitioner's case

4. The Notice of Motion application was made pursuant to the provisions of Articles 1[2],3,6,10,12,19,20,21,22,23,25,27,28,40,43,47,52,56,60,61,62,63,64,65,66,67,68,69,258[2][d] and 260 of *the constitution* of Kenya 2010, Sections 13 [2] of the *Environment and Land Court Act* no

19 of 2011, Sections 4,6,12 of the *Community Land Act*, Sections 1A,1B & 3A under the provision of Orders 40 and 51 of the Civil Procedure Rules 2010. The application sought for the following orders:-

a. Spent.

b. That pending the inter - partes hearing and determination of this application this honourable court be pleased to grant an order of temporary injunction restraining the 1st Respondent, its agents, employees, representatives and proxies from donating, selling, transferring, leasing, charging or in any way deal with all that parcel LR No 14211 measuring 63,039Ha situate in Lungalunga in Kwale County within the Republic of Kenya

c. That pending the inter partes hearing and determination of this petition this honourable court be pleased to grant an order of temporary injunction restraining the 1st Respondent, its agents, employees, representatives and proxies from donating, selling, transferring, leasing, charging or in any way deal with all that parcel LR No 14211 measuring 63,039Ha situate in Lungalunga in Kwale County within the Republic of Kenya

d. That pending the inter partes hearing and determination of this application this honourable court be pleased to grant orders of temporary injunction restraining the 2nd Respondent, its agents, employees, representatives and proxies from donating, selling, transferring, leasing, charging or in any way deal with all that parcel LR No 14211 measuring 63,039Ha situate in Lungalunga in Kwale County within the Republic of Kenya

e. That pending the inter partes hearing and determination of this Petition this honourable court be pleased to grant an order of temporary injunction restraining the 2nd Respondent, its agents, employees, representatives and proxies from donating, selling, transferring, leasing, charging or in any way deal with all that parcel LR No 14211 measuring 63,039Ha situate in Lungalunga in Kwale County within the Republic of Kenya

f. That pending the inter - partes hearing and determination of this application this honourable court be pleased to grant an order of temporary injunction restraining the 3rd Respondent, its agents, employees, representatives and proxies from donating, selling, transferring, leasing, charging or in any way deal with all that parcel LR No 14211 measuring 63,039Ha situate in Lungalunga in Kwale County within the Republic of Kenya

g. That pending the inter - partes hearing and determination of this petition this honourable court be pleased to grant an order of temporary injunction restraining the 3rd Respondent, its agents, employees, representatives and proxies from donating, selling, transferring, leasing, charging or in any way deal with all that parcel LR No 14211 measuring 63,039Ha situate in Lungalunga in Kwale County within the Republic of Kenya

h. That costs of this application be provided for and borne by the Respondents.

5. The application was premised upon grounds listed on its face and the 19 Paragraphed supporting affidavit of Peter Ponda Kadzeha the Chairman of the Petitioner herein. He averred that:-

a. The Petitioner is an association registered under the *Societies Act* in Kenya.

b. The suit property subject of this petition is both community and ancestral land of the Duruma dialect of the Mijikenda community who have been practising farming and keeping livestock on the land. This position is confirmed by a report which the 1st Respondent commissioned its preparation to carry out land survey in Kwale County.

c. It was averred that from the report specifically pages 9-13, it was found that the sub counties of Kinango, Msambweni and Kwale have four livelihood zones namely livestock farming, in the hinter of Kinango Samburu and Lungalunga and the official ranching activity which started in 1970.

d. The evolution of ranches started way back before the year 1900 and most uncultivated and unforested land under natural pasture was used freely for livestock grazing by nomadic pastoralists. That from the report the system of free grazing came under serious overhaul during colonisation but in year 1955 the Swynerton Plan was adopted for reform of African land tenure and is defined new land use policy.

e. To implement the Swynerton Plan the British launched 40 grazing schemes in several districts including Kwale. At paragraph *5* it is averred that although the report notes that the suit property was initially a state owned land, it did not disclose what activities were undertaken by the state thereon and when the same became a state property.

f. The report did not further indicate the true acreage of the suit property. The Petitioner further states that trust/community land in Kenya is vested in the county council which holds the same on behalf of the community residing thereon. That the Lungalunga ranch among other ranches in Kwale county was established on the suit property in the year 1972 for purposes of livestock keeping and protecting the suit property from being wasted or grabbed.

g. The Petitioner stated that in the year 1977 the then president of the Republic of Kenya Jomo Kenyatta granted lease of the suit property to Lungalunga Ranch direct agricultural company for a period of 45 years. That upon execution of the lease, the Lungalunga Ranch direct agricultural company sought to evict some of the community members that inhabited the suit property but the action faced opposition hence the said members inhabit the land to date.

h. It was stated that the lease expired in the year 2023 and the 1st Respondent has sought to establish development of public infrastructure thereon. That the 1st Respondent further seeks to allocate smaller portions of land which the Petitioner states will be oppressive to them as they have huge herds of cattle.

i. At paragraph 13 of the affidavit, the deponent stated that prior to expiry of the lease the Lungalunga Ranch Direct Agricultural Company sought extension of the same but the request was denied for reason that the company had defaulted in payment of the requisite rent.

j. That the 1st Respondent sought to cancel the deed plan for 458610 registered as LR No 14211 which seeks to extinguish the existence of the suit property from the records. That the 1st Respondent has sought to take possession of the suit property and has come up with plans to effect development of public infrastructure on the suit property.

k. The Petitioner maintained that these plans were what had led to the proposal that all families living on the property ought to be moved to smaller portions which exercise will adversely affect the community in occupation of the suit property for the reason that some have huge herds of cattle which could not be accommodated on small portions.

6. The deponent stated that the suit property being community land ought to be vested back to the community after expiry of the lease and that there was a need for a compensation plan for the affected members. seeking injunctive orders against the Respondents over any dealings on Land Parcel No 14211 measuring 63,039Ha situated in Lungalunga in Kwale county hereinafter referred to as the suit property.

7. The Petitioner filed this Petition contemporaneously with the Notice of Motion application subject of this ruling. The application was filed under certificate of urgency by the Law firm of Messrs. Luvuno Lung'azi & co advocates the urgency cited being that the lease to the suit property herein and which according to the Petitioner is community land has expired.

8. The 1st Respondent sought to take possession of the suit property and initiated plans to have the suit property developed with public infrastructure, which process will lead to illegal allocation of the suit property to land grabbers and squatters to the detriment of the community hence the necessity in filing the Petition and application.

III. The responses by the 1st Respondent

9. In opposing the application, the 1st Respondent through the Law firm of Messrs. Ann Kowido & Associates Advocates filed a Notice of Preliminary Objection dated 28th October 2024. The objections raised the following grounds:-

    a. The Petitioner herein was not a corporate body.

    b. The Petitioner herein was a community welfare association having no "locus standi" to sue and be sued

    c. The Petitioner herein was not a legal entity separate from its members and should therefore sue through its officials.

    d. The Petition was therefore defective per incuriam and ought to be struck out with costs.

The Responses by the 2nd , 3rd and 4th Respondent.

10. In response to the application, the 2nd 3rd and 4th Respondents filed a Replying Affidavit sworn by John M Karanja the Kwale Land Adjudication and Settlement Officer. He stated as follows:-

    a. The Lungalunga Ranching Limited LR No 14211 was public land and not community land.

    b. The lease over the said property had been for 45 years from March 1997 and the same had since expired.

    c. The deponent averred that only settlement processes are undertaken in public land and not adjudication as alleged by the Petitioner.

    d. He further stated that to his knowledge settlement activities had not commenced on the land as planning processes are still being undertaken by the 1st Respondent and reservation for settlement of beneficiaries by the national land commission.

    e. The 2nd to 4th Respondents aver that no case has been made against them and further that the petition has not met the threshold set for a constitutional petition as was stated in Anarita Karimi Njeru Versus Republic.

11. The court was urged to dismiss the application and the Petition.

Submissions

12. On 23rd January, 2025 while all the parties were present in Court, they were directed to canvass both the application and the objection by way of written submissions. By the time of penning down this Ruling, the Honourable Court was only able to access the written Submissions by the Petitioners/Applicants.

Those by the 1st, 2nd 3rd and 4th Respondents were not yet on record. The Honourable Court reserved and delivered its Ruling on 3rd April, 2024 accordingly.

A. The Written Submissions by the Petitioners/Applicants.

13. This was the Petitioner's Submissions on the Notice of Motion dated 28th August, 2024. The Petitioners/Applicants filed two separate submissions one in support of the Notice of Motion application and the other in opposition of the preliminary objection. On the notice of motion application, the Petitioner submitted that under the provisions of the Civil Procedure Rules 2010 a court was mandated to grant a temporary order of injunction to restrain any act of putting a property in dispute in a suit from the danger of being wasted, damaged or alienated by any party to the suit. The Petitioners/Applicants referred the Court to the holding in case of:-

> "Njenga - Versus - Njenga" where the court stated that an injunction being a discretionary remedy ought to be granted on the basis of evidence and sound legal principle. The Petitioner further referred to the dictum in "E. A. Industries Ltd – Versus - True Foods Ltd and in Giella Versus Cassman Brown & Co Ltd" on the principles for grant of an injunction.

14. On whether or not the Petitioner/Applicant had established a prima facie case. They submitted that the Petitioners had proved that the suit property is Community/Trust land as per the provision of Section 114 [1] of *the Constitution* of Kenya 1963 and the amended Constitution 2010 under the provision of Article 63. Further, the Petitioner submitted that the report referred to as an annexture in the affidavit in support of the application and marked as "PPK – 2", the land is classified as trust land.

15. The Petitioners/Applicants stated that the President of the Republic of Kenya set apart the suit property and leased the same to Lungalunga Ranching Direct Agricultural Company Limited for agricultural purposes. However, that no intention to acquire the suit property was issued to community members and no compensation was preferred in their favour.

16. The Petitioners/Applicants maintained that the President in setting aside the suit property violated the provisions of *the Constitution* of Kenya, 1963 and the Community Act that existed back then. That the lease in question lapsed in the year 2023 and the 1st Respondent had commenced the process of acquiring the suit property for its intended projects. It was submitted that there has been no notice of the intended acquisition given to the community in occupation of the property. The Petitioners/Applicants stated that upon expiry of the lease the property ought to have been reverted back to the community.

17. On irreparable injury, the Petitioners/Applicants referred the Court of Appeal decision in the case of "Nguruman Limited – Versus - Jan Bonde Nielson & 2 Others" on what constituted irreparable injury. The Petitioners/Applicants submitted that the community in occupation of the suit property stood to suffer irreparable injury. In the event the 1st Respondent takes possession of the suit property considering that they are in physical occupation of the property and had invested extensively on the same. Further that the 1st Respondent had failed to follow the known laid down procedure in compulsory acquisition of community land.

18. Lastly, the Petitioners/Applicants averred that it had established that the balance of convenience in the event of granting the relief of temporary injunction would exceed that of the Respondents in case they are restrained. Reliance was placed on the holding in the case of "Films Rover International Limited & Others Versus Cannon Film Sales Limited".

B. Petitioner's Submissions on the Preliminary Objection dated 28th October, 2024.

19. It was submitted that the instant Petition was a special suit being a Constitutional Petition instituted on behalf of the community as per Articles 23[1] & 2, 22[1] of *the Constitution* of Kenya 2010. That the Petition had thus been instituted for the benefit of the community in occupation of the suit property and not for its own benefit. The Petitioners/Applicants referred Court to the findings in "Matemu - Versus - Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR which quoted the findings in the case of "John Wekesa Khaoya - Versus - Attorney General High Court Petition No 60 of 2012" on the parameters guiding filing matters with public interest litigation.

20. That the preliminary objection has been raised to challenge "the locus standi" of the Petitioner based on its incorporated nature and that it is not a legal entity with the capacity to sue and be sued in its own name. The Petitioner argued that this as being a procedural technicality and stated that Article 159[2] [d] of *the constitution* discourages denying justice based on undue regard to procedural technicalities.

21. Their contention was that under provision Article 22[1] of *the constitution* every person has a right to institute court proceedings under the bill of rights. The Petitioner further cited the provisions of Article 260 of *the constitution* on the definition of a person. That the said provision of *the constitution* does not discriminate on who may institute proceedings to claim violation under the bill of rights on public interest. The Petitioner states that it has filed several constitutions which have been determined by the court.

22. The Petitioner refers the court to Paragraph 78 of "the Mumo Matemu Case [Supra]" and stated that from the same, the Supreme Court stated that under the new constitution every person including an association whether incorporated or not could institute proceedings before a court challenging the contravention of *the constitution*. That the instant Petition was a matter of public interest and this court is seized with the requisite jurisdiction to determine the same.

IV. Analysis and Determination

23. I have carefully read and critically put into account all the filed pleadings, the well written submissions, cited authorities relied on and the relevant provisions of the appropriate and enabling laws with regard to both the Notice of Motion application dated 28th August, 2024 by the Petitioner and the Preliminary Objection dated 28th October, 2024 by the 1st Respondent.

24. In order to arrive at an informed, fair and just decision, I have framed the following three (3) salient issues for determination. These are: -

    a. Whether the Preliminary objection dated 28th October 2024 raised by the 1st Respondent herein meets the threshold founded in Law and precedents and hence merited?

    b. Whether the Notice of Motion dated 28th August 2024 by the Petitioner meets the threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

    c. Who will bear the Costs of Notice of Motion application dated 28th August 2014 and the Preliminary Objection dated 28th October 2024

Issue No. a). Whether the Preliminary objection dated 28th October 2024 raised by the 1st Respondent herein meets the threshold founded in Law and precedents and hence merited?

25. In choosing to first address the preliminary objection, the court is alive to the fact that the same can in the first instance resolve the issues raised in the application and petition as it is trite that an objection if properly raised can dismiss a suit without further proceedings. The case of "Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

> " ----a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration".

26. In the same case Sir Charles Newbold, P. stated:

> "a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".

27. The court in the case of "Bashir Haji Abdullahi ...Vs... Adan Mohammed Nooru & 3 Others (2004) eKLR, further stated that a preliminary objection ought to be raised purely on points of law and cannot be sustained if facts are contested. The court held that;

> " We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the Court to know exactly the nature of the Preliminary points of law to be raised. To state that 'the Application is bad in law' without saying more does not assist the other parties to the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush. Such practice of course ought to be discouraged".

28. In the case of "Oraro – Versus - Mbajja (2005) eKLR the court stated thus on 'Preliminary Objection'.

> " I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I

am in agreement that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point"

29. Lastly, the Supreme Court of Kenya in the case of: "Aviation & Allied Workers Union Kenya – Versus - Kenya Airways Ltd & 3 Others [2015] eKLR the Court stated as follows: -

> 'Thus, a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.'

30. The Court has a duty to determine whether the objection raised by the 1st Respondent qualifies to be a Preliminary Objection as described in the aforementioned case of Mukisa Biscuit Manufacturing Co. Limited - Versus - West End Distributors Ltd (1969) EA 696. The 1st Respondent has pleaded that the Petitioner has no Locus Standi or capacity to institute this petition and application. That due to the lack of the said capacity, the petition is incompetent and should be struck out. Locus standi is defined in Black's Law Dictionary as: -

> "The right to bring an action or to be heard in a given forum."

31. In the case of "Law Society of Kenya – Versus - Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000," the Court held that; -

> " Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law". Further in the case of Alfred Njau and Others.Vs. City Council of Nairobi (1982) KAR 229, the Court also held that; -
>
> > "the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

32. It is therefore evident that locus standi is the right to appear and be heard in Court. Therefore, if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a formidable case. It is further evident that if this Court was to find that the Petitioner has no locus standi, then the Petitioner cannot be heard and that point alone may dispose of the Petition. In the case of: "Quick Enterprises Ltd – Versus - Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999, the Court held that: -

> " When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone".

33. Having now considered the objections raised by the 1st Respondent, the Court finds that lack of "Locus standi' can dispose of the matter preliminarily without having to resort to ascertaining of facts. The Preliminary Objection raised by the 1st Respondent therefore fits the description of Preliminary Objection as stated in myriad of authorities mentioned above.

34. The Petitioner at Paragraph 1 of the petition describes itself as a Community Welfare Association and registered as such pursuant to the *Societies Act*, Cap. 108. From the description it is clear that the Petitioner is not a body corporate with perpetual succession. It follows that it lacks the capacity to

sue or be sued in its own name. In the case of "Trustees Kenya Redeemed Church & Anor vs Samuel M'Obiya & 5 others [2011] eKLR" it was held thus:

> " It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officer's orders. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity."

35. Further, in the case of:- "Festus Makau Kitati – Versus - New Konza Ranch Associations [2019] eKLR" the court stated as follows:-

> " Reading of section 3 of the *Societies Act* shows that the Defendant does not have the legal capacity of suing or being sued in its own name. In the case of John Otteyo Amwayi & 2 others v Rev. George Abura & 2 others – Civil Appeal No 6339 of 1990, the court held as follows:
>
> > "The *Societies Act* does not contain provisions with regard to the presentation and prosecution of suits by or against the unincorporated Societies. It would appear to me that the legislature did not intend that suits be brought by or against those Societies in their own names."

36. Further in the case of:- "Pentecostal Fellowship in Kenya vs Kenya Commercial Bank Nairobi HCCC No. 4116 of 1992 it was held:

> " The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of or against all the members of the body or bodies where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions or Order 1 Rule 8 Civil Procedure Rules."

37. A similar position was taken in the case of:- "Seely v Schenck & Denise quoted with approval in Richardson v Smith & Co. [I885] 21 FLA. 336, 341

> " Thus, a society is a number of persons taking to themselves a fictitious name, and by that name, protruding themselves into a court of justice.... But by this assumed name, they cannot appear in a court of justice. They can neither sue nor be sued by it. This is a privilege appertaining to corporate bodies only ... To sue and be sued, in their corporate name, is one of the great privileges granted to corporate bodies. It can only be authorized by statute. It is too plain for any argument that the unincorporated societies in their own name cannot be so sued. The right to sue and be sued is a corporate franchise."

38. The Petitioner argues that the petition raises issues of abuse of constitutional rights and hence the same cannot be dismissed on technicalities as stated under Article 159[2][d] of *the constitution*. The question is whether the issue of lack of locus can be cured under the provisions of Article 159[2][d] of *the constitution* on administration of justice without due regard to procedural technicalities. The Court in "Phares Omondi Okech & 3 others (Suing for and on behalf of Kasgam Community – Wadhari

Clan) v Victory Construction Co. Ltd & Kisumu Water & another [2015] eKLR addressed the said issue and held that: -

> "...That the issue of capacity to sue cannot be a matter of procedure as Counsel for the Plaintiffs submitted to be cured through Article 159 of *the constitution* by the consideration of substantive justice. The lack of capacity cannot be cured by Article 159 of *the constitution* that emphasizes on substantive justice or by applying the oxygen principle under Section 1A, 1B and 3A of the *Civil Procedure Act*..."

39. I think the Petitioner is misusing *the constitution* and its provisions in trying to circumvent the fact that it does not have the legal capacity to institute a suit on its own. This in my opinion cannot be cured by the provisions of Article 159 of *the constitution*. Without the capacity to be before the court, the petitioner cannot expect the court to determine whether there is an abuse of rights of a person who is in the first place not properly before the court. a society can only sue or be sued through its officials, that's the law and the same cannot be overlooked under any circumstances.

40. From the above, it is clear that the instant petition and application was filed by a body that is not a body corporate and so it lacks the capacity to be sued in its own name. Having failed to sue through its officials or trustees the Court finds that the Petitioner lacks the capacity to sue in its own name and the Preliminary Objection as raised is thus merited.

Issue No. b). Whether the Notice of Motion dated 28th August 2024 by the Petitioner meets the threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

41. Well, supposing the Petitioner had capacity to sue, would the application before court survive? I have perused the set of documents filed before court by the Petitioner in support of its application for injunction. The annexture marked as "PPK - 3" on the affidavit in support of the application is a letter by Abigael Mbagaya Mukolwe the then vice chairperson of the National Land Commission addressed to the Chief Land Registrar Nairobi. At paragraph 3 of the same it is stated as follows;

> " The lease for LR 14211 has only four [4] years to its expiry. The conditions of the 45-year lease has been grossly violated by non-payment of fees and charges, non-use of the ranch for the intended purposes and abandoning of the original idea of livestock ranching. Non-use of the land has led to the flooding of the ranch by squatters, poachers and charcoal burners. There has been attempts at subdividing the land with serious security breaches emanating from illegal sales of pieces of the ranch to speculation from outside the area".

42. Further below in the same letter, the National Land Commission urges the 1st Respondent to step in and take possession of this vast ranch and which is the suit property herein and secure the same from illegal subdivisions and potential environmental degradation. This letter paints a different picture from what had been presented before court by the Petitioner over the alleged occupation and large scale livestock farming by its members. The court would be hesitant in granting any injunctive orders as the contents of the above letter which surprising enough was availed by the Petitioners/Applicants, have not been challenged. The court will leave the issue at that.

Issue No. c). Who will bear the costs of the Preliminary objection and the application.

43. It is now well established that the issue of Costs is the discretion of Courts. According to the Black Law Dictionary, "Cost" is defined to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other". The provisions of Section

27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides :-

> "(1) The award of costs is at the discretion of the Court.
>
> (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms."

44. In the case of "Reids Heweet & Company – Versus - Joseph AIR 1918 cal. 717" and "Myres – Versus - 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....."

45. Further, these legal principles were upheld in the Supreme Court case of "Jasbir Rai Singh – Versus – Tarchalans Singh, (2014) eKLR" and the Court of Appeal cases of "Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya & Ano. (2016) eKLR" the Courts held:-

> ".....the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case".

46. Therefore, the events in the instant case is, while the Petitioners/Applicants herein have failed to establish their case on Preponderance of probabilities, the 1st Interested Party also partially has made his case. For that very fundamental reason, therefore, in the interest of natural Justice Equity and Conscience I hold that each party bear their own costs of the application and this Petition.

V. Conclusion & disposition

47. Consequently, upon conducting an intensive analysis of the framed issues herein, the Honourable Court proceeds to make the following orders:-

    a. That the Preliminary Objection dated 28th October 2024 be and is hereby allowed.

    b. That the Petitioner herein lacks the capacity to sue in its own name.

    c. That the Constitutional Petition herein be and is hereby found to be incompetent, bad in law and incurably defective and thus it is hereby struck out.

    d. That the Notice of Motion application dated 28th August, 2024 be and is hereby found to lack merit and thus be and is hereby dismissed.

    e. That each party to bear its own costs.

    It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 3RD DAY OF APRIL 2025

.....

HON. MR. JUSTICE L.L NAIKUNI,

ENVIRONMENT & LAND COURT

AT

KWALE.

Ruling delivered in the presence of: -

a. Mr. Daniel Disii, the Court Assistant.

b. Mr. Gambo Advocate for the Petitioner/Applicant.

c. M/s. Atieno Advocate holding brief M/s. Kowido Advocate for the 1st, Respondent.

d. M/s. Kiti Advocate for the 2nd, 3rd & 4th Respondents.