Chondo & another (As Administrators of Safari Chondo) v Cabinet Secretary, Ministry of Lands Public Works Housing & Urban Development & 6 others; Jawa & 2 others (Affected Party) (Environment & Land Petition E005 of 2024) [2025] KEELC 3243 (KLR) (2 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3243 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT & LAND PETITION E005 OF 2024

LL NAIKUNI, J

APRIL 2, 2025

BETWEEN

ALI SAFARI CHONDO ..... 1ST PETITIONER

SWALEH ALI MWIJUMA ..... 2ND PETITIONER

AS ADMINISTRATORS OF SAFARI CHONDO

AND

THE CABINET SECRETARY, MINISTRY OF LANDS PUBLIC WORKS HOUSING & URBAN DEVELOPMENT ..... 1ST RESPONDENT

THE LAND ADJUDICATION & SETTELEMENT OFFICER KINANGO ..... 2ND RESPONDENT

THE CHAIRMAN, LAND ADJUDICATION & SETTELEMENT OFFICER KINANGO ..... 3RD RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .... 4TH RESPONDENT

THE COUNTY SURVEYOR KWALE ..... 5TH RESPONDENT

THE DIRECTOR OF SURVEY & MAPPING ..... 6TH RESPONDENT

THE HON ATTORNEY GENERAL ..... 7TH RESPONDENT

AND

MKALA MWERO JAWA ..... AFFECTED PARTY

LUPHANDE NGANYAWA MWIJO ..... AFFECTED PARTY

JAWA KOMBO JAWA ..... AFFECTED PARTY

RULING

I. Introduction

1. Before this Honourable Court for its determination are two (2) Notice of Motion applications. The first one dated 28th June 2024 by the Petitioners herein while the second one was dated 11th December 2024 by the 1st 2nd and 3rd Affected Parties herein.

2. From the records each of the parties responded to the said application. The Honourable Court has dealt with each of the applications distinctly and simultaneously but rendered one omnibus Ruling hereof.

II. The Notice of Motion applicated dated 28th June, 2024 by the Petitioners/Applicants.

3. For good order, the court will begin with the application by the Petitioners herein. It was made pursuant to the provisions of Sections 1A, 1B, 3A and 63[e] of the *Civil Procedure Act*, Cap. 21, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Rule 19 of the Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 and all other enabling provisions of the law.

4. The Petitioners/Applicants sought for the following orders:-

    a. Spent.

    b. Spent.

    c. That the Honourable Court be pleased to issue an order of injunction restraining the Respondents, its officers, sub - ordinates, agents, assigns, employees and /or any other person whosoever from implementing 4th Respondents and/or the minister decision prohibiting the decision in Land Appeal Case No 394 Of 2021 in relation to Parcel No 358 Kinango B Adjudication Section pending hearing and determination of the Petition herein.

    d. That the Honourable Court be pleased to direct that the Petition be heard and determined expeditiously

    e. That the Respondents do bear the costs of the application and suit.

5. The application is premised by the grounds, testimonial facts and the averments made out under the 12 Paragraphed of the jointly sworn Affidavit by the by both ALI SAFARI CHONDO and SWALEHE ALI MWIJUMA, the 1st and 2nd Petitioners herein. The deponents averred as follows:

    a. The Deponents were both the 1st and 2nd Petitioners herein who were well conversant with the facts relating to the suit herein and hence competent to sear the said affidavit herein.

    b. The Respondents had issued a letter – annexed and marked as "SF – (SP) – 1" - indicating their intention to implement the decision which was the subject of the Constitutional Petition and the implementation would cause the Petitioners irreparable effect on their rights.

    c. There was a risk that the implementation would render the pending Petition moot and cause irreparable harm to them.

    d. They were advised that the Petition herein exhibited a prima facie case on two fronts:-

i. The Land Adjudication Committee, particularly the 3rd Respondent [Rashid Bora] and members [Kombo Mwingo, Kombe Nzole,Nzaphila] failed to disclose their interest in parcel no. 358 in direct contravention of the principles of natural justice and the *Land Adjudication Act*, Cap. 284. (Hereinafter referred to as "The Act")

ii. The decision made by the 1st to 3rd Respondents were grossly unreasonable and biased. The 1st to 3rd Respondent's actions were influenced by irrelevant considerations rendering their decisions unlawful

e. The implementation of the decision would cause the Petitioners significant harm that would not be compensated adequately by damages. Specifically, they risked losing their legitimate rights and interests over Plot No. 358.

f. The Petitioners right to a fair administrative action and fair hearing had been violated and that allowing the decision to be implemented would exacerbate these violations.

g. The balance of convenience tilted towards maintaining the status quo pending the hearing and determination of the Petition and which would prevent irreversible harm and uphold the principle of natural justice and fairness.

h. The Respondents would stand to suffer no harm or significant prejudice by the issuance of the injunction whereas the Petitioners stand to suffer significant irreversible harm.

i. The application had been made in good faith and conformity with the courts overriding objective.

III. The responses by the Affected Parties

a. In response to the application dated 28th June 2024, the Affected Parties filed a Replying Affidavit sworn by 2nd affected party filed on behalf of the 1st and 3rd Affected parties. It was dated 8th November 2024. It averred therein as follows:-

b. That the Applicants had not demonstrated to the court their source and proper authority and doctrine of justiciability to initiate a constitutional Petition on behalf of the Estate of Safari Chondo in respect to the suit property which was the subject of the application

c. That the dispute relating to ownership and possession of the suit land had been subjected to several judicial processes and the outcome had always been in favour of the affected parties

d. That the Applicant's forefather Chondo Mangumi had been sued by the affected parties before the Kinango Land Disputes Tribunal and a decision in favour of the affected parties was made and adopted as an order of the court on 29th October, 1992.

e. That there was an appeal preferred against the decision of the Kinango Land Disputes Tribunal and a similar claim was made and once again it was dismissed on 17th September, 2006.

f. A further claim was filed by the Petitioners before the District Adjudication & Settlement Committee but the same was again dismissed on 17th April, 2014 and which decision was subject of the judicial review case filed before this court earlier on the doctrine of exhaustion. The said JR was dismissed by the court.

g. That the current Petition and application was res judicata and an abuse of the court process and ought to be dismissed in limine and the status quo orders vacated.

h. The court was urged to proceed and dismiss both the Petition and the application dated 28th June 2024 with costs.

IV. The Notice of Motion application dated 11th December, 2024 by 1st 2nd and 3rd affected parties case

6. The 1st, 2nd & 3rd Affected parties herein filed the Notice of Motion application dated 11th December 2024. It was brought under the provision of Article 10, 40 & 129 of *the Constitution* of Kenya, 2010; Sections 43 & 44 of the Las of *Evidence Act*, Cap. 80; Sections 1A, 1B, 3A, 7 & 8 of the *Civil Procedure Act*, Cap. 21, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Applicants sought for the following orders:-

    a. Spent.

    b. That the instant Petitioners' Petition and/or application is Res judicata and filed contrary to Section 7 of the *Civil Procedure Act*, Cap. 21 and therefore the honourable court lacks jurisdiction and the same should be dismissed in limine

    c. That pending the hearing and determination of this application inter - partes, this Honourable Court be pleased to order the Executive Officer of Kwale Law Courts to avail the file in Court being Kwale ELC Judicial Review Application No. E004 of 2022 from the courts archive

    d. That pending the hearing and determination of this application inter - parties, this Honourable court be pleased to grant an order setting aside/vacating injunctive/status quo orders issued prohibiting respondents from dealing with any activity touching on the suit property known as Parcel No 358 Kinango B.

    e. That the cost of this application be provided for.

7. The application is premised upon grounds, testimonial facts and the averments made out from the 11 Paragraphed supporting affidavit of Luphande Nganyawa Mwijo. He averred as follows that:-

    a. He was the 2nd Affected Party/Applicant herein and hence conversant with the facts of the case. He had the authority of the other Petitioners to act and pled on their behalf thus competent to swear this affidavit..

    b. the Petitioners/Respondents approached court on diverse dates on 2nd July, 2024 and 17th October, 2024 seeking injunctive reliefs/orders against the 1st to the 7th Respondents from proceedings with the legal process of demarcating, sub - dividing and issuance of title deed in respect to parcel no 358 Kinango "B"

    c. That the Petitioners intentionally omitted to include the affected parties herein who were largely and directly affected by orders as sought/granted by court.

    d. The Affected Parties continued to suffer. They had suffered emotionally as they awaited adjudication process to be concluded for the first time since it has been over 20 years when the process been thwarted by the Petitioners.

    e. The Petitioners Petition together with their application were Res Judicata contrary to the provision of Section 7 of the *Civil procedure Act*, Cap 21, as the dispute herein had already been heard and conclusively determined in KWALE ELC JR No E004 of 2022 and no appeal had been preferred against the decision of the court.

    f. Thus, the Petitioners had reinstituted the same suit without any colour of right.

g. The Honourable Court lacks jurisdiction and must down its tools.

V. The responses by the 1st and 2nd Petitioners

8. The Petitioners opposed the application vide a Replying Affidavit sworn jointly by the 1st & 2nd Petitioners Ali Safari Chondo And Swalehe Ali Mwijuma. They averred as follows that:-

   a. The application was an abuse of the court process. The Interested Parties only sought to malign the Petitioners and from the tone of their pleadings, they were seeking sympathy from the court.

   b. The facts stated in the application were misleading and fabricated. The issues before court was constitutional issues raising abuse of rights and prerogative orders which issues have never been decided by the courts.

   c. The proceedings in the Civil Case of KWALE ELC JR E004 of 2022 were terminated by a preliminary objection which raised several issues including the jurisdiction of the court, Applicants "locus standi' in instituting the proceedings and that the proceedings offended the provisions of the Act.

   d. The issues raised in this suit under the Constitutional Petition had never been heard and determined and as such never fell under the provision of Section 7 of the *Civil Procedure Act*, Cap. 21.

   e. The application was termed as an abuse of the court process and the court was urged to dismiss the same.

VI. Submissions

9. On 29th January 2025 while all the parties were present in Court, they were directed to have both Notice of Motion applications dated 28th June 2024 and 11th December 2024 disposed of by way of written submissions.

10. Subsequently, only the 1st 2nd and 3rd affected parties have obliged by filing their written Submissions. Pursuant to that, a ruling date was reserved on 17th March, 2025 by Court accordingly but due to unavoidable circumstances the same has been delivered on 2nd April, 2025.

A. The Written Submissions by 1st 2nd and 3rd Affected Parties.

11. The Applicant through the Law firm of Mutisya Mwanzia & Ondeng Advocates for the interested parties filed their written submissions dated 5th March 2025. Mr. Ondeng Advocate commenced his submission by providing a brief background of the matter. The Petition was filed by the Petitioners against the Respondents seeking for the above stated reliefs.

12. The Learned Counsel in his submissions identified the following issues for determination: -

   a. Whether the Petitioners instant application dated 28th June 2024 was "Res judicata".

   b. Whether the Petitioners application dated 28th June 2024 offended the principle of constitutional avoidance and the Doctrine of internal exhaustion of dispute resolution mechanism.

   c. Whether the Petitioners were entitled to the orders sought in the instant application

d. Who would bear the costs of the application?

13. On the first issue for determination. The Learned Counsel stated that the instant suit before court was Res Judicata in that it was determined in Kwale ELC JR E004 of 2022. He argued that the provisions of Section 7 of the *Civil Procedure Act*, Cap. 21 were highlighted and the elements to be established in proof of the doctrine of res judicata as was stated in the case of "Independent Electoral and Boundaries Commission Versus Maina Kiai [2017] eKLR.

14. The Counsel submitted that the Petitioners prayers in the instant suit which sought to prevent the Respondents from the legal process of demarcating, sub - dividing and issuance of title over the suit property parcel no 358 Kinango B was res judicata and should not be dealt with again by this court.

15. The Affected Parties stated that this court should exercise its discretion and grant them the relief of setting aside the injunction orders earlier issued to the Petitioners on an interim basis. Reliance was placed on the holding in the cases of:- "Shah Versus Mbogo [1967] EA 116" and in "Patriotic Guards Limited - Versus - James Kipchirchir Sambu [2018] eKLR".

16. On the second issue for determination. The Learned Counsel submitted that the principle of constitutional avoidance entailed that a court would not determine a constitutional issue when a matter may be properly decided on another basis or in an ordinary suit. To buttress his point, the Counsel made reference to the holding in the cases of: "S - Versus – Mhlungu, 1995 (3) SA 867 (CC) where Kentridge Aj articulated this principle as follows:-

> " I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed"

While in the case of "KKB - Versus - SCM & 5 Others [Constitutional Petition 014 of 2020] [2022] KEHC 289[KLR]". Mativo J had this to say:-

> " In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. Inn other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks, Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause"

That the provisions of the Act under Sections 29 and 30 provide for the procedure of an appeal of the decision of the Land Adjudication Officer or the Land Adjudication Committee.

17. That the Petitioners had offended the provisions of Sections 29 and 30 of the Act which provides for resolution of disputes in terms of filing appropriate appeal contemplated under Section 9[2] of the Fair Administrative Actions Act 2015. Thus that the principle of exhaustion had not been explored by the petitioners before approaching this court. The Affected Parties relied on the case of:- "Mohamed Ahmed Khalid[Chairman] And 10 Others - Versus - Director of Land Adjudication and 2 Others [2013] eKLR where Justice Angote held as follows:-

> " Considering that the *Land Adjudication Act*, Cap 284 has an elaborate procedure on how complaints arising from the land adjudication process, demarcation, planning and surveying of Trust land are supposed to be dealt with, it is my view that this Court cannot substitute

the established bodies which are supposed to deal with these complaints. The Petitioners can only move this Court for declaratory orders and judicial review orders or by way of an ordinary suit once they have exhausted the mechanisms that the law has put in place. I find that the Petiton was prematurely filed"

And in the case of "Speaker of National Assembly - Vrsus - Karume [1992] KLR.

18. That despite the Petitioners being granted the right of appeal to the committee within 14 days they never filed the appeal and have instead opted to file the instant application and suit. The affected parties maintain that this court did not have the jurisdiction to handle the instant dispute before the Petitioners exhaust all the internal remedies available. It should down its tools.

19. Further, the Affected Parties submitted that the Petitioners had failed to establish a prima facie case as required in Giella - Versus - Cassman Brown case" as it was evident that the JR application addressed the issues that had been raised by the Petitioners in this current application. On the second limb, he argued that it was the affected parties who were in fact incurring losses and damages even after the adjudication committee ruled in their favour because as it stood the Affected Parties were yet to enjoy the fruits of their Judgement by the applications filed by the Petitioners.

20. On the third limb, the balance of convenience tilted towards the Affected Parties the Petitioners having failed to exhaust all the internal dispute mechanisms as required after ruling. They had waited for over 8 years to perfect their Judgement. The court was asked to deny the orders sought in their application dated 28th June 2024 and to grant them costs.

VII. Analysis and Determination

21. I have carefully read and considered the pleadings herein by the Applicants from the twin applications herein, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes. I must admit that both applications and the Petition are highly contested.

22. The court will determine both applications concurrently as the issues raised somehow intermarry. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has four (4) framed issues for its determination. These are:

    a. Whether *the Constitution* Petition herein offended the Doctrine of "Res – Judicata"?

    b. Whether *the Constitution* Petition was contrary to the Doctrine of Constitutional Avoidance

    c. Whether the Petition met the threshold of being granted the temporary injunctive orders sought

    d. Who bears the costs of both the applications dated 28th June, 2024 and 11th December, 2024?

ISSUE No. a). Whether *the Constitution* Petition herein offended the Doctrine of "Res – Judicata"?

23. Under this Sub – title, the Honourable Court is alive to the fact that the issue of res judicata has been raised by the affected parties as against the suit. It is imperative of the court to first deal with the issue in that it might undermine the court's jurisdiction to determine the suit. The doctrine of res judicata has its genesis in the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya which provides that: -

    No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such

subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

24. The provisions of Section 7 of the *Civil Procedure Act* defines the principle of res – judicata to apply where the issues in the previous suit ought to have been "heard and finally decided."

25. The Black's Law Dictionary 10th edition defines the terms "heard and determined" as follows: -

> " of a case, having been presented to a Court that rendered Judgment.".

26. The term "hearing" is defined in the same dictionary as follows:

> " A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying."

27. The High Court in South Africa respectfully submitted that the approach to be followed in res judicata matters is correctly set out in the case of:- "Bafokeng Tribe – Versus - Impala Platinum Ltd 1999 (3) SA 517 (B) by Friedman JP held that:-

> " From aforegoing analysis I find that the essentials of res judicata are threefold, namely that the previous judgment was given in an action or application by a competent court
>
> (1) Between the same parties,
>
> (2) Based on the same cause of action (ex eadem petendi causa),
>
> (3) With respect to the same subject-matter, or thing (de eadem re).
>
> Requirements (2) and (3) are not immutable requirements of res judicata. The subject matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same. However, where there is a likelihood of a litigant being denies access to the courts in a second action, and to prevent injustice, it is necessary that the said essentials of the threefold test be applied. Conversely, in order to ensure overall fairness, (2) or (3) above may be relaxed. A court must have regard to the object of the exceptio res judicata that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions. This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties."

28. Now applying this principles to the instant case. The Court has keenly perused the order issued on 26th April 2023 over the application dated 17th April 2023 in Judicial Review No E004 of 2022 which order dismissed the application and suit. I have not had the privilege of perusing the pleadings in the said JR suit given that the same was handled by this Court's predecessor Lady Justice Dena and have not been availed by either party herein.

29. However, at this point the court is of the opinion that it will be proper to discuss what judicial review entails as it is alleged that the petition herein is res judicata given that the issues raised were already dealt with in Judicial Review No E004 of 2022. Judicial review is a common law remedy for checking administrative actions. The same in simple terms means judicial review checks the decision making process and not the outcome of the process/ decision itself.

30. I note that the judicial review proceedings were terminated by a preliminary objection on locus of the parties and the court's jurisdiction to hear the suit. The court did not therefore get to hear and make a determination on the judicial review. Further, the judicial review was not on infringement of rights. Black's Law Dictionary 10th Edition defines the terms "heard and determined" as follows: - " of a case, having been presented to a Court that rendered Judgment.".

31. In the case of "Tee Gee Electrics and Plastics Company Limited – Versus - Kenya Industrial Estates Limited [2005] KLR 97 the Court stated:

> " Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in The Tee Gee Electrics and Plastics Company Ltd – Versus - Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits".

32. It is evident that Kwale JR No E004 of 2022 was not heard and determined on merit. For that reason, I find that the threshold for the doctrine of res judicata has not been met.

ISSUE No. b). Whether the Petition offends the doctrine of constitutional avoidance.

33. The Honourable Court has fully appreciated the elaborate and comprehensive expose on this concept graphically brought out by the Learned Counsel for the Affected Parties. Thus, the Court will need not belabour the point. Nonetheless, the Black's Law Dictionary, 10th Edition at page 377 defines the doctrine as:

> " The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion"

34. From the above definition, it is imperative of the court to only deal with a matter when absolutely sure that there exists no other existing remedy in law which the aggrieved party is yet to exhaust. This positon was aptly put by Onguto J in the case of:- "Wanjiru Gikonyo & 2 others – Versus - National Assembly of Kenya & 4 others Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR, stated:-

> (27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.

35. The Affected Parties herein have submitted that the Petitioners have failed to exhaust all the available remedies in resolution of the dispute before court which are well stipulated under the Land Adjudication regime. They argued that the Petitioners' Petition filed before court is terms as not only being premature but also a ploy to avoid the right procedure in pursuing the known procedure in law for dispute resolution for land under the adjudication regime. That instead the Petition herein is being disguised as a constitutional petition claiming violation of the Petitioners land rights.

36. In view of the stiff legal position taken, the Honourable Court has been compelled to extrapolate on the brief background of the matter. From the pleadings presented before this court, I have been able to make out a brief history of the dispute between the parties herein. The dispute was previously before the Kinango Land Disputes Tribunal vide claim no 4 of 2006. Having perused the proceedings before the tribunal and which were availed to this court, the court further established that before the matter was brought before the tribunal, the dispute had been before the district officer and elders in the year 1992 where the decision made was in favour of the Affected Parties families. Similarly, the Affected Parties also got the dispute before the tribunal decided to their favour.

37. Legally speaking, in accordance with the provision of the Act all matters of the land adjudication and the persons who are ordinarily residents of the area and hence registered in the adjudication register, have the rights and interests go through the process of adjudication. These includes ascertainment and registration of the said rights and interests. The process commencing from the provision of Section 5 to 29 of the Act, includes an elaborate dispute resolution mechanism which culminates in issuance of the title deed.

38. The Act is the law that governs all processes concerning land under the adjudication regime provides for lodging of complaints where more than one person lays a claim to a specific parcel of land. The Act sets up a dispute resolution mechanism starting with the appointment of the Land Adjudication Committee and the arbitration board.

39. The provision of Section 19 (2) and (3) state as follows;

> "(2) If there are two or more conflicting claims to an interest in land and the recording officer is unable to resolve the conflict, he shall submit the dispute to the committee to decide. (3) The recording officer shall rectify the forms in accordance with any decision which the adjudication officer, the committee or the board may make in accordance with this Act."

40. A party dissatisfied with the decision of the Adjudication Committee may prefer the dispute to the Arbitration Board for determination under the provision of Section 21 (3) of the Act which provides that:-

> "Any person named in or affected by a decision of the committee who considers the decision to be incorrect may, within fourteen days after the decision, complain to the executive officer of the committee, saying in what respect he considers the decision to be incorrect."

41. The elaborate dispute resolution process culminates with the appeal to the Minister under the provision of Section 29 of the Act which provides that:-

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

42. As has been observed above, the dispute herein was heard before the Kinango Land Disputes Tribunal. I have perused the documents supporting the Petition and have come across an appeal designated as Land Appeal No 394 of 2021. The said appeal was before the Minister and whose decision was that the

case was partially allowed and the Appellant was to be given a portion of land which is in the southern side containing his graveyard.

43. The Petitioners state that they are displeased with the demarcating, sub - dividing and issuance of title deed in respect to parcel no 358 Kinango "B". Indeed, a reading of the Minister's decision indicates that the Petitioners were to be given a portion of the suit property.

44. The status quo orders issued by this court earlier were to prevent further activities on the parcels. The Affected Parties have not given any evidence of any steps taken towards appealing the decision by the Minister. For that reason, it was improper of them to proceed with the demarcation of the suit property in the absence of the Petitioners.

45. The Petitioners plead abuse of their rights to ownership of land as envisaged under *the Constitution* of Kenya 2010. They further plead violation of their right to a fair hearing and the manner in which the rights have been allegedly violated, they have further enumerated the prayers they wish to be granted by the court. Whether the same is true is a matter to be determined after the hearing of the Petition.

46. I am of the opinion that the Petition has met the threshold required of a Constitutional Petition and the principles of constitutional avoidance are thus not applicable. I rely on the Court of Appeal decision in "Mumo Matemu – Versus - Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012" where it was stated:-

> " We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.... We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party..."

ISSUE No. c). Whether the application meets the threshold to be granted temporary injunctive orders sought

47. Under this Sub – heading, the Honourable Court will examine whether the application by the Petitioners meets the threshold to grant temporary injunction orders sought by the Petitioners. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

48. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of "Giella – Versus - Cassman Brown & Co Limited (1973) EA 358", where it was stated: -

> " First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

49. The three conditions set out in "Giella (supra)", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR": -,

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

50. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case "MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125" of: -,

> " So, what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

51. In the case of "Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1", the court held that;

> " In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

52. Similarly, in the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited" the court held that;

> " In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

53. In the present case, from the stated facts the Petitioners/Applicants have demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of "Giella - Versus - Cassman Brown & Co. Limited (Supra)".

54. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Petitioners/Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in the case of:- "Nguruman Limited (Supra)", held that:-

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

55. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.

56. The judicial decision of:- "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

57. Quite clearly, the Petitioners/Applicants would not be able to be compensated through damages as it has shown herein. The Applicants have therefore satisfied the second condition as laid down in "Giella's case".

58. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)" which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants

if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

59. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

60. Both the Petitioners and the affected parties are in occupation of the suit property. As such, the court is well aware that any orders granted at this stage will have an effect on either parties. The same informed the court's decision to grant status quo orders pending determination of the petition.

61. With the above in mind, this court opines that status quo orders will still suffice in the instant petition pending the hearing and determination of the same. The Black's Law Dictionary, Butter Worth's 9th Edition, defines status quo as a Latin word which means 'the situation as it exists'. The purpose of an order of status quo has been reiterated in a number of decisions.

62. In the case of "Kenya Airline Pilots Association (KALPA) – Versus - Co-operative Bank of Kenya Limited & another [2020] eKLR", the purpose of a status quo order was explained as follows:

> " ..... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision."

63. In a bid to distinguish status quo from injunctive orders, Justice Murithi J in the case of "Mombasa Misc. Civil Application (JR) No.26 of 2010 Republic –vs- The Chairperson Business Premises Rent Tribunal at Mombasa (Bench Mochache) Ex - Parte Baobab Beach Resort (Mombasa Limited) & Monica Clara Schriel" opined:

> " In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint."

64. With the knowledge that the parties herein are both in occupation of the suit property, it is proper that the court seeks to establish whether or not the petition is merited and the appropriate remedies before issuing any orders that might have some essence of finality in their nature. The status quo orders will therefore still be in place pending determination of the petition. The order to set aside/vacate the status quo orders earlier granted is not allowed given the circumstances.

ISSUE No. d). Who will bear the cost of the application?

65. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of a legal action or proceedings in any ligation. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 provides as follows: -

27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

66. By the event, it means the result or outcome of the legal action. In the case of: "Republic – Versus - Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd the court held as follows: -

> " The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle 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 prosecuting or defending the case".

67. Bearing in mind the protracted dispute over the suit property herein between the parties, and further that they are both on the suit property in terms of habitation, in the interest of justice and maintaining peace and tranquillity between the parties, it is proper that each party bears its own costs.

V. Conclusion & findings.

68. In conclusion, having caused an in-depth analysis to the framed issues, the Honourable Court based on the principles of Preponderance of Probabilities and the balance of Convenience, proceeds to make the following orders:-

a. That the Notice of Motion application dated 28th June, 2024 be and is hereby allowed in that the status quo to be maintained on the suit property meaning the Respondents, its officers, subordinates, agents, assigns, employees and /or any other person whosoever are barred from implementing 4th Respondents and/or the minister decision prohibiting the decision in Land Appeal Case No 394 Of 2021 in relation to Parcel No 358 Kinango B Adjudication Section

b. That the Notice of Motion application dated 28th June, 2024 by the Affected Parties herein be and is hereby dismissed.

c. That for expediency sake, there be a mention on 12th June, 2025 for conducting Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 on directions to dispose of *the Constitution* Petition.

d. 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 2ND 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. Arunga Advocate holding brief for Mr. Nyaboke Advocate for the 1st & 2nd Petitioners.

c. Mr. Penda Advocate for the Respondents.

d. Mr. Ondeng Advocate for the Affected Parties.