



Osman & 164 others (Suing on Their Behalf and Behalf of Residents of Merti Sub-County, Chari, and Cherab Wards in Isiolo County) v Northern Rangelands Trust & 10 others (Petition 006 of 2021) [2025] KEELC 3006 (KLR) (2 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3006 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
PETITION 006 OF 2021
OA ANGOTE, CK YANO & CK NZILI, JJ
APRIL 2, 2025

BETWEEN

ABDIRAHMAN OSMAN & 164 OTHERS & 164 OTHERS & 164 OTHERS PETITIONER

SUING ON THEIR BEHALF AND BEHALF OF RESIDENTS OF MERTI SUB-COUNTY, CHARI, AND CHERAB WARDS IN ISIOLO COUNTY

AND

NORTHERN RANGELANDS TRUST 1ST RESPONDENT
THE COUNTY GOVERNMENT OF ISIOLO 2ND RESPONDENT
ABDI JARSO 3RD RESPONDENT
GOLICHA JARSO 4TH RESPONDENT
HALKANNO GOLLO 5TH RESPONDENT
GOLLO FUGICHA 6TH RESPONDENT
KENYA WILDLIFE SERVICE 7TH RESPONDENT
MINISTRY OF LANDS AND PHYSICAL PLANNING 8TH RESPONDENT
COUNTY COMMISSIONER OF ISIOLO 9TH RESPONDENT

AND

BILIQO BULESA COMMUNITY BASED ORGANIZATION 1ST PROPOSED RESPONDENT

CHERAB COMMUNITY CONSERVANCY [SUING THROUGH ITS ELECTED OFFICIALS ABDI JARSO, AMINA TADICHA AND ADAN WAKO] 2ND PROPOSED RESPONDENT



RULING

Background

1. Before this Court for determination are three Motions being the 1st Respondent's Notice of Motion dated 7th February, 2025, and the proposed Respondents' (hereinafter 10 and 11th proposed Respondents) Notice of Motions dated the 6th February, 2025 and 7th February, 2025 respectively.

1st Respondent's Motion dated 7th February, 2025

2. This Motion has been brought pursuant to the provisions of Rules (2), 3(a), 3(b), 32(3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The 1st Respondent/Applicant seeks the following reliefs:
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. That the court be pleased to stay its entire judgment delivered hereon on 24th January, 2025 (save for order 5 in respect of registration of community land) pending the hearing and determination of its intended Appeal to the Court of Appeal.
 - v. That the court be pleased to make any orders as may serve to stay the judgment delivered on 24th January, 2025 and preserve the status quo as it may deem fit and just.
 - vi. That costs be provided for.
3. The Motion is based on the grounds set out on its face and is supported by the affidavit of Mr. Tom Lalampaa, the Chief Executive Officer of the 1st Respondent of an even date. He deponed that the 1st Respondent is a charitable, non-profit, and non-political trust established in 2004. Its objectives include, among others, conservation, sustainable resource management, tourism development, environmentally sustainable income-generating projects, poverty alleviation, the promotion of health services and facilities, and support for charitable organizations with similar purposes.
4. Mr. Lalampaa further deponed that the 1st Respondent, being aggrieved by this court's judgment, has filed an appeal at the Nyeri Court of Appeal. Through its Memorandum of Appeal, the 1st Respondent has raised substantial constitutional and public interest questions.
5. He stated that on 26th June 2007, a community-based organization (CBO) known as Biliqo Bulesa Wildlife Conservancy Community Based Organization (Chari Ward) was duly registered. Later that year, on its own volition, it applied to become a member of the 1st Respondent. Similarly, on 28th May 2021, another CBO, Cherab Community Conservancy (Cherab Ward), was registered by the community and, of its own volition, applied for membership in the 1st Respondent in late 2021.
6. According to Mr. Lalampaa, the conservancies are not designated protected areas where wildlife conservation is the primary land use. Rather, the 1st Respondent has facilitated various charitable initiatives on the suit property, including environmental conservation, education, access to clean water, healthcare improvement, and economic empowerment. In 2025, it secured Kshs 60,760,152/= and



- Kshs 30,843,354/= from bilateral donors within the international donor community to support development initiatives in Biliqo Bulesa and Cherab Community Conservancies, respectively.
7. Mr Lalampaa deposed that from several crisis meetings he has personally had with development partners, he can confirm that the judgment has caused unprecedented shock, apprehension and uncertainty leading to the donors threatening to freeze the already secured and desperately needed development funds channeled through the 1st Respondent for the benefit of the suit land.
 8. He deposed that the implementation of the judgment portends irredeemable and imminent damage and loss and will lead to the immediate halting of various projects to wit, the operational borehole at Dhima Adho, entire water supply infrastructure at Qonohongura Water Point, used to pump water from Ewaso River to Biliqo Bulesa Conservancy, and Biliqo Bulesa Mararas Borehole which assures over 15,000 users of life sustaining water.
 9. Furthermore, implementing the judgment will result in the closure of the health facility in Biliqo Bulesa Conservancy, which was constructed with Kshs 27,500,000/= from donor funding. The facility includes a maternity wing, laboratory, dispensary, and housing for health officers. Additionally, the loss of bursary support provided by the 1st Respondent, amounting to Kshs 12,720,000/= will affect 605 secondary school students, 50 university students, and 80 college students in Biliqo Bulesa, as well as 625 students in Cherab.
 10. He noted that the 1st Respondent has funded several community projects, including a classroom at Dima Ado Primary School costing Kshs 1,600,000/=, a dining hall at Bulesa Primary School costing Kshs 3,000,000/= and a classroom at Awarsitu Primary School, currently serving 118 students. Additionally, it has constructed an administration block at Goda Primary School, and enrolled over 160 women in microcredit projects who are at risk of losing Kshs 4,000,000/= should the court decline to stay its judgment. They have equally facilitated vocational training for 31 female and 20 male community members.
 11. In 2009, he deposed, the 1st Respondent mobilized 15 community conservancies, including Biliqo Bulesa, to participate in the Northern Kenya Rangelands Carbon Project, a long-term climate change mitigation initiative covering 1,900,000 hectares. This project generates significant revenue for Biliqo Bulesa, and implementing the judgment could result in the removal of Biliqo's land from the initiative. He emphasized that Biliqo and Cherab Conservancies serve as a critical and strategic wildlife habitat, urging the court to consider the public interest in wildlife conservation.
 12. Mr. Lalampaa further stated that the Rangers, trained by the 7th Respondent at its Law Enforcement Academy in Manyani, operate in full compliance with constitutional and legal requirements, as affirmed by the Isiolo County Police Commander. He warned that, given the foregoing circumstances, the 1st Respondent, its benefactors, and the general public could suffer severe and irreparable losses, including lasting reputational damage unless it is allowed to access justice and prosecute the appeal to its final determination.
 13. In response to this Motion, the Petitioners, through Mr. Abdirahman Osman, swore a Replying Affidavit on 26th February 2025. He deposed that the Motion seeks to deprive the Petitioners of the fruits of their judgment and fails to meet the parameters set out in Order 42 Rule 6 of the Civil Procedure Rules. He further asserted that, having already found a breach of fundamental constitutional provisions, the court should not suspend its own findings, as doing so would undermine the principle of constitutional supremacy.
 14. Mr. Osman noted that while the 1st Respondent has referenced various initiated community projects in an attempt to demonstrate the presumably positive engagements and claiming significant investments,



- they have failed to demonstrate that the projects are in compliance with the law. He urged the court to note that these investments are being undertaken on unregistered community land without the involvement of the Petitioners.
15. Regarding the initiation of a carbon project, he deponed that the court was clear, such investments on community land cannot proceed without due process and cannot be initiated with the mere hope of compliance at a later stage. He further noted that while the 7th Respondent had asserted during trial that there were no records of registered conservancies in Isiolo, the 1st Respondent has now produced correspondence suggesting the 7th Respondent was aware, raising questions about the authenticity of this correspondence.
 16. Mr. Osman also contended that the letter from the Isiolo Police County Commandant, which states that the rangers comply with the law, was an afterthought, authored only after this court's judgment had declared the arming and deployment of the rangers unconstitutional. He emphasized that, in any event, given that the 1st Respondent opines that this court erred in law and in fact in rendering its judgment, and it intends to appeal, the matter now falls within the jurisdiction of the Court of Appeal and this court ought not be placed in the untenable position of reviewing its own judgment.
 17. In response to the Replying Affidavit, the 1st Respondent, through Mr. Lalampaa, filed a Further Affidavit on 27th February 2025. He reiterated the assertions made in his Supporting Affidavit, emphasizing that the Motion does not seek to deprive the Petitioners of the fruits of their judgment or suspend any constitutional provisions. Rather, it seeks a temporary suspension of the judgment to allow the Court of Appeal interpret, balance, and apply the interrelated and multifaceted constitutional provisions, including Articles 10, 40, 42, 60 and 69, as well as the various provisions of the Bill of Rights.
 18. He deponed that, as advised by Counsel, the 1st Respondent has a constitutional right to access justice and a fair hearing. He further argued that the charitable and public interest projects facilitated by the 1st Respondent are solely for community benefit, with no profit motive, and a temporary suspension of the judgment is necessary to prevent operational limbo, substantial and incalculable losses, and irreparable damage, should the appeal be rendered nugatory by the refusal to grant a stay.
 19. For clarity, he asserted, all developments were subjected to an Environmental Impact Assessment (EIA) process, in which the Petitioners had full opportunity to participate. He further deponed that, as advised by Counsel, the carbon project is governed by the *Climate Change Act* and the Climate Change (Carbon Markets) Regulations, 2024, which outline compliance requirements overseen by the National Environment Management Authority (NEMA). Disputes arising therefrom, he contended, fall within the jurisdiction of the National Environment Tribunal, and not this court as the forum of first instance.
 20. He further stated that, in any event, Regulation 38 of the *Climate Change Act* and the Climate Change (Carbon Markets) Regulations, 2024, grants ongoing carbon projects a two-year compliance window from 17th May 2024, including a requirement for fresh public participation within that period. He stated that the 1st Respondent, as the project proponent, is actively working to ensure full compliance by the deadline of 16th May 2026, and urged the court to defer questions of carbon project compliance to the relevant authorities.
 21. Mr. Lalampaa deponed that the 7th Respondent as a trustee of the 1st Respondent, is privy to all the 1st Respondent's activities in Isiolo as well as in other parts of Kenya. He further asserted that the armed rangers are neither a militia nor operating illegally, and any claims questioning the authenticity of the



letter from the Isiolo Police County Commander on this matter are unfounded. He urged the court to grant the orders sought.

10th Proposed Respondent's Motion of 6th February, 2025

22. This Motion has been brought pursuant to the provisions of Sections 3(1) and 19 of the *Environment and Land Court Act*, and Rules 3(1), (2), (3), (4), (5), 5 and 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The proposed 10th Respondent, Biliqo Bulesa Community Based Organization, seeks the following reliefs:
 - i. Spent
 - ii. Spent.
 - iii. Spent
 - iv. That the proposed Respondent Biliqo Bulesa be admitted as a Respondent in this Petition.
 - v. That this Honourable court be pleased to set aside its judgment delivered on the 24th January, 2025 and order that the Petition be heard de novo.
23. The Motion is premised on the grounds on the face thereof and supported by the affidavit of Halkano Gollo, the chairman of the proposed 10th Respondent of an even date. He deponed that, based on legal advice, he has been sued in his capacity as the chairman and founder of the proposed 10th Respondent, despite the fact that the CBO itself was not named as a party in the Petition. He further stated that he was unaware of the Petition's existence until after the judgment was delivered, as he had never been personally served with the pleadings.
24. Mr. Gollo averred that Biliqo Bulesa is a duly registered CBO that has existed for over 18 years, having been registered in 2007. Over time, it has initiated various community projects aimed at addressing the unique challenges of Arid and Semi-Arid areas, benefiting the entire community rather than any individual.
25. He further deponed that, despite the Petitioners seeking orders against the proposed 10th Respondent, it was never formally made a party to the proceedings. He clarified that while Biliqo Bulesa operates under the umbrella of the 1st Respondent for purposes of conservation, governance, and resource mobilization, it remains a distinct legal entity from the Trust. He also asserted that although the Trust appointed Counsel who entered appearances and filed pleadings, he was neither consulted nor did he consent, and he did not swear any affidavit in opposition to the Petition.
26. Additionally, he stated, the proposed 10th Respondent was deprived of an opportunity to respond to key evidentiary issues raised in the Petition, particularly regarding the progress of community land registration, the CBO's initiatives, and approvals for conservatory scouts/rangers, matters solely within the CBO's knowledge and competence to address.
27. He noted that, having been in existence since 2007, the proposed 10th Respondent has significantly contributed to wildlife conservation, and resource mobilization for grazing land, water supply, and other essential social amenities, thereby enhancing rather than curtailing the community's right to its land.
28. While acknowledging the court's efforts and time spent in delivering the judgment, Mr Gollo urged that they should be granted an opportunity to be heard. He further asserted that the court has jurisdiction to set aside a judgment upon sufficient cause being shown, a discretion aimed at ensuring justice and preventing undue hardship arising from an unfairly obtained judgment.



29. Mr. Gollo outlined the principles governing the setting aside of judgments, emphasizing the need to provide a reasonable and satisfactory explanation for failing to participate in the proceedings. He argued that when a judgment is obtained irregularly, particularly due to non-service, the court has the discretion to set it aside, even on its own motion as the right to be heard is fundamental. In such instances, he asserted, the court need not consider whether the intended defense raises triable issues or whether there has been undue delay in applying to set aside the irregular judgment.
30. In response to this Motion, the Petitioners, through Mr. Abdirahman Osman, swore a Replying Affidavit on 17th February 2025. He deponed that the 5th Respondent was sued in his capacity as an official of Biliqo Bulesa Conservancy, as stated in paragraph 4 of the Petition. While the Petitioners do not object in principle to the firm of Wesonga Theuri coming on record for the 5th Respondent, he contended, the 5th Respondent could not now seek to distance himself from the representation previously provided by the firm of Ochieng Ogola & Co Advocates.
31. Mr. Osman further averred that the Petition was duly served upon the 5th Respondent, with a return of service filed as proof. He stated that, as advised by Counsel, Biliqo Bulesa Conservancy is registered as a community based organization (CBO) and as such can only be sued through its registered officials. Consequently, the joinder of the proposed 10th Respondent was irregular, as it was already represented by the 5th Respondent, who was properly sued in his official capacity.
32. He further stated that upon service, the 5th Respondent entered appearance through the firm of Ochieng Ogola & Co Advocates. Mr. Ogola, for the firm, appeared in court and confirmed that they were acting for the 1st and 3rd –6th Respondents. He argued that no evidence was provided to refute the facts that the 5th Respondent was duly served, entered appearance through Counsel, filed documentation opposing the Petition, and subsequently filed a Notice of Appeal against this court's judgment. Further, he noted, while the 5th Respondent sought to change its Advocates, he had not formally withdrawn instructions from his previous Counsel.
33. According to Mr. Osman, the 5th Respondent actively participated in the trial, filing several documents, including the Grounds of Opposition dated 30th June 2022 and the final submissions dated 24th April 2024. Despite now alleging that they did not authorize the firm of Ochieng Ogola & Co Advocates to represent them, no evidence has been adduced to support this claim or to show any formal action taken against the said firm through the appropriate legal channels. This, he argued, amounts to an allegation of professional misconduct against an Advocate without any substantiating evidence.
34. He further noted that internal administrative issues between the 5th Respondent and the 1st Respondent, such as whether Ochieng Ogola & Co Advocates had proper conduct of the matter, should not be used to prejudice the Petitioners, whose rights have already been adjudicated upon. Moreover, the 5th Respondent, through the firm of Ochieng Ogola & Co Advocates has filed a Notice of Appeal dated 27th January 2025, which remains on record. The said firm has not filed an application to cease acting for the 5th Respondent.
35. Mr. Osman deponed that, under the *Evidence Act*, a party who, by declaration, act, or omission, has caused another party to believe a certain position to be true and to act upon that belief, cannot later deny the truth of that thing. Consequently, the 5th Respondent is precluded by the doctrine of issue estoppel from denying his prior legal representation.
36. He contended that the 5th Respondent, having been properly sued, served, and represented, is now attempting to reopen the case through indirect means and while asserting that consultation and public participation were conducted, he has failed to demonstrate that such participation took place before



- the establishment of the proposed 10th Respondent or that the Petitioners were invited to or took part in the process.
37. Mr. Osman further argued that an application for review is governed by Order 45 Rule 1 of the Civil Procedure Rules, 2010, and the same may only be granted upon the discovery of new and important evidence that was not within the applicant's knowledge or could not have been produced with due diligence during the proceedings, which has not been demonstrated herein. Additionally, a party seeking review must not be simultaneously pursuing an appeal.
 38. According to Mr Osman, the proposed 10th Respondent has failed to provide any justification for the reliefs sought and the claims now being advanced were well within the 5th Respondent's knowledge during trial but were not presented at the time. Even if the new material sought to be introduced were admitted, he deponed, it would still fail to meet the necessary threshold for review or to sufficiently address the issues raised in the Petition. In any event, the 5th Respondent having filed a Notice of Appeal, which remains on record, the grounds for review pleaded in the Motion are untenable, as the trial court is functus officio.
 39. He asserted that the proposed 10th Respondent is attempting to cure perceived legal deficiencies identified during the trial, effectively asking the court to sit on appeal of its own judgment. He argued that there remains insufficient evidence of public participation, the certificates allegedly issued by the 7th Respondent were not produced during trial, and the Isiolo Police County Commandant has not demonstrated how instructions for the protection of a privately owned conservancy were conveyed from the National Police Service.
 40. Finally, he deponed, this court in its judgment found that the Respondents had jointly and severally infringed upon the Petitioners' rights. He argued that by seeking a stay and the setting aside of the judgment, while excluding other parties who were also found liable but have not appealed, such as the 2nd, 7th, 8th, and 9th Respondents, the 5th Respondent's application would effectively suspend the Petitioners' rights. Granting the application, he warned, would unjustly absolve the duty bearers, of their obligation to uphold the Petitioners' rights, despite their failure to appeal the judgment.
 41. The proposed 10th Respondent, through Halkano Gollo, swore a Further Affidavit on 26th February 2025. He deponed that the judgment of this court has far-reaching implications, not just for the parties before it, but for the entire community, whose proprietary interests over communal land now stand jeopardized. The judgment in rem affects more than just the immediate litigants, and in the interests of justice, the matter should be revisited to safeguard community rights.
 42. He further deponed that, as per constitutional guarantees, public participation is fundamental in all matters concerning communal land rights. The exclusion of the proposed 10th Respondent from the proceedings, he argued, undermines the principles of fair administrative action, the right to be heard, and public participation in decision-making processes. Additionally, the courts have consistently held that a litigant should not be punished for the inadvertence, mistake, or omission of Counsel.
 43. According to Mr. Gollo, the material sought to be introduced has always been in their possession and was not deliberately withheld. He explained that due to the limited instructions initially provided for the preparation of their response, key documents were inadvertently omitted. As advised by Counsel, he asserted that the court has a duty to ensure that substantive justice is served, and where an omission results in an unjust outcome, it has the discretion to intervene and rectify the situation.
 44. He further stated that, in the interests of justice, parties should be given the opportunity to present all relevant material, and the court should not be used as an instrument to uphold an unjust technicality. He stated that there are instances where courts have exercised discretion to allow additional evidence,



particularly where its omission was due to oversight. In making its determination, he urged the court to consider whether the failure to adduce certain evidence was an oversight rather than a deliberate or willful act.

Proposed 11th Respondent's Motion of 7th February, 2025

45. This Motion has been brought pursuant to the provisions of Articles 47, 50(1), and 159 of *the Constitution* of Kenya, 2010, Sections 12 and 19 of the *Environment and Land Court Act*, and Rules 3, 5, 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. The proposed 11th Respondent, Cherab Community Conservancy seeks the following reliefs:
- i. Spent
 - ii. Spent
 - iii. Spent
 - iv. That the Cherab Community Conservancy, represented by its duly elected officials be joined as a Respondent to the Petition.
 - v. That the judgment and orders of this Honourable Court issued on 24th January, 2025 in ELC Petition No E006 of 2021 be reviewed, varied and set aside and the Petition proceeds for hearing de novo.
 - vi. That such other and/or further relief be granted as this Honourable Court might deem fit and just to grant in the unique circumstances of this matter.
 - vii. That the costs of this application be provided for.
46. The Motion is based on the grounds set out on its face and is supported by the affidavit of Abdi Jarso, the Chairman of Cherab Community Conservancy, sworn on the same date. He deponed that Cherab Community Conservancy is a duly registered community based organization (CBO) whose members reside in Cherab Ward, Merti Sub-County, Isiolo North Constituency.
47. According to Mr Jarso, while the Petitioners purported to sue him in his capacity as the chairperson, he was never served with the Petition and the proposed 11th Respondent only became aware of the proceedings after the court had delivered its judgment and the decision was published in the mainstream media.
48. Upon reviewing the judgment, he deponed, the proposed 11th Respondent and its membership were taken aback to learn that he had allegedly entered appearance and was jointly represented by Counsel for the 1st, 4th, 5th, and 6th Respondents. He asserted that the proposed 11th Respondent did not participate in the proceedings and had never authorized the 1st Respondent to enter appearance on its behalf. He noted that while the 1st Respondent may have acted in good faith, it did so without the consent or authorization of the proposed 11th Respondent or its members.
49. According to Mr. Jarso, the determination of key issues in the Petition was based on non-disclosure of critical facts. In particular, he emphasized that Cherab Community Conservancy was established in March 2021 as a community-led initiative in Cherab Ward, following extensive consultations with community members, administrative heads, village elders, and other stakeholders between March and May 2021. Thereafter, the elected board members engaged representatives from the Kenya Wildlife Service (KWS), the County Government, and community leadership to facilitate its registration,



- identify a suitable location for the conservancy, and establish frameworks to ensure community engagement and prosperity.
50. Following a board meeting on 21st May 2021, he stated, the officials resolved to register the proposed 11th Respondent as a CBO and before determining the geographical location of the conservancy, the board conducted awareness campaigns throughout the ward, targeting a broad demographic. Further, he stated, the meeting of 21st May 2021 resolved that the proposed 11th Respondent's headquarters would be situated in Korbesa, with an outpost at Yamicha. This decision was approved by residents of both locations.
 51. Mr Jarso stated that on 15th June 2022, the proposed 11th Respondent wrote to the 2nd Respondent seeking approval for the construction of its headquarters and outpost, attaching an Environmental Impact Assessment (EIA) Report and minutes of consultative meetings. The 7th Respondent subsequently wrote to the 2nd Respondent, commending the proposed 11th Respondent's conservation efforts and recommending it for land allocation to establish its headquarters and ranger outpost.
 52. NEMA equally issued an Environmental Impact Assessment (EIA) license for the construction of the headquarters at Korbesa and with the necessary infrastructure in place, the proposed 11th Respondent then applied for membership with the Kenya Wildlife Conservancies Association (KWCA).
 53. In light of these facts, Mr. Jarso contended that the proposed 11th Respondent should be given an opportunity to respond to allegations that it violated constitutional principles of public participation as enshrined under Articles 10 and 69(1)(d) and (f) of *the Constitution*. He refuted claims that the proposed 11th Respondent had frustrated the adjudication and registration of community land, stating that on 22nd August 2024, the Cabinet Secretary for Lands, Public Works, Housing, and Urban Development, in consultation with the 2nd Respondent, developed and gazetted a comprehensive adjudication program for Cherab Dedha.
 54. On 18th November 2024, he stated, the Isiolo County Government invited all community members with communal interests to a public meeting to elect members of the Community Land Management Committee. Following the court's judgment, the Cherab Dedha Community Land Committee wrote to the 2nd Respondent, confirming that the adjudication process was nearing completion and that the community intended to retain the conservancy within the land use plan once the title certificate was issued.
 55. Regarding security, Mr. Jarso deponed that the rangers deployed in the conservancy are local community members trained by the 7th Respondent's college and cleared by the National Police Service. The 7th Respondent issued certificates to all 20 rangers, and the National Police Service recommended their issuance of firearms. He asserted that these facts were never brought to the court's attention and that, given the Petitioners' failure to effect service upon the 3rd Respondent or the proposed 11th Respondent, the latter was condemned unheard.
 56. Mr. Jarso highlighted that the conservancy has been crucial in addressing regional crises. During the 2023 drought, it partnered with the County Government of Isiolo to distribute over 10.7 tonnes of assorted food supplies and 9,000 litres of fuel for water trucking to households across six locations. In 2025, it played a key role in responding to the Isiolo wildfire emergency by providing water to extinguish the fire.
 57. Additionally, it had disbursed Kshs. 2,500,000/= in bursaries in 2022 and Kshs. 6,000,000/= in 2023/2024. It also collaborated with the County Government of Isiolo to develop water infrastructure, including renovating and maintaining the Dogogicha borehole during the 2023



- drought. In conclusion, Mr. Jarso urged the court to review, vary, and set aside its judgment, arguing that failure to do so would result in a grave miscarriage of justice.
58. In response to this Motion, the Petitioners, through Mr. Abdirahman Osman, swore a Replying Affidavit on 15th February 2025. He deponed that the Petition was duly served upon the 3rd Respondent, who acknowledged receipt by physically accepting the documents. He asserted that as a community based organization (CBO), Cherab Conservancy Community can only be sued through its elected officials, which was properly done in this case. Therefore, the claim that its elected officials, Abdi Jarso, Amina Tadicha, and Adan Wako, were never served and are unaware of the case is misleading.
 59. Mr. Osman further deponed that the 3rd Respondent was not only duly served but also entered appearance through the firm of Ochieng Ogola & Co. Advocates, filed documentation opposing the Petition, and subsequently filed a Notice of Appeal against this court's judgment. Further, it is disingenuous for the 3rd Respondent to claim a lack of knowledge of a case that was of significant public interest and generated considerable attention.
 60. It was submitted that the 3rd Respondent, jointly with the 4th, 5th, and 6th Respondents, responded to the Petition via the Grounds of Opposition dated 30th June 2022, filed submissions on the 24th April 2024 and at all times actively participated in the proceedings. While alleging that they did not authorize Ochieng Ogola & Co Advocates to represent them, they have provided no evidence to support this claim, which amounts to an unsubstantiated allegation of misconduct against an Advocate.
 61. Mr. Osman deponed that the proposed 11th Respondent cannot cast aspersions on the integrity of an Advocate while simultaneously contending that the Advocate was acting in good faith. This amounts to blowing hot and cold. Additionally, the board resolution dated 3rd February 2025, adduced by the 3rd Respondent, corroborates the position that the proposed 11th Respondent was aware of the Petition and was represented. Any internal administrative issues between the proposed 11th Respondent and the 1st Respondent should not be used against the Petitioners.
 62. He contended that the proposed 11th Respondent is invoking misrepresentation as a pretext to evading compliance with the court's judgment. Even if a dispute exists between the 3rd Respondent and its legal representatives, such a matter falls within the purview of the relevant authorities and should not be used to prejudice the Petitioners, whose rights have already been determined as violated.
 63. Moreover, the letter dated 3rd February 2025, from Cherab Community Conservancy to the 1st Respondent confirms that they are members and had duly appointed Ochieng Ogola & Co Advocates to represent them. Any alleged conflict in legal representation is, therefore, a personal matter that does not concern the Petitioners. Additionally, the 3rd Respondent, through his Advocates, filed a Notice of Appeal dated 27th January 2025, which remains on record and there is no indication that Ochieng Ogola & Co Advocates have applied to withdraw from representing the 3rd Respondent.
 64. According to Mr Osman, as advised by Counsel, under Section 120 of the *Evidence Act* (Cap 80), a party cannot deny what they have knowingly allowed another to believe. Consequently, the 3rd Respondent is estopped from disassociating himself from its legal representation. He averred that the proposed 11th Respondent is using the excuse on mis-representation to evade compliance with the court's judgment. Even if there was a conflict between the 3rd Respondent and his legal representation, this issue should be addressed by the relevant authorities and should not disadvantage the Petitioners, whose rights were found to have been infringed upon.



65. Mr. Osman stated that Cherab Community Conservancy is one of 43 conservancies managed by the 1st Respondent, making it impossible to separate it from the 1st Respondent and Cherab Community. The proposed 11th Respondent's letterhead is revealing as the email address thereon is cherab@nrt-kenya.org, indicating collaboration between the 1st and 3rd Respondents. Among the attendees of the board meeting of the proposed 11th Respondent were five chiefs as well as the 8th Respondent, affirming their allegation of bias against the 8th Respondent.
66. He contended that Mr. Tom Lalampaa, in his affidavit in response to the Petition, spoke authoritatively on behalf of the 3rd to 6th Respondents under oath which statements have not been recanted, further affirming the close relationship among these entities. He noted that the 3rd Respondent appears to be attempting to reopen the case through the backdoor.
67. Mr Osman stated that the proposed 11th Respondent seeks to take a second bite at the cherry by alleging that consultations and public participation were conducted prior to its establishment with the involvement of the 2nd and 7th Respondents. Despite allegedly having knowledge of such consultations, the 2nd and 7th Respondents did not present any evidence of this before the court and did not plead it in the Petition. It was their unequivocal assertion that there are no registered community land conservancies in Isiolo County and they are bound by their pleadings as is the law.
68. He contended that as advised by Counsel, an application for review is founded on Order 45 Rule 1 of the Civil Procedure Rules, 2010. This provision allows review where there is a discovery of new and important evidence that was not within the applicant's knowledge despite due diligence or where there is an error apparent on the face of the record. The proposed 11th Respondent has failed to meet this threshold. Further, a party seeking review is distinct from one appealing a decision and the 3rd Respondent having filed a Notice of Appeal dated 27th January 2025, which remains unwithdrawn, is engaging in forum shopping by invoking both appellate and trial court jurisdictions.
69. He asserted that the proposed 11th Respondent has not demonstrated why this court should stay or set aside its judgment and while it has presented evidence alleging public participation, completion of the Environmental Impact Assessment (EIA) reports, and compliance with legal processes, there has been no demonstration of any error on the face of the record or justification of the introduction of new material that was available but not presented during the trial. Even if admitted, this information would not adequately address the issues raised in the Petition.
70. He stated that notably, the minutes of the Cherab Community Conservancy Board Meeting held on 21st May 2021 show that the 9th Respondent (through four Chiefs) was in attendance and a key resolution (Minute 5/5/21) was to open a bank account for the CBO, with signatories including the Board Chair, Finance Chair, and the 1st Respondent's Country Director. This further demonstrates the inextricable link between the 1st and 3rd Respondents. They do not however indicate public participation.
71. Further, whereas the 9th Respondent was in attendance in the meeting of 21st May 2021, as a board member, there is no indication that the broader community was involved in these meetings. Board members, he emphasized cannot purport to make decisions on behalf of the entire community. Pursuant to Section 29(c) of the Community Land Act, he averred, registered communities have the authority to establish conservancies, and registration should precede establishment.
72. According to Mr Osman, there is demonstration that the 1st, 3rd and 8th Respondents were colluding to establish and operate conservancies at the Petitioners' expense and the 2nd and 7th Respondents were involved in the same contradicting their pleadings in the Petition. Regarding the Environmental



- Impact Assessment (EIA), it lists the 1st Respondent as the project proponent. He noted that this information while in the 1st Respondent's possession was not disclosed during trial. Furthermore, the Environmental Impact Assessment (EIA) pertains only to the establishment of Cherab Community Conservancy Headquarters, not the conservancy itself.
73. As to the purported certificate from the Law Enforcement Academy, he deponed, the same is suspect given the 7th Respondent's denial. Additionally, the claim that rangers were trained and deployed to protect conservancies lacks clarity on how such instructions originated from the National Police Service.
74. Finally, Mr. Osman urged that the court's judgment held the Respondents jointly and severally liable for infringing upon the Petitioners' rights. Despite their participation, the 3rd Respondent is now seeking a stay and review while excluding other liable parties, including the 2nd, 7th, and 8th Respondents, who have not appealed. Granting the Motion would effectively stay the Petitioners' rights and unduly absolve duty bearers of their responsibilities.
75. The 11th Proposed Respondent, through Mr. Abdi Jarso filed a Further Affidavit on 25th February 2025. Mr. Abdi Jarso deponed that he did not meet Mr. Samuel Mutua on 28th October 2021 and that no service was effected upon him. He asserted that Korbasa Primary School is located in a remote part of Cherab Ward, requiring approximately six hours of travel from Isiolo Town. Given that Nairobi is over 400 km away, a journey of about ten hours, he opined that it was inconceivable that Mr. Mutua could have traveled from Nairobi to Isiolo and still managed to effect service on the same day.
76. Mr. Jarso further stated that Korbasa Primary School is in one of the remotest parts of Cherab Ward, where a non-resident would require assistance from a local to find directions. He pointed out that Mr. Mutua did not explain how he navigated to the school, which he had never visited before nor how he identified him having never met before. Additionally, the visitors' book for 28th October 2021, did not record Mr. Mutua's presence and yet Mr. Mutua claims to have served him with the process, even though they had never met.
77. He deponed that, contrary to the Petitioners' assertions, the proposed Respondents were neither represented at the hearing nor did they file substantive responses addressing the merits of the Petition. Instead, they only filed Grounds of Opposition. He maintained that the correct factual position was outlined in his Affidavit of 7th February 2025. He also clarified that the Cherab Community Conservancy is a distinct entity separate from the 1st Respondent, which only provides it with technical support. He emphasized that an Advocate can only act in a matter where they have been properly instructed.
78. Mr. Jarso stated that, as advised by Counsel, the Notice of Appeal merely secures the 1st Respondent's right to appeal, signifying an intention to challenge the judgment. However, it does not prevent the court from considering an application for review, variation, or setting aside of the judgment. He concluded that public interest considerations necessitate the granting of the orders sought.

Submissions

79. The Motions were canvassed through oral submissions on 28th February 2025. Mr. Theuri, appearing for the 5th Respondent and proposed 10th Respondent/Applicant, Biliqo Bulesa Community Based Organization, submitted that the issue before the court pertains to the use of community land and its impact extends beyond the Petitioners to the entire community.
80. Counsel emphasized that the broader aspects of the case should be considered. He pointed out that the 3rd, 4th and 5th Respondents did not file any substantive responses to support their claims, instead



- relying solely on Grounds of Opposition. He further noted that critical allegations concerning the registration of community land were left unaddressed by the parties. Additionally, he contended that proper instructions could not have been issued due to the lack of service of pleadings.
81. Mr. Theuri informed the court that the gazettment of the adjudication process had been completed, and the community land register had been prepared. He further stated that elections for the community land committees had taken place, and gazette notices had been filed, signifying that the process was ongoing. However, he lamented that this crucial information had not been presented before the court. He opined that had it been disclosed, the court might have issued a structural interdict or, at the very least, rendered a more precise decision.
 82. Counsel urged the court to adopt a holistic interpretation of *the Constitution*, emphasizing the need to strike a balance that serves the broader interests of the community. He argued that although the parties had presented their cases and judicial time had been expended, a fair and proportional approach necessitated reopening the proceedings and setting aside the judgment.
 83. In conclusion, Counsel submitted that the court should be mindful of the community's interests and the benefits they derive from community land. He contended that the affected parties should be given an opportunity to illustrate these benefits. Additionally, he highlighted the need for courts to address situations where Advocates on record have not adequately presented a party's full case.
 84. Mr. Issa, appearing for the 3rd Respondent and the 11th proposed Respondent, associated himself with the submissions of Mr. Theuri. He acknowledged the time and effort the court had taken to adjudicate the dispute but emphasized that historically, community land in the region has been significantly impacted. He noted that the legal framework governing community land has since evolved and is now more robust.
 85. Through their evidence, he stated, the Respondents had demonstrated the broader context of the dispute, particularly the Gazette Notice of 23rd August 2024, which set out the adjudication program for Isiolo County, including Merti Sub-County and Cherab. He added that a notice had also been issued to the community to elect representatives, with corresponding communication sent to the County Government.
 86. Counsel further submitted that they had shown evidence of active community participation, with the community having resolved to collaborate with the 1st Respondent. He highlighted that the 7th Respondent, had granted the necessary approvals for the construction of the conservancy headquarters, and that an Environmental Impact Assessment (EIA) had been duly conducted in partnership with the 1st Respondent.
 87. On the issue of armed rangers, Mr. Issa submitted that the Respondents had adduced evidence confirming that the Directorate of Criminal Investigations (DCI) had issued the requisite licenses, that the rangers had undergone training facilitated by the 7th Respondent, and that approval had been granted for the issuance of arms.
 88. Counsel argued that since this is a constitutional petition, the threshold for setting aside a judgment is different, requiring a broad and purposive interpretation, particularly in matters relating to community land and the role of key stakeholders such as the 1st and 2nd Respondents. In support, he referred to the case of *JMK vs MWM & Another* [2015] KECA 532 (KLR).
 89. He contended that Cherab Conservancy cannot be heard in the Court of Appeal not having been a party to these proceedings. Moreover, he asserted that the conservancy had been incorrectly described in the Petition and was not part of the 1st Respondent. He emphasized that both Biliqo Bulesa



and Cherab Conservancies should have been sued in their own names as unincorporated bodies, as permitted under Article 260 of *the Constitution*.

90. Mr. Issa further submitted that the mode of service had been defective. He clarified that the 1st Respondent operated in a consultative rather than executive capacity. To support his argument, he relied on *James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another* [2016] KECA 470 (KLR), where the court set aside a judgment after finding that the right to be heard had been violated. He also cited *Toshika Construction Company Limited vs Harambee Co-operative Savings & Another* [2019] KECA, where the court held that improper service warranted setting aside the judgment.
91. In conclusion, Counsel urged the court to recognize that the right to be heard is fundamental. Given that the dispute involved community rights, he submitted that the court should err on the side of caution to ensure that justice is served.
92. Mr. Ogola, appearing for the 1st Respondent, submitted that the 1st Respondent is a charitable organization, and the Director General of the 7th Respondent sits on the board of the 1st Respondent, ensuring coordination between the two entities.
93. Counsel emphasized that the 1st Respondent has an arguable appeal. He underscored the crucial role of the 7th Respondent in supporting conservation efforts and maintaining operational structures. He further submitted that Rule 33 of the Mutunga Rules was applicable in the present case and that the 1st Respondent stood to suffer substantial loss if the judgment was not reconsidered. He noted that the conservancy was engaged in several essential activities, including the provision of water and other amenities, which had now been adversely affected.
94. Mr. Ogola stated that through its judgment, the court had restrained the 1st Respondent from engaging in other activities, effectively halting service provision. This, he argued, raised critical concerns regarding the balance between environmental conservation and socio-economic rights. He stated that despite mobilizing resources for various community-based initiatives, the 1st Respondent was now unable to access the land, hindering its ability to implement these projects. He pointed to the 2020 Wildlife Policy, which emphasizes the importance of partnerships in conservation and community engagement.
95. Counsel submitted that substantial loss can manifest in various forms, including the disruption of donor-funded programs. He noted that the court's decision had effectively restricted the 1st Respondent's operational rights, affecting essential services such as a hospital and a maternity facility within the conservancy. The potential closure of these vital facilities, he argued, would result in irreparable harm that could not be quantified in monetary terms.
96. Counsels for the 2nd and 7th Respondents while noting that they would not prefer an appeal against the decision of the court, intimated that they were in support of the three Motions.
97. In response, Mr. Makaka, representing the Petitioners, submitted that the 3rd and 5th Respondents were sued in their official capacities as officials of Cherab and Biliqo Bulesa Conservancies. He argued that a community based Organization (CBO) cannot be sued in its own name; therefore, any contention to the contrary is erroneous. In support of this position, he referred to the case of *Kipsiwo Community Self Help Group vs Attorney General and 6 Others* [2013] KEELC 63 (KLR).
98. Mr. Makaka further submitted that the 3rd and 5th Respondents were duly served and entered appearance through their Advocate, Mr. Ogolla, who also represented the 1st, and 4th Respondents. He noted that Mr. Ogolla had not indicated to the court that he lacked instructions to act on their behalf.



- Moreover, he had filed Grounds of Opposition which are still on record. If there was any conflict regarding representation, he argued, it should not be of concern to the Petitioners.
99. Additionally, he pointed out that the same Advocate had filed a Notice of Appeal on behalf of the 3rd and 5th Respondents. He submitted that Section 120 of the *Evidence Act* and the doctrine of equitable estoppel were applicable, as illustrated in *Nurdin Bandali vs. LOM Bank (1963)E.A.* and that the 3rd and 5th Respondents have at all times been aware of the proceedings.
 100. Mr. Makaka highlighted that in the Further Affidavit, the 1st Respondent deponed that Cherab is a registered CBO and a member of the 1st Respondent, which explains why they were represented by the same Counsel. He asserted that despite numerous documents being adduced, the core issues in the Petition remained unaddressed. Specifically, there was still no compliance, and the land in question remained unregistered.
 101. It was his submission that the 7th Respondent had failed to produce the certificates now being exhibited during trial. He also contended that the letter from the Isiolo County Police Commandant, dated 3rd February 2025, did not adequately address the issue of armed rangers. According to Mr. Makaka, the exhibited documents suggested that investments were made on the land in violation of the judgment. Additionally, he emphasized no evidence of legal compliance existed before these investments were undertaken, a dangerous grey area.
 102. Mr. Makaka submitted that in an application for review, there must be demonstration of the existence of important new evidence or an error apparent on the face of the record none of which had been demonstrated. He urged that nonetheless, there being an appeal, a review could not be simultaneously sought. He also noted that the matter had been pending for four years, and the 3rd and 5th Respondents should not be allowed to introduce new evidence at this stage, which would essentially amount to a "second bite at the cherry." He cited the case of *Grace Akinyi vs Gladys Kemunto Obiri & Another [2016] eKLR* in support of this argument.
 103. Mr. Kubai, also representing the Petitioners, submitted on the Motion for stay, stating that orders sought therein are discretionary. He stated that the claims of substantial loss had yet to be proven. For instance, there was no evidence of the Kshs 90,000,000/= allegedly secured from donors. Similarly, while photos were annexed, it was unclear where they were taken, as no certificate was provided under the *Evidence Act*.
 104. Mr. Abdullahi also for the Petitioners added that Order 42 Rule 6 of the Civil Procedure Rules governs the question of stay of execution. He pointed out that no evidence of loss had been provided and argued that a profit-making organization cannot claim to suffer losses. He questioned how the 1st Respondent was affected by continuing to operate on unregistered community land and raised concerns about the validity of their claim of receiving carbon credits. He also referenced Section 36 of the *Community Land Act*, seeking clarification on who the members of the Community Based Organization were. He concluded that staying the judgment would have serious ramifications for the entire community.
 105. In a rejoinder, Mr. Ogola stated that they have filed an appeal and will seek to have the court determine the issues. He urged for a holistic interpretation of *the Constitution* and asserted that the submissions on Section 36 of the *Community Land Act* had been made out of context. He emphasized that the carbon project is subject to a distinct and clear regime, to be implemented within two years of the Act, which has not yet lapsed. He also pointed out that the orders would affect the ongoing carbon project, which was generating millions of shillings.
 106. Mr. Ogola further stated that they had provided a certificate of electronic evidence concerning the photos. He argued that the Petitioners, having come to court to advance public interest, should not



- be focused on technicalities. He emphasized that services such as schools and hospitals should not be closed, and if the stay is not granted, it would prejudice those benefiting from these services.
107. Mr. Issa argued that the court had found in the judgment that the 3rd Respondent had not sworn an affidavit and urged the court to consider the plea for setting aside the judgment. He referred to Article 260 of *the Constitution*, which clarifies that a CBO is a "person," noting a departure from previous case law in an effort to align with Articles 22, 23, and 260 of *the Constitution*. He maintained that they had not yet delved into the merits of the case.
 108. Referencing the case of *Gachagua & 40 others vs Speaker, National Assembly & 15 others; Law Society of Kenya & 7 others (Interested Parties) (Constitutional Petition E565 of 2024 & Petition E013 (Kerugoya), E014 (Kerugoya), E015 (Kerugoya), E550 (Nairobi), E570 (Nairobi) & E572 (Nairobi) of 2024 (Consolidated))* [2024] KEHC 13473 (KLR) he noted that this court is not precluded from suspending the implementation of a judgment or a declaration of unconstitutionality. He argued that if the Motion to re-open is disallowed, the court should allow the stay of execution.
 109. Mr. Theuri stated that this court's interpretative jurisdiction was invoked pursuant to Article 258 of *the Constitution*, allowing any person to appear before the court. He argued that the parties should have been more clearly defined in the Petition and that Biliqo Bulesa should have been sued in its own name, a point that would have been raised had it been properly sued. He contended that the court should determine whether the material before it was valid at the time of making the determination and that they should be given an opportunity to demonstrate the benefits to the community.
 110. Finally, Mr. Theuri stated that the Civil Procedure Rules do not apply strictly in this case and may instead be referenced to ensure compliance with *the Constitution*. He argued that where there are sufficient reasons, the court has the authority to review its decision. He concluded that the doctrine of estoppel did not apply, as there had been insufficient representation.

Analysis and Determination

111. Having considered the Motions, responses and submissions, the issues that arise for determination are:
 - i. Whether this court is functus officio?
 - ii. Whether or not this court should set aside its judgment of 24th January 2025, reopen the matter and join the proposed 10th and 11th Respondents? And if not?
 - iii. Whether this court should stay the execution of its judgment dated the 24th January, 2025 pending the hearing and determination of the Intended Appeal.

I. Whether this court is functus officio?

112. The Petitioners contend that this court is divested of jurisdiction to entertain the present Motions on account of the doctrine of functus officio. It is their contention in this regard that the court has fully and finally determined the matters in issue herein and the same cannot be the subject of re-litigation. Furthermore, since an appeal has been proffered, jurisdiction now rests with the Court of Appeal.
113. The doctrine of functus officio embodies the legal principle of finality, ensuring that once a court has fully rendered its decision, it has exhausted its jurisdiction over that matter.
114. The Supreme Court in *Odinga vs Independent Electoral & Boundaries Commission & 3 Others (Petition 5, 4 & 3 of 2013)* [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) in its interpretation of this doctrine cited with approval an excerpt from an article by Daniel Malan



Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in the following words:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

115. In addition the Supreme court also referred to the case of *Jersey Evening Post Limited vs A. Thani* [2002]JLR 542 at pg. 550 where the court stated:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

116. Indeed, while this doctrine aims to uphold finality in litigation, it does not operate as an absolute bar to all post-judgment proceedings. This position was articulated in *Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others* [2018] eKLR, thus:

“I understand the doctrine, like its sister, the res-judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes. As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

....There are several proceedings that can only be undertaken after judgment and not before. The following are just but examples; Application for stay; Application to correct the decree; Application for accounts; Application for execution including garnishee applications; Applications for review; Application under section 34 of the Act.

If one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice.”

117. Indeed, the pleas for setting aside, post judgment joinder and stay of execution pending appeal form part of the matters that the court is vested with jurisdiction to undertake after judgement guided by the relevant parameters as set out in law.

118. Ultimately, it is the finding of the court that it is not functus officio.



II. Whether or not this court should set aside its judgment of 24th January 2025, reopen the matter and join the proposed 10th and 11th Respondents?

119. Vide the Motions dated 6th and 7th February 2025, the proposed 10th and 11th Respondents have moved this court seeking to have it set aside its judgment of 24th January, 2025 and to have the matter re-opened, thereby allowing them to be joined in the proceedings. They ask that the matter proceeds de novo.
120. In so doing, they invoke the provisions of Articles 47, 50(1), and 159 of *the Constitution* of Kenya, Sections 3 and 19 of the *Environment and Land Court Act* alongside Sections 3(1), (2), (3), (4), (5), 5,19, and 25 of *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, commonly, and hereinafter referred to as the “Mutunga Rules”.
121. Articles 47 and 50 of *the Constitution* provide for the rights to fair administrative action and the rights to a fair hearing respectively. Article 159 establishes that judicial authority is derived from the people and vests in, and is exercised by the courts and tribunals established by or under *the Constitution*. It emphasizes key principles that should guide judicial authority, including ensuring access to justice for all, delivering justice without delay, and promoting alternative dispute resolution mechanisms.
122. On the other hand, Section 3 of the *Environment and Land Court Act* outlines its overriding objectives, being to ensure the just, expeditious, proportionate, and accessible resolution of disputes under the Act. Section 19 further provides for the court’s procedure and powers, requiring that proceedings be conducted swiftly and without undue reliance on procedural technicalities, while adhering to the *Civil Procedure Act* (Cap. 21).
123. Section 3 of the Mutunga Rules, on the other hand sets out the Rules, scope and objectives. It provides that the Rules are applicable to all proceedings under Article 22 of *the Constitution* and are designed to facilitate access to justice for all, as mandated by Article 48. Further, the Rules must be interpreted in line with Article 259(1) of *the Constitution*. Their application aims to advance and uphold the rights and fundamental freedoms enshrined in the Bill of Rights, as well as the broader constitutional values and principles.
124. Rule 3(5) sets out the overriding objectives of the court, which includes the just determination of the proceedings, efficient use of the available and administrative resources, timely disposal of proceedings at a cost affordable by the respective parties, and use of appropriate technology.
125. As regards Rule 5, the same deals with the provisions of joinder, substitution and the striking out of parties, while Rule 19 sets out the manner in which applications are to be presented before court. Rule 25 provides for the setting aside of orders issued under Rule 22, which deals with the filing of written submissions.
126. Considering the foregoing, it is noted that the cited provisions of law primarily outline general objectives and guiding principles. Indeed, a perusal of the Mutunga Rules makes it is clear that the same are silent on the questions of setting aside, re-opening and post judgment joinder as sought. Nonetheless, judicial precedent has established that where a lacuna exists in the Mutunga Rules, the Civil Procedure Rules, 2010, may be invoked to fill the gap.
127. Speaking to this, the Court of Appeal in *Karl Wehner Claasen vs Commissioner of Lands & 4 others* [2019]eKLR, noted:

“...in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that



Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of *the Constitution*.”

128. The court will be so guided.

129. As aforesaid, the proposed 10th and 11th Respondents seek an order setting aside this court's judgment, reopening the case and joining them as Respondents. Their primary contention is that they were not parties to the proceedings, despite the Petitioners seeking orders against them. They argue that the suit was improperly instituted against their officials instead of naming them directly as parties. Additionally, both Mr. Abdi Jarso, an official of the 10th Respondent, and Mr. Halkano Gollo, an official of the 11th Respondent, assert that they were never served with any court process related to this Petition.

130. Consequently, it is asserted, the proposed 10th and 11th Respondents were excluded from the proceedings depriving them of an opportunity to present crucial evidence that could have influenced the court's determination, potentially leading to a different outcome.

131. It is well established in law that this court's jurisdiction to set aside a judgment depends on the nature of the judgment itself. Whether a judgment is deemed regular or irregular is a factual determination based on the specific circumstances of the case.

132. Addressing this distinction, the Court of Appeal in *James Kanyita Nderitu vs Maries Philotas Ghika & Another* [2016] eKLR, stated that:

“In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice such party is likely to suffer.”

133. The court then stated regarding an irregular judgment that:

“Judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

[See Also *Kaluma vs NGO C0-ordination Board & 5 others* [2023]KESC 72(KLR).]



134. It is averred that the proposed 10th and 11th Respondents were never served with any process and were consequently unaware of the proceedings. As such, they contend, this judgment ought to be set aside as a matter of course.
135. In response to this claim, the Petitioners have adduced affidavits of service as proof that proper service was effected on Mr Abdi Jarson and Mr Halkano Gollo, officials of the proposed 10th and 11th Respondents. Specifically, they rely on the affidavit of service sworn by Samuel Mutua on 28th October 2021, which attests to personal service upon Mr. Abdi Jarso, the 3rd Respondent, at Korbessa Primary School, where he serves as the headteacher.
136. Similarly, the affidavit sworn by Innocent Makaka on 1st November 2021 confirms that the 5th Respondent was served via WhatsApp on 15th November 2021.
137. In refuting these affidavits, 3rd Respondent states that given the considerable distance between Nairobi and Isiolo and Isiolo to the school, it would have been practically impossible for the process server to have completed the journey and effected personal service on him. He further asserts that there is no record of Mr. Mutua's entry into the school in the gate book at Korbessa Primary School on the stated date, which, in his view, casts doubt on the credibility of the affidavit of service.
138. The 5th Respondent, on his part, simply reiterates that he was not personally served. This argument is moot considering that Order 5 Rule 22B of the Civil Procedure (Amendment) Rules, 2020 recognizes electronic service, including WhatsApp, as a valid mode of service.
139. It is well established in law that an affidavit of service constitutes prima facie proof of service, and unless successfully rebutted by cogent evidence, it remains conclusive. This is ordinarily done by cross-examination of the process server. In this case, the mere absence of an entry in the gate book at Korbessa Primary School does not, in itself, conclusively disprove service.
140. In any event, the fact of representation by Counsel works against the claim of non-service. The record demonstrates that the firm of Ochieng Ogola & Co Advocates have been on record for the 3rd and 5th Respondents at all times during the pendency of this case. The Notice of Appeal dated the 27th January 2025, has been filed by the said Advocate on behalf of both the 3rd and 5th Respondents.
141. The 3rd and 5th Respondents also argue that Counsel acted without proper instructions and that their representation, although well-intended, was erroneous. They contend that the 1st Respondent gave Counsel instructions on their behalf without their knowledge and as a consequence there were unable to put up a proper response.
142. It is apparent from the evidence that the 1st Respondent and the proposed 10th and 11th Respondents maintain a relationship that is symbiotic in nature. The proposed 10th and 11th Respondents are members of the 1st Respondent and operate under its umbrella reinforcing the close ties among them. Critically, there has been no admission by the 1st Respondent that its instructions to Counsel were unilateral and without the input of the proposed 10th and 11th Respondents.
143. There is equally no evidence to support the claim that there was any mistake of Counsel as alluded to by the 3rd and 5th Respondents. In any event, even if such a mistake were established, it would not automatically warrant the reliefs sought.
144. As the Court of Appeal stated in *Tana and Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 others* [2015] KECA 674 (KLR), courts may excuse a mistake of counsel if doing so serves the broader interests of justice by ensuring a justiciable, expeditious, and holistic disposal of a matter. However, this discretion is by no means automatic. While courts recognize that a litigant



should not always bear the consequences of counsel's mistakes, it is equally important to uphold the duty of counsel not only to their client but also to the court and opposing parties.

145. Ultimately, the court finds that the 3rd and 5th Respondents were duly served with process, and were fully aware of these proceedings at all material times and duly participated.
146. Having found as aforesaid, the next issue for consideration is whether the involvement of the 3rd and 5th Respondents was sufficient or whether the proposed 10th and 11th Respondents ought to have been sued in their own names.
147. It is trite that the proposed 10th and 11th Respondents are community based organizations which are currently governed by the Community Groups Act, 2022. Prior to the enactment of this legislation, CBOs could only be registered under statutes such as the *Societies Act*, the *Companies Act*, or the Non-Governmental Organizations Coordination Act, each with varying implications on their legal standing.
148. The question of the legal personality of community based organizations was discussed in *Kipsiwo Community Self Help Group vs Attorney General & 6 Others* [2013] eKLR, where the court held:

“Currently, there is no legal framework for registering CBOs such as Ray of Hope Clinic and Community Centre outside the provisions of the *Societies Act*, the *Companies Act*, and the Non-Governmental Organizations Coordination Act. Registration of these unincorporated entities by a Ministry in the Executive arm of Government as welfare associations presents a challenge as to their legal standing. Consequently, they are not recognized as legal persons capable of suing or being sued in their own names.”
149. The Court of Appeal in *Kenya Power & Lighting Co Ltd –vs- Benzene Holdings Ltd t/a Wyco Paints* [2016] eKLR, in discussing the institution of suits by non-juristic persons stated thus:

“This principle was emphasized as long ago as 1923 by Bankes LJ in *Banque Internationale De Commerce*(supra), which was subsequently in 1959 cited with approval by Templeton, J of then Supreme Court of Kenya in *Fort Hall Bakery Supply Co V Fredrick Muigai Wangoe* (1959) EA 474, who said: 'The party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence. A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed.’”
150. The proposed 10th and 11th Respondents assert that under Article 260 of *the Constitution*, they qualify as "persons" and should, therefore, have been sued in their own names. Indeed, Article 260 defines a "person" to include “a company, association or other body of persons whether incorporated or unincorporated.
151. While this constitutional provision acknowledges that unincorporated bodies fall within the definition of "persons," it does not automatically confer upon them the right to initiate or defend suits in their own name without proper procedural and statutory backing.
152. In *Kisumu Bar Owners Association vs Cabinet Secretary, Ministry of Interior & Coordination of National Government & 2 others (Constitutional Petition E002 of 2024)* [2024] KEHC 6003 (KLR) (27 May 2024) (Ruling), the High Court, sitting as a constitutional court clarified that while an



unincorporated association qualifies as a "person" under Article 260, the manner in which such an entity may sue or be sued remains governed by procedural and statutory considerations. It noted:

"It should also be noted that the question is not whether the association can sue or be sued but how it should approach the court since it is also a 'person' under Article 260 of *the Constitution*, which term includes a company, association or other body of persons, whether incorporated or unincorporated. It is therefore not doubtful that an association can commence proceedings but the manner in which such unincorporated bodies can commence or institute proceedings and this is an issue that courts have settled through Judicial Constitutional interpretation. In the *Kituo cha Sheria vs John Ndirangu Kariuki & Another (Supra)* case, a Petition was filed by the Kituo cha Sheria and an application was filed seeking to strike out the petition on account that the Petitioner lacked the legal standing to file and prosecute the petition. Kimondo J found that Kituo cha Sheria is not a legal entity capable of bringing an action in its own name and that it could only maintain an action through its officials or other person nominated by its Board. Again in *Dennis Ololoigero & 2 Others vs The Art of Ventures Limited & 2 Others [2006] eKLR*. Members of a Community Based Organization (CBO) registered under the Ministry of Gender, Sports, Culture and Social Services filed suit which the court held that the organization had no legal capacity to sue in its own name without its officials and struck out the suit. It follows that a person recognized in law can only sue on behalf of members of the association or a group and such persons will then demonstrate that they have the consent of the other members to bring the action on their behalf."

153. From the foregoing, while *the Constitution* extends the definition of "person" to include unincorporated entities, this does not override well-established legal principles governing the initiation and prosecution of suits by such entities. Indeed, it is noted that the proposed 11th Respondent is named in its pleadings as -Cherab Community Conservancy(Suing through its elected officials.....).
154. Ultimately, the court finds that the institution of the suit against the 3rd and 5th Respondents, in their capacities as officials of the proposed 10th and 11th Respondents, was appropriate. This conclusion is reinforced by the undisputed fact that these Respondents are the legitimate officials of the proposed 10th and 11th Respondents.
155. The upshot of the foregoing discussion is that the judgment entered by the court was neither irregular nor improperly entered. Rather, it was a judgment delivered after an inter partes hearing, with the full participation of all the parties involved, none of whom can be heard to say that their rights to fair hearing and/or administrative action were breached. This distinguishes the present case from the decision in *JMK vs MWM (supra)*, where the Appellant was not a party to the proceedings that culminated in adverse findings against him.
156. As to whether any other special circumstances exist that would warrant the setting aside of the judgment, the court finds no basis for such an intervention. The proposed 10th and 11th Respondents have presented a range of evidence, which they argue portrays a different perspective from what was previously considered by the Court.
157. They contend that had this information been available at the time of determination, the outcome might have been different. Additionally, they urge this court to take into account the broader interests of the community, asserting that there are far-reaching implications that should not be overlooked.
158. In considering this, two key principles emerge: first, that litigation must come to an end, and second, that litigants bear the responsibility of presenting their best case at the appropriate time. The proposed



parties were actively involved in the proceedings and were ably represented by counsel. They chose to file Grounds of Opposition and written submissions in opposition to the Petition. Additionally, they had the opportunity to file Further Affidavits but failed to disclose the material they now seek to introduce.

159. This Petition was determined based on the pleadings, affidavits, and documents presented by the parties during the hearing. All parties were given a fair opportunity to attend the proceedings in open court, present their arguments, and file written submissions, which they did. The proposed 10th and 11th Respondents cannot now claim ignorance of the proceedings when their officials were present in court and fully participated in the matter. The court will not entertain unnecessary judicial reconsideration of disputes where parties had the opportunity to present their case but failed to do so diligently.

160. As emphasized by the Court of Appeal in *Gerald Kithu Muchange vs Catherine Muthoni Ngare & Another* (2020) eKLR;

“The applicant wants to have a second bite of the same cherry, and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error.”

161. Additionally, the proposed 10th and 11th Respondents seek joinder into these proceedings. The jurisdiction to admit a party after judgment is exercised only in exceptional and justifiable circumstances. Such circumstances typically arise when adverse orders have been issued against a party who was neither notified of the proceedings nor afforded an opportunity to be heard. This principle was reaffirmed by the Court of Appeal in *Mary Beach Limited vs Attorney General & 18 others* [2018] eKLR, which held:

“However, there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been passed. One such exception is where a matter has been determined and adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. Enjoining such a party, a court would also have to set aside the judgment entered to give him/her an opportunity to be heard.”

162. As discussed above, no such circumstances exist herein. The parties were duly represented in the proceedings.

163. The Petitioners have contended that the proposed 10th and 11th Respondents have not met the threshold for review as set out under Section 80 and Order 45 of the Civil Procedure Rules. However, upon careful examination of the pleadings and authorities presented, it is evident that the proposed 10th and 11th Respondents never sought review under the parameters of Sections 80 and Order 45. In any event, we note that the Notice of Appeal filed before the filing of these Motions was filed on behalf of the 3rd and 5th Respondents who we have found to have been ably represented in the proceedings before this court that led to the impugned judgment.

164. As articulated by Sir Jack Jacob in “The Present Importance of Pleadings [1960] Current Legal problems, at P174:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot



be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation.”

165. Ultimately, we find the plea for the re-opening, setting aside and joinder of the proposed 10th and 11th Respondents into these proceedings to be unmerited.

III. Whether the 1st Respondent has satisfactorily discharged the conditions warranting the grant of stay of execution pending Appeal?

166. The 1st Respondent asks this court to stay its judgment entered into on the 24th January, 2025 pending its intended appeal to the Court of Appeal. Rule 32 of the Mutunga Rules provides thus as regards stay:

“ 32.

- (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.
- (2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.
- (3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.”

167. The Rule requires that an application for stay be filed timeously, within 14 days of the judgment. The present application was filed on 7th February 2025, within the prescribed timelines. Complementary to Rule 32, are the Civil Procedure Rules. Order 42 rule 6(1) and (2) provide that:

- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub rule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

168. In *Vishram Ravji Halai vs Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal clarified the High Court’s [read ELC’s] discretion under this Order, stating:

“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

169. Similarly, in *Butt vs Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal elaborated on the exercise of judicial discretion in granting a stay thus:

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

170. From the foregoing, it is evident that granting a stay is a matter of the court’s discretion, which must be exercised judiciously. Moreover, the court must adhere to the overriding objectives expressed in Section 3 of the *Environment and Land Court Act*, Section 1A of the Civil Procedure Rules, and Rule 3 of the Mutunga Rules.

171. At the onset, the court notes that the 1st Respondent has substantially pleaded on the arguability of their Appeal. Order 42 Rule 6 of the Civil Procedure Rules does not contemplate or require the court to assess the arguability of the pending appeal as a condition for granting a stay. This position is well-founded. It would be both procedurally improper and logically untenable for this court to assess the arguability of an appeal arising from its own decision. The court will disregard any arguments under this head.



172. Moving to the pre-requisites under Order 42 Rule 6(2), the court will begin with the aspect of sufficient cause. What constitutes the same was explicitly discussed by the court in *Antoine Ndiaye vs. African Virtual University* [2015] eKLR, which persuasively stated:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

- a) The application is brought without undue delay;
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”.

173. The court has already found that the Motion was filed timeously and as such will proceed to the aspect of substantial loss. In *Rhoda Mukuma vs John Abuoga* [1988] eKLR, the court proffered the following definition of substantial loss:

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”

174. Similarly, the court in *Century Oil Trading Company Ltd vs Kenya Shell Limited* as cited in *Muri Mwaniki & Wamiti Advocates Vs Wings Engineering Services Limited* [2020] eKLR, held:

“The word 'substantial' cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words 'substantial loss' must mean something in addition to all different from that.”

175. The courts have also held that substantial loss must be demonstrated. This position was articulated by the Court of Appeal in *Kenya Shell Limited vs Benjamin Karuga Kibiru & Another* [1986] eKLR thus:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”

176. The 1st Respondent argues that unless a stay of execution is granted, it will suffer substantial and irreparable loss, given its involvement in various community-based projects. It opines that it is actively engaged in initiatives such as water provision, education and classroom development,



- primary healthcare, social enterprises, women empowerment, vocational training, and climate change mitigation.
177. Further, that it has secured substantial financial support from international bilateral donors, for development initiatives in Biliqo Bulesa Community Conservancy and Cherab Community Conservancy. It contends that enforcing the impugned decision would disrupt these projects, ultimately affecting the communities that benefit from them and if the stay is not granted, the appeal will be rendered nugatory.
 178. However, the Petitioners strongly challenge these assertions, arguing that the 1st Respondent has failed to demonstrate substantial loss. They maintain that the allegations of potential financial and operational disruptions are speculative, unsubstantiated, and insufficient to warrant the grant of a stay. They contend that in any event, the court should not suspend its own findings, as doing so would undermine the principle of constitutional supremacy.
 179. In support of its contention, the 1st Respondent has adduced photographs of the projects alluded to as well as statements of accounts for Biliqo Bulesa Conservancy and financial statements for Biliqo Bulesa Conservancy, highlighting carbon credit funds.
 180. In this case, the court notes that the allegations raised by the 1st Respondent constitute new information. The existence of various projects, as now alleged, had not been placed before this court in prior proceedings. As far as the court is concerned, only the conservancy headquarters existed on the property.
 181. This being so, the 1st Respondent cannot now introduce new claims as a basis for seeking a stay of execution. The principle of finality in litigation dictates that parties must present their entire case, including all material facts and evidence, at the appropriate stage of proceedings. Allowing the 1st Respondent to rely on extraneous or previously undisclosed information would also undermine the integrity of the judicial process.
 182. Substantial loss as held in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, must be demonstrated with tangible and cogent evidence. It is what has to be prevented from happening if the judgment was to be executed. The effect of the judgment in this case was to stop unconstitutional acts and omissions found to have been committed. Even if there are projects as alleged which were never disclosed, this court would be sanctioning an illegality or unconstitutional acts if it were to accede to the request by the Respondents to stay its judgment.
 183. The 1st Respondent in our view has not demonstrated any substantial loss which was real, demonstrable, and not merely speculative. The mere assertion that community based initiatives will be disrupted does not, in itself, satisfy the threshold required for granting such an order.
 184. The 1st Respondent has also invoked the doctrine of public interest to say that the judgment will have far reaching ramifications. In determining whether to grant a stay, courts must consider not only the interests of the parties but also the broader public impact of their decisions. This principle was discussed in the case of *Cabinet Secretary, Ministry of Health vs Aura & 13 Others (Civil Appeal (Application) E565 of 2024) [2024] KECA 1195 (KLR) (20 September 2024) (Ruling)*, which stated thus:

“Where litigation involves a public interest element, then a further consideration could be whether or not it is in the public interest for the stay to be granted. This is explained in the decision of this Court *East African Cables Limited vs Public Procurement Complaints, Review And Appeals Board & Another* [2007] eKLR; “We think that in the particular



circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.”

185. In our understanding, the 1st Respondent is invoking public interest to justify acts and omissions which this court has already found to be in contravention of *the Constitution* and the statutes. Granting a stay in these circumstances would be contrary to the principles of justice, as it would effectively allow the Respondents to benefit from non-disclosure of illegalities and unconstitutionality.
186. Suffice it to say, the material used to seek the orders of stay sought, as can be seen from the annexures were either in the possession of the Respondents and not adduced before this court during the trial such as the certificates of attendance for the community rangers course issued by the Law Enforcement Academy for trainings conducted between 14th May, 2022-5th August, 2022, letter referencing the aforesaid training issued on the 17th March, 2022, and the Police Clearance Certificates dated 17th February, 2022(NG-5) and minutes of the special board meeting dated 21st May, 2022, (AJ-8)
187. Other evidence was procured after the trial had concluded and/or almost at the eve of the impugned judgment and others still after the judgment. These include the Deed of Amendment and Restatement dated the 10th December, 2024 and registered in January, 2025, (TL-1), statements of account for Biliquo Bulesa dated the 5th February, 2025, (TL-16), letter dated 3rd February, 2025 as regards legal representation, (AJ-3), letter from Isiolo Police County Commander regarding issuance of arms to conservancy rangers dated 3rd February, 2025(TL-19).
188. As to the question of security, the same is at the discretion of the court. Considering the nature of the matter, the court does not consider that the same is necessary.
189. Ultimately, the court finds that the plea for stay of execution is not merited.
190. In the end, the court makes the following final determination:
 - i. The 1st Respondent’s Notice of Motion dated the 7th February, 2025 is found to be unmerited and is hereby dismissed.
 - ii. The 10th proposed Respondent’s Notice of Motion dated the 6th February, 2025 is found to be unmerited and is hereby dismissed.
 - iii. The 11th proposed Respondent’s Notice of Motion dated 7th February, 2025 is found to be unmerited and is hereby dismissed.
 - iv. There shall be no orders as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 2ND DAY OF APRIL, 2025.

O. A. ANGOTE

PRINCIPAL JUDGE

C. K. YANO

JUDGE



C. K. NZILI

JUDGE

In the presence of;

Mr. Makaka and Abdulahi for the Petitioners.

Mr. Ogolla for 1st Respondent.

Mr. Eric Theuri for 4th and 5th Respondents and the proposed 10th Respondent.

Mr. Chege for Issa for 3rd Respondent and the proposed 11th Respondent.

Mr. Mutai for the 7th Respondent.

Mr. Muriithi for 2nd Respondent.

Mr. Kimathi for 8th and 9th Respondents.

