# Chikumbo & 4 others v Chief Land Registration Officer, Kilifi County & 2 others; Gonzi & 3 others (Interested Parties) (Constitutional Petition 45 of 2020) [2022] KEELC 13758 (KLR) (18 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13758 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**CONSTITUTIONAL PETITION 45 OF 2020**

**LL NAIKUNI, J**

**OCTOBER 18, 2022**

**BETWEEN**

**LAWRENCE CHAI CHIKUMBO ................................................... 1ST PETITIONER**

**JASTIN LAWRENCE MWAMBA .................................................. 2ND PETITIONER**

**MOHAMED CHIRINGA GULANI ............................................... 3RD PETITIONER**

**WAKF OF MASJID TAWHEED .................................................... 4TH PETITIONER**

**SWALEH MWADZIWE CHIKANDE ............................................ 5TH PETITIONER**

**AND**

**CHIEF LAND REGISTRATION OFFICER, KILIFI COUNTY .... 1ST RESPONDENT**

**CHIEF LAND REGISTRAR ....................................................... 2ND RESPONDENT**

**ATTORNEY GENERAL ............................................................. 3RD RESPONDENT**

**AND**

**HASSAN HAMISI GONZI ..................................................... INTERESTED PARTY**

**SAHA KATUMO GONZI ....................................................... INTERESTED PARTY**

**3. MWINGA DZOGA MWINGA (AS THE ADMINISTRATORS OF THE ESTATES OF THE LATE KATUMO GONZI MWINGA AND MWADZIDZA BARAKA TSUMA) .................................................................. INTERESTED PARTY**

**GODFREY MENGO ................................................................ INTERESTED PARTY**

**JUDGMENT**

## I. The Preliminaries

1. The Judgement is the one from the suit which was instituted vide a Petition dated December 18, 2020 by the Lawrence Chai Chikumbo, Jastin Lawrence Mwamba, Mohamed Chiringa Gulani, the Wakf of Mbasjid Tawheed and Swaleh Mwadziwe Chikande the 1st, 2nd, 3rd, 4th and 5th Petitioners herein. The Petition was against the 1st, 2nd and 3rd Respondents herein.

## II. The 1st, 2nd ,3rd, 4th and 5th Petitioners' case

2. The Petitioners prayed for the following orders: -

    a. A Declaration that the 1st Respondent, Boundary Dispute Report dated September 10, 2020, is unconstitutional, unlawful, invalid, null and void to the extent of the said unconstitutionality.

    b. A Declaration that while exercising authority to determine boundary disputes under Sections 18 and 19 of the *Land Registration Act* Cap 300 (Sic) of the Laws of Kenya and Regulations 40 and 41 of the *Land Registration (General) Regulations* 2017, the Land Registrar appointed under the *Land Registration Act* Cap 300 of the Laws of Kenya (who is a Public Officer) has no power or authority to determine rights of the parties on the issue of title, use, occupation, evacuation, demolition, valuation and compensation which are the preservation of the Environment and Land Court set up under Article 162 (2)(b) of the Constitution of the Republic of Kenya and Section 4 of the *Environment and Land Court Act* No. 12A of the Laws of Kenya and or Subordinate Courts with competent jurisdiction.

    c. A conservatory order restraining and or preventing the 1st Respondent or her agents or servants of any other person(s) acting on her directions or instructions or authority from implementing and/or acting upon the 1st Respondent's Boundary Dispute Report dated 10th September 2020 and or interfering with the Petitioners' interest occupation and ownership on Plot No. Buni/Kisimani/238 pursuant to the 1st Respondent's Boundary Dispute Report dated 10th September 2020.

    d. An Order of Certiorari to remove to this Honorable Court for purposes of quashing and to quash the 1st Respondent's Boundary Dispute Report dated 10th September 2020 and all processes flowing from the said decision.

    e. An Order of Mandamus do issue directing the 2nd Respondent, the Chief Land Registrar to cause a fresh Boundary dispute hearing for Plot No. Buni/Kisimani/238 as per the 1st Petitioner's application dated 16th March 2020 to be consolidated with the boundary dispute for Plot No. Buni/Kisimani/250 and Buni/Kisimani/251 as per the 1st to 3rd Interested parties application dated 26th June 2020 and to be heard with notice to all the parties and occupiers of adjoining properties and a decision made and delivered publicly to all the parties herein within six (6) months from the date of this order, by a Senior Land Registrar other than Stella Gatwiri Kinyua and a report thereof filed with this Honorable Court in these proceedings.

    f. This Honorable Court be pleased to issue an order for the Respondent to provide the following information and supply documentation to the petitioners within seven (7) days.

i. Copies of the application for Boundary establishment dated 26th June 2020 authored by Hassan Hamisi Gonzi, Saha Katumo Gonzi and Mwinga Dzonga Mwinga as Administrators of the Estates of the late Katumo Gonzi Mwinga and Mwadzindzaa Baraka Tsuma, including attached payment receipts; photocopies of Title Deeds and Grants of Letters of Administration of the respective estates, referred to in the 1st Respondent Boundary Dispute Report Buni/Kisimani 250 and 251 dated 10th September 2020.

ii. Copied of the summons issued to the Area Chief and owners of neighboring Plots for a site visit on 30th June 2020.

iii. Copies of the District Surveyor Report dated 24th July 2020 reference KFI/ACS/51C/Vol. VI/12 referred to in the 1st Respondent Boundary Dispute Report Buni/Kisimani 250 and 251 dated 10th September 2020.

iv. Copies of the statements of the concerned parties and observations made on the ground on 30th June 2020 referred to in the 1st Respondent's Boundary Dispute Report Buni/Kisimani 250 and 251 dated 10th September 2020.

g. General damages for mental anguish, anxiety and psychological torture endured and suffered by the petitioners as a result of the 1st Respondent's Boundary Dispute Report dated 10th September 2020.

h. The costs of the Petition be borne by the respondents.

3. The Petition concerns three (3) parcels of landn, Land Reference Numbers Buni/Kisimani 250, Buni/Kisimani 251 and Buni/Kisimani 238 (Hereinafter referred "Plot No. 250, 251 and 238 respectively) which are all situated within the Buni/Kisimani Land Adjudication Section or area, Rabai the Sub County of Kilifi of the County of Kilifi. The 1st, 2nd, 3rd 4th & 5th Petitioners herein averred that during the adjudication and demarcation process of the Buni/Kisimani Adjudication Section in the years 1980s, these Plots were adjudicated and allocated as follows; Plot No. Buni/Kisimani 250 to Katumo Gonzi Mwinga, Plot No. Buni/Kisimani 251 to Katumo Gonzi Mwinga and Mwadzidza Baraka Tsuma and Plot No. Buni/Kisimani 238 to Chikombo Bunguu Baya also known as Vidzunga in accordance with the law.

4. After the land adjudication and demarcation process, no Certificate of title deeds were issued. This was mainly due to the reason that the Registry Index Map (known as "The RIM") never corresponded with the physical boundaries on the ground. In particular, the Petitioners claimed that the Plot numbers indicated in the RIM never corresponded with some of the Plot numbers on the ground, the approximate area indicated on the titles nor with the area occupied by people. They averred that the acreage showed in the RIM did not match with the area occupied by people on the ground. In the year 2009, the Land Registry at Kilifi conducted re-parcellation where they carried out physical survey to identify the uncontested boundaries. Thereafter they amended the RIM to correspond with the actual acreage on the ground as well as the correct plot numbers on the title deeds issued.

5. The persons who were originally adjudicated upon the said suit properties had since died and left them in the hands of their heirs. For instance, with regard to the Plot No. 238, Mr. Chikombo Bunguu Baya died in the year 1987. His five sons then divided the land informally among themselves and later sold some portions. Indeed, on 26th September 2003, the 1st Petitioner sold a portion of the land to the 2nd Petitioner, while on 1st July 2010 the 3rd Petitioner bought a portion from Mr. Juma Chikombo a grandson to the registered owner. The 2nd Petitioner later sold off a portion to the 5th Petitioner, who

later acquired more portions of Plot No. 238, while the 3rd Petitioner sold to the 4th Petitioner, a part of his portion. The Petitioners claim that the occupants of Plot No. 238 did so without any objection from the heirs of the late Chikombo Bunguu Baya.

6. It is the Petitioners' case that the dispute began in the year 2020 when Godfrey Mengo, the 4th Interested Party purchased two parcels being Plot No. 250 and 251 from the heirs of the late Katumo Gonzi Mwinga and Mwadzidza Baraka Tsuma. It was claimed that on 21st February 2020 a Land Surveyor came to reestablish the boundaries of Plot 250 and 251 but was met with protest from the residents. Despite all this, on 28th February 2020 the said Land Surveyor with security from police officers was able to re - establish the boundaries despite objections from the villagers; and concluded that Plot No. 238 had encroached onto Plot No. 251. The Chief of the area intervened and ordered that there should be no beacons placed on Plot No. 238. Instead, he directed that the affected parties to follow up with Lands Registry at Kilifi. Eventually, the 1st, 2nd and 3rd Petitioners met the 1st Respondent whereby she disowned the Land Surveyor who had carried out the boundary reestablishment and advised them to report the matter to police as well as seek boundary confirmation for the Plot No. 238. But the Petitioners claimed that the police officers at Rabai Police Station were not of any assistance to them. They treated their case casually as they neither recorded the matter in the OB nor record their statements.

7. Upon returning to the 1st Respondent, the Petitioners were advised to obtain title for Plot No. 238 in the name of the late Chikombo Bunguu Baya, as well as paying for a boundary re - establishment which they did on 16th March 2020. The 1st Petitioner was advised to wait for summons to issue to his neighbors for boundary re – establishment. However, later on he was notified that the same could not take place due to the shutdown of physical hearing as a result of the insurgency of the global Covid -19 pandemic and the Government – Ministry of Health restrictions. Later on, 27th June 2020 the 1st and 2nd Petitioner received summons for the boundary reestablishment for the Plot No. 250 and 251. On 3oth June, 2020, the 1st and 2nd Petitioners were present when the exercise was conducted. However, they claim that they were neither heard nor granted an opportunity to show the boundaries between Plot No. 251 and 238. They alleged that the police, were threatening and intimidating those present in the meeting and that the Land Surveyor was taking instructions from the 4th Interested Party. They further alleged that the 3rd, 4th and 5th Petitioners were not served with the summons and so they were neither present nor represented during the process. Thereafter, on 10th September 2020, the 1st Respondent delivered a decision which was to the effect inter alia that Plot No. 238 had encroached onto Plot No. 251 and that ostensible encroached part ought to be returned to the families of Baraka Mwinga Tsuma and Katumo Gonzi Mwadzidza. The Petitioners were dissatisfied with that report contenting that the said decision was unconstitutional and ultra vires to the powers vested on the 1st Respondent herein.

8. The Petitioners herein maintained that the actions of the 1st Respondents herein had infringed onto fundamental rights and freedoms of the Petitioners. They averred that there to a fair hearing and trial was infringed, violated and denied since the 1st Respondent had sent her deputy to the meeting who could not independent and impartial as relied on proceedings that took place in her absence. Further, taking that the 3rd, 4th and 5th Petitioners were not present nor represented during the proceedings taking that they were never served with summons. Although, the 1st and 2nd Petitioners but were denied an opportunity to be heard as required by law. The Petitioners claimed that taking that the decision was arrived at without hearing all the parties, their right to fair hearing and trial as envisioned under the provision of Article 50 of the Constitution of Kenya, 2010 was infringed, threatened and denied.

9. With regard to the provision of Article 47 of the Constitution of Kenya, 2010 on the right to fair administrative action, the Petitioners argued that their application for boundary re - establishment made on 16th March 2020 had not been attended to and no explanation had been given by the 1st Respondent, despite of the Service Charter for the Land Registry which provided that the timeline for such services was two days. Further, it was argued that the provision of Regulation 40 of the *Land Registration (General) Regulations* 2017 stated that a dispute for determination of boundary unless in special circumstances should be completed within a period of Six (6) months from the date of making the application. The Petitioners maintained that the failure by the 1st Respondent to act upon the application by the 1st Petitioner dated 16th March 2020 for over (6) months was contrary to the provision of Article 47 of the Constitution of Kenya, 2010 which dictates were for an administrative action to be reasonable and procedurally fair. The Petitioners averred that the provision of Article 47 (2) of the Constitution of Kenya required that persons adversely affected by the administrative action must be notified. A situation that never happened taking that the 3rd to 5th Petitioners who were never notified nor served and a decision made. Clearly, they were condemned unheard since they were never notified of the proceedings. It was also claimed that fair administrative actions required the 1st Respondent to have heard the application dated 16th March, 2020 as a first priority before the application by the Interested Parties since it was first one to be filed.

10. With reference to the provision of the Article 27 of the *Constitution of Kenya*, 2010 on equality and freedom from discrimination, it was claimed that the 1st Respondent favored the Interested Parties over the Petitioners by failing to consider the two applications as equal. Additionally, it was opined that the 1st Respondent discriminated the 1st Petitioner when she failed to offer the reason to have first heard the application by the Interested Party before that of the 1st Petitioners. They held that the provision of Article 40 of the Constitution of Kenya, 2010 on the right to own property, the Petitioners contended that the effects of the decision of the 1st Respondent made on 10th September 2020 was an arbitrary deprivation of property. The Petitioners' right to own property would be adversely affected by the decision of the 1st Respondent to evict them from Plot 238, on the notion that they had encroached on Plot 251.

11. On the right to access justice as enshrined in Article 48 of the Constitution of Kenya, 2010, the Petitioners claimed that the 1st Respondent's decision to set out the right of appeal as 90 days as opposed to 30 days as provided for under Regulation 40 (6) of the *Land Registration (General) Regulations* 2017 was a misrepresentation of facts and misled the Petitioners to believe they had 90 days upon which to prefer an appeal. The Petitioners held that they relied on that information which led them to losing their right to appeal to this court within the statutory period and therefore missing on access to justice. As far as the provision of Article 35 of the Constitution of Kenya was concern on the right to access information, the Petitioners claimed that they wrote to the 1st Respondent on 11th and 13th November 2020 requesting to be furnished or supplied with the documents which they had relied upon to arrive at the decision made on 10th September 2020 including the application dated 26th June 2020 but none had been forthcoming. The Petitioners argued that the 1st Respondent simply wrote back on 2nd December 2020 informing the Petitioners that the matter was still under review and a decision would be conveyed in two weeks' time from that date but no response had been forthcoming. The Petitioners claimed that the 1st Respondent had denied them access to documents that contained information which affected them and was crucial to proving their case, with no legitimate reason of withholding that information.

12. Further, the Petitioners claimed that the 1st Respondent usurped the powers of this court when she went beyond her powers to determine on title and occupation of the suit properties as opposed to

hearing disputes relating to boundaries as spelled out on the provision of Section 14 of the *Land Registration Act*, No. 3 of 2012. The Petitioners deponed that she went beyond her powers by determining which title had encroached onto the other, trespass, occupation, valuation, evacuation and compensation which ought to be determined by this court. They deponed that the Land Registrar delegated her powers to determine boundary disputes to her deputy contrary to the law that states that the disputes are to be heard by the Land Registrar only. The 1st Respondent was accused of failing to adhere to the due process of law by failing to notify all parties to the dispute, as well as the occupiers of adjoining lands of the intention to ascertain and fix boundaries as well as informing them of the decision.

**III. The 2nd Interested Parties case**

13. On 21st June 2021, the 2nd Interested party, Saha Kaatumo Gonzi swore a Forty-Three (43) Paragraphed Replying Affidavit on behalf of the Interested Parties in response to the filed Petition and Four (4) annexures marked as "SKG -1to 4" annexed thereto. He deponed that they were the duly appointed Legal Administrator to the estate of the late Katumo Gonzi Mwadzidza the legal and registered owner of all that suit property known as Plot No, 251, having been issued with a Certificate of Confirmation of Grant issued on 2nd September 2020. He deponed that the 1st Petitioner had no "Locus Standi" to institute the Petition nor did the rest of the Petitioners who bought land from him. The 1st Petitioner was said to had no legal capacity to deal with the matter of the estate of the deceased as he had no Grand Letters of Administration to the estate of the deceased. That the actions by the 1st Petitioner to sell the estate of a deceased by all means intermeddling contrary to the provision of Section 45 of the Laws of Succession, Cap. 160 and had no claim whatsoever.

14. The Deponent argued that all parties concerned with the land boundary dispute were invited by the Land Registrar. Indeed, he averred that summons were served to all parties through the offices of the Chief of the area. Mr. Saha contended that the 1st Petitioner was issued with summons to attend both the sessions held on 18th February and 30th June 2020. He asserted that the 1st Petitioner had failed to explain how he acquired the title to the parcel in year 2009 in the name of the deceased as well as how he made the application for boundary re - establishment on 16th March 2020 as the registered owner. Further, he deponed that the Petitioner had made allegations of bribery and influence against the 4th Interested Party but had not produced any evidence to support the allegations whatsoever.

15. It was argued that the boundary dispute had been a long-standing issue that had existed even before the 2020 when the 4th Interested Party purchased the land as alleged by the Petitioners. In addition, the Respondent argued that despite of the Petition being time barred yet they never sought for leave to extend time before making this application. Mr. Saha held that that there was an existing Civil case being ELC (Mariakani) No. 16 of 2020 on the same subject matter and whereupon the Petitioners should pursue their grievances rather than filing a fresh suit in form of this Petition, which ought to be dismissed. The deponent maintained that the Interested Parties were the ones being prejudiced by the Petition herein, taking that the Petitioners are continuously trespassing on their land and constructing on it, thereby denying the Respondent their right to property and enjoyment of their land. The Petition was said to be ill intended, bad in law and incurably defective and should be dismissed with costs.

**IV. The Responses by the 1st Respondent**

16. On 29th October, 2021, the 1st Respondent, M/s. Stella G. Kinyua the Chief Land Registration Officer, the County of Kilifi swore a sixteen (16) Paragraphed Replying Affidavit dated 28th October, 2021 in opposing the Petition together with Four (4) annextures marked as "SKG 1 to 4 annexed thereto. She

deponed that her office received an application for boundary dispute dated 24th July 2020 from the County Surveyor, Kilifi. She proceeded to issue notice of a site visit dated 22nd June 2021 on to all that parcel of land known as Plot No. 250 and 251 to the parties concerned. Upon inquires it emerged that there were developments in close proximity and it was uncertain as to the rightful owner of the land. She conducted a ground visit and she received proof of ownership of land in form of vesting orders, an entry into adjudication register or a title deed. The survey data collected after the visit showed that the developed portion of land in dispute lies within the boundaries of Plot No. 251. After the exercise she prepared a boundary dispute report on Plot No. 250 and 251 dated 10th September 2020.

### V. The Petitioners' Supplementary affidavit in response to the Respondents case.

17. On 8th November 2021, the 1st Petitioner Lawrence Chai Chikumbo swore and filed a Seven (7) Paragraphed Supplementary Affidavit dated 8th November, 2021 with leave of court to respond to the 1st Respondent's Replying Affidavit. He deponed that the 1st Respondent's affidavit did not contradict any averments that he had made in his Petition. Inter alia, he argued that it was confirmed that Buni/Kisimani was an adjudication section that had been having boundary issues and that he sought a boundary re - establishment for Plot 238 on 16th March 2020 which is yet to be attended to. Further he deponed that the 1st to 3rd Interested Party application dated was referred to his with no explanation, and on the material day of 30th June 2020 the 1st Respondent did not attend the meeting but her deputy. He argued that the averments he raised in his petition concerning the decision made on 10th September 2020 remains unchallenged and court ought to grant the prayers as sought in his petition.

### VI. Submissions

18. On 1st November 2021, while in the presence of all the parties, the Honorable Court directed and with the consensus of the parties, that the Petition be disposed off by way of written submissions. Pursuant to that all parties fully complied and the Court rendered a date for the delivery of Judgement on notice.

### A. The Written Submissions by the Petitioners

19. On 24th January 2022, the Learned Counsel for the 1st, 2nd, 3rd, 4th and 5th Petitioners, the Law firm of Messrs. Njoroge Katisya Advocates filed submissions in support of the Petition dated even date Mr. Njoroge Advocate submitted on the following issues; the jurisdiction of this Court, the Preliminary objection raised by the Interested parties, the rights of the Petitioners which were infringed by the Respondents herein, the relief sought and costs.

20. On the issue of the Jurisdiction of the Court, the Learned Counsel argued that this court has original and unlimited jurisdiction to hear and determine the Petition seeking redress from constitutional breaches arising from land matters as vested upon by the provision of Article 162 (b) of the *Constitution of Kenya*, 2010 and Sections 3 and 13 of the Environment & Land Court Act, No. 19 of 2011.

21. The Counsel objected to the objection raised by the 1st to the 4th Interested Parties through the Notice of Preliminary Objection dated 18th June 2021. It was submitted that the issue of "*Locus Standi*" could not be a ground of objection in the expanded scope of the Constitution of Kenya. The Counsel submitted that it was the 1st Respondent who invited the 1st Petitioner herein to attend and participate the field survey exercise. Besides, the Petitioners were the persons physically on the ground and taking that they were in the first and foremost the ones being affected by the decision of the 1st Respondent. The Counsel contended that the Petitioners had demonstrated that they were directly affected by the impugned decision. Therefore, it met the 'minimal personal interest doctrine'. The Counsel argued that the lack of Grand Letter of Administration of the Estate of the late Chikombo Bunguu Baya

as advanced by the Interested Parties was not necessary in addressing constitutional infringement as discussed by the Supreme Court in the case of:- "*Mumo Matemu - Versus - Trusted Society of Human Rights Alliance & 5 others* (2011)eKLR. The Counsel submitted "*inter alia*", under the Rule 40 (6) of the *Land Registration (General) Regulations* 2017, provided that a person aggrieved by the decision of the Land Registrar on a boundary dispute may appeal the decision within 30 days from the date of notification; could not bar the Petitioners from seeking the enforcement of their fundamental rights and freedoms.

22. The Counsel averred that the Petitioners' fundamental rights were breached by the Respondents. In particular the Counsel submitted that on seven classes of breach being the provision under the provision of Article 50 of the *Constitution of Kenya*, 2010 and on the right to fair hearing, counsel submitted that the 1st respondent as the decision marker did not attend the hearing on 30th June 2020, but merely proceeded to deliver the decision. It was submitted that although the 1st and 2nd Petitioners were present on 30th June 2020, they were not given an opportunity to be heard. Further, it was submitted that the 3rd to 5th Petitioners were not notified of the hearing so they were not able to attend, yet the 1st Respondent was obligated to inform them. The Counsel in his argument relied on the provision of Section 19 of the *Land Registration Act*, which states that the Land Registrar shall notify the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries; and after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question. The Counsel submitted that all persons affected by the dispute included the heirs of the late Chikombo Bunguu Baya as well as persons in occupation of any developments on Plot Buni/ Kisimani/238, Plot Buni/Kisimani/250 and Buni/Kisimani/251 ought to have been fully involved in this proceedings.

23. With regard to the provision of Article 47 off the *Constitution of Kenya*, on the right to fair administrative action, the Counsel submitted that the nature of the hearing contemplated during a boundary re - establishment fell under the fair administrative action. That the failure of the 1st Respondent to respond to the 1st Petitioner's application for boundary reestablishment dated 16th March 2020, was not procedurally fair. Further it was submitted that the fact that the interested party's application dated 26th June 2020 was expediated, while the petitioners was overlooked was prove that there was favoritism, in an adjudication process that was only meant to confirm the rights of persons in occupation of the suit properties within a specific timeframe. To buttress on this point, the Counsel relied on the case of "*Mwangi Stephen Murithi – Versus - National Land Commission & 3 others* (2018) eKLR where the court held that the right to be heard extended beyond mere notice of the hearing. This right was held to include the right to be notified of the complaint or any information which was prejudicial to the affected party that the decision marker was. The Counsel submitted that without allowing parties a fair hearing, the 1st Respondent could not have accorded fair administrative action to the Petitioners and her decision was liable to be nullified.

24. On the provision of Article 27, on Equality and freedom from discrimination, counsel submitted that the favoritism given to the 2nd application dated 22nd June 2020 over the Petitioners' application, which came first on 16th March 2020 with no explanation was a form of discrimination. That equality in law required both applications to have received equal weight and dealt with simultaneously or within similar timelines. On Article 40 on protection of the right to own property, the Learned Counsel submitted that the decision of the 1st Respondent dated 10th September 2020 that required the Petitioners to vacate the suit properties amounted to arbitrary deprivation of property. The decision to deprive the petitioners of their right to own property and the subsequent order of compensation was ultra vires to the powers of the registrar under Section 14 of the *Land Registration Act*, No. 3 of 2012.

25. With regard to the provision of Article 48 of the *Constitution*, on the Access to Justice, the Counsel submitted that the 1st Respondent stated in her report dated 10th September 2020 that the affected parties had 90 days to appeal as opposed to 30 days as included in Regulation 40 (6) of the *Land Registration (General) Regulations* 2017, was a deliberate distortion of the law to defeat the Petitioners right to appeal. On Article 35 on access to information, the Counsel submitted that the 1st Petitioner wrote to the 1st Respondent on 11th and 13th November 2020 requesting for information that was used in the report, however nothing has been forthcoming and has not produced any information as to why the same should not be produced. A response from the 1st Respondent to the Petitioners on 2nd December 2020 was that the decision of 10th September 2020 was under review but the 1st Respondent had not been forthcoming with the progress of the same.

26. The Counsel contended that the decision of the 1st Respondent usurped the jurisdiction of this court, since the decision made was on occupation, gave orders on eviction, valuation and compensation which are the jurisdiction of the Environment & Land Court. The Counsel relied on the decision of "*Mechack Mutori Siro suing through Janet Siro holder of Power of Attorney No. 2954, National Land Commission & 2 others,* where the court held that the National Land Commission acted *ultra vires* in cancelling the title in issue. The Counsel argued that the 1st Respondent arrogated powers vested on to this court by the constitution. The Counsel urged court to allow the Petition and grant the relief sought, he argued that this honorable court can in exercise of Judicial review in Constitutional cases strike down the impugned decision and substitute it with its own decision.

**B. The Written Submissions by the Respondents'**

27. On 21st January 2022, the office of the Honorable Attorney General, the Counsels on record for the 1st, 2nd and 3rd Respondents herein filed their written submissions dated 26th January, 2022 in opposition of the Petition filed by the 1st, 2nd, 3rd, 4th and 5th Petitioners herein. Mr. Makuto Advocate, submitted that the 1st Respondent acted within the powers conferred upon the Land Registrar by the dint of Section 18 of the *Land Registration Act*, No. 3 of 2012. The Counsel submitted that the hearing notices to the application dated 26th June 2020 were issued to all affected parties. He further insisted that, all the Petitioners, through their appointed representatives were granted an opportunity to be heard and present their case. That a hearing notice dated 22nd June 2021 was issued to the parties' concerned of the impugned decision. The Counsel denied that the 1st Respondent violated the Petitioners' rights and urged court to dismiss the Petition.

**C. The Written Submissions by the Interested Parties'**

28. On 4th March, 2022 the Counsel for the Interested Parties through the Law Firm of M/s. Anaya & Company Advocates filed submissions in opposition of the Petition. The Counsel reiterated the contents of their Notice of Preliminary Objection and submitted that the Petitioners have no "*Locus Standi*" to bring the Petition as the heirs to the estate of the Late Chikombo Bunguu Baya. He cited the Provisions of Section 54 Form 14 of the Fifth Schedule and section 82 all of the *Laws of Succession* Cap. 160 of the Laws of Kenya to buttress their point, Counsel submitted that in the case of "*Isaya Masira Momanyi – Versus - Danied Omwoyo & another* (2017) eKLR "*Troustick Union International & Another –versus- Jane Mbera* C.A. No. 145 of 1990 and *Virginia Edith Wambui Otieno –Versus- Josiah Ougo & Another* 1982 IKAR 1048 it was held that a suit which is commenced without letters of administration in respect of a deceased estate is null and void abinitio and cannot be cured by a party subsequently obtaining the letters of administration. The Counsel urged court to dismiss the Petition and find the 1st Petitioner is merely intermeddling with the deceased property.

29. The Counsel further submitted that the jurisdiction of this honorable Court is timed barred by Rule 40 (6) of the *Land Registration (General) Regulations* 2017, and the petitioners never sought leave to extend time despite being aware of the decision of the registrar. The Counsel further submitted that the Petition is challenging the decision based on Section 19 of the *Land Registration Act* and the same must be done within the set timeframe despite it being a Petition. The Counsel relied on the cases of "*Zipporah Muthoni Njagi –versus- Faith Wairimu Gitubu* (2015) eKLR, *Godfrey Paul Okutoyi & others – Versus - Habil Olaka & another* (2018) eKLR", where the court dealt with the alternative remedy in lieu of constitutional remedies. The Court held that:-

> 'it is not every failure to act in accordance with a statutory provision that should give rise to a constitutional Petition. A party should only file a Constitutional Petition for redress of a breach of the constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.'

The Counsel submitted that the Petition herein did not qualify to be a constitutional Petition, as there were no rights that had been infringed. He cited the case of "*Bernard Murage – Versus - Fine Serve Africa Limited & Others* eKLR". The Counsel argued that the Petitioners failed to extend time to file an appeal and now have turned the boundary dispute into a Petition and the same should be found by court as an abuse of the court process.

30. The Counsel submitted that the 1st Respondent was within her mandate to have delegated the task of the site visit to her deputy or any other competent officer. He relied on the decision of "*Christopher Kioi & Another –Versus- Winnie Mukolwe & 4 Others* (2018) eKLR". Further, the Counsel submitted that the Petitioners were duly notified of the hearing of 30th June 2020. Indeed, they were heard and their grievances captured in the report. The Counsel argued that the Petitioners had not shown the prejudice they would suffer if the Petition failed. This was because they had merely encroached on the suit property which belonged to the Interested Parties. Further, the Counsel argued that since there was a pending Civil case at Mariakani Law Courts whereby the Petitioners ought to have made their claim and presented their evidence. They would have been heard on merits. In the long run, the Counsel urged court to dismiss the Petition with costs.

## VII. Analysis and Determination

31. The Honorable Court has keenly considered all the filed pleadings, the written submissions and the authorities cited herein by all the parties in relation to the filed Petition by the 1st, 2nd, 3rd, 4th & 5th Petitioners herein. Additionally, it has taken into account the relevant provision of the Constitution of Kenya, 2010 and statures.

32. In order to reach an informed Judgement, the Honorable Court has condensed all the subject matter into the following six (6) salient issues. These are:-

    a. Whether the Preliminary Objection raised by the Interested Parties through a Notice of Preliminary Objection dated 18th June, 2021 and filed on 21st June, 2021 meets the required standards of law and precedents.

    b. Whether the filed Constitution Petition herein by the 1st, 2nd, 3rd, 4th & 5th Petitioners herein meets the threshold for a Constitutional Petition as founded and set out under the Constitutional law and precedents.

    c. Whether this court has the jurisdiction to hear and determine the filed Constitution Petition.

d. Whether the Petitioners have "the *Locus Standi*" to institute the Petition.

e. Whether the boundary dispute report dated 10th September 2020 was unconstitutional and ultravires to the jurisdiction of this court.

f. Whether the Petitioners are entitled to the relief sought and at orders should the court grant.

g. Who will bear the costs of the Petition.

**Issue No. a) Whether the Preliminary Objection raised by the Interested Parties through a Notice of Preliminary Objection dated 18th June, 2021 and filed on 21st June, 2021 meets the required standards of law and precedents.**

33. As indicated, the Interested Parties through their Advocates, the esteemed Law firm of Messrs. Anaya & Company Advocates raised Preliminary objection through a Notice of Preliminary Objection dated 18th June, 2021 and filed in Court on 21st, June, 2021. According to the Black Law Dictionary a Preliminary Objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary......."

The above legal preposition has been made graphically clear in the now famous case of "*Mukisa Biscuits Manufacturing Co. Limited –Versus - West End Distributors Limited* [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

34. This Court has further referred to the decision of "*Attorney General & Another –Versus - Andrew Mwaura Githinji & another* [2016] eKLR:- which explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-:-

i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, it should be filed at the earliest opportunity in order to pave way for the smooth management and determination of the main dispute in a matter. The Interested Parties filed the objection on time. Essentially, the objection raises the following isues. These are:-

a. The 1st Petitioner had no "Locus Standi" to institute these proceedings on the basis of the son and the heir of the Late Chikumbo Bunguu Baya aka Vudzunga with out Grant Letters of Administration ad litem.

b. The 2nd to 5th Petitioners had no claim as their cause of action was premised on the 1st Petitioner who had no "Locus Standi" and/or transaction to transact in the estate of the Late Chikumbo Bunguu Baya aka Vudzunga.

c. The Petition was time barred in view of the provision of the Regulation 40 (6) of the *land (General) Regulation.*

d. The property was situated at the County of Kilifi hence the territorial Jurisdiction lied at ELC Malindi.

e. The 4th Interested party was a resident outside Kenya yet no leave was sought to serve him with court documents as required by law. His name was Godfrey Kango and not Godfrey Mengo as pleaded in the Petition.

f. The Petition was currently presented as without merit, highly vexatious and did not meet the threshold of a Constitutional Petition"

35. Certainly, apart from the issue of "*Locus Standi*" all the other issues seem to be marred with matter of facts which would require proof through evidential process. They are not strictly speaking pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. As for the issues of "Locus Standi" and the "Local Limits" where suits should be filed by parties, the Honorable Court will deliberate on them indepth in this Judgement at a later stage. Therefore, the Honorable Court discerns that the said objection fail to meet the threshold of a Preliminary Objection as clearly spelt out herein and hence should not succeed.

**Issue No. b). Whether the filed Constitution Petition herein by the 1st, 2nd, 3rd, 4th & 5th Petitioners herein meets the threshold for a Constitutional Petition as founded and set out under the Constitutional law and precedents.**

36. The Constitutional basis of the main Constitutional Petition by 1st, 2nd, 3rd, 4th & 5th Petitioners herein are well founded under Paragraphs 1to 215 of the Petition dated 18th December, 2020 they include:-

a. Article 22 of *Constitution of Kenya* declaring the right upon any person or authorized representative to commence proceedings for declaration and compensation for violation of rights and fundamental freedom.

b. Article 23 of the *Constitution of Kenya* giving High Court jurisdiction to deal with such matters and out timing the nature of relief that can be granted.

c. Article 25(c) and 50 (1) and (2) of the *Constitution* which provides that the right to a fair trial and hearing shall not be limited despite any other provisions of the Constitution of Kenya.

d. Article 27(4) of *Constitution of Kenya* on Equality Freedom from discrimination

e. Article 35(1) on the access to information.

f. Article 40 (1) and (3) of the *Constitution of Kenya* declares the right to acquire and own property.

g. Sixth schedule under Article 262 on Transitional and consequential provisions on Existing obligations laws and Rights which preserves all rights and obligations of the Government of Kenya or the Republic and subsisting immediately before the promulgation of the year 2010.

h. Article 47 (1) and (2) of *Constitution of Kenya* on fair administrative action which provides for written reasons to be served upon a person whose right has been or is likely to be adversely affected by acts of the government.

  i. Article 48 of the Constitution of Kenya on the access to Justice.

j. Article 165(3) (d) and 5 as read with Article 162 (2) (b) of the *Constitution of Kenya* on usurping the Jurisdiction of the Environment and Land Court. Further, on giving this court jurisdiction to determine the questions whether a right of fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened inland matters.

37. As a matter of course, the Constitution of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

This *Constitution* shall be interpreted in a manner that:-

a. Promotes its purposes, values and principles;

b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c. Permits the development of the law; and

d. Contributes to good governance......"

This Court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided.

Further, it is important to fathom that the *Constitution* is "a living instrument having a soul and consciousness of its own" . It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

38. Based on the principles set out in the edit of The Court of appeal case of the *Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another* (2013) eKLR provided the standards of proof in the Constitutional Petitions as founded in the case of *Anarita Karimi Njeru –Versus - Republic* [1980] eKLR 154 where the court is satisfied that the Petitioner's claim were well pleaded and articulated with absolute particularity. It held:-

> " Constitutional violations must be pleaded with a reasonable degree of precision..........."

Further, in the "*Thorp – Versus – Holdsworth* (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:

> " The whole object of pleadings is to bring the parties to an issue and the meaning of the rule......was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing".

39. In application of these set out principles for filing a Constitutional Petition to this case, the honorable court is fully satisfied that the Petitioners herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents, the Affected parties and the Interested Parties herein and pleading for the prayers sought.

**Issue No. c). Whether this court has the jurisdiction to hear and determine the filed Constitution Petition.**

40. Under this sub heading, the Honorable Court is guided by the legal ratio arrived at by Justice Nyarangi, in the now famous case of "*Lillian Motor Vessel "S" Versus Caltex Oil Company Limited*" when he emphatically held "Jurisdiction is everything, without it court cannot make one more step. Jurisdiction flows from either the Constitution or legislation," the Supreme Court of Kenya in '*Samuel Kamau Macharia & another – Versus - Kenya Commercial Bank Limited & 2 others* (2012) eKLR, held that:-

> " A court's jurisdiction flows from either the constitution of legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.
>
> This court dealt with the question of jurisdiction extensively, In the Matter of the *Interim Independent Electoral Commission (Applicant)*, Constitutional Application No. 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislative would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

41. Under the provision of Article 162 (2) (b) of the *Constitution* establishes and confers this court with jurisdiction: "Parliament shall establish courts with the same status of the High Court to hear and determine disputes relating to - the environment and the use and occupation of, and title to land." Parliament then enacted *Environment and Land Court Act* to give effect to the provision of Article 162 (2) (b) of the *Constitution of Kenya*, 2010. The jurisdiction of the Environment & Land Court is set out at the provision Section 13 of the *Environment & Land Court Act*, No. 19 of 2011 as follows: -

> " In exercise of its jurisdiction under Article 162 (2) (b) of the *Constitution*, the Court shall have power to hear and determine disputes—
>
> 2.
>
> (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> (b) relating to compulsory acquisition of land;
>
> (c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the *Constitution*.

42. The Petitioners claim that their rights had been violated by the acts of omission and commission by the Respondents who proceeded to hear and determine a boundary dispute relating to the suit properties and prepared a report dated 10th September 2020 without following the due procedures and the law. From a simple reading of Section 13 (2)(a) a boundary dispute is within the jurisdiction of this court. I further emphasis that this court has powers to grant any of the prayers sought herein as seen from Section 13 (7) which states: -

> " In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
>
> (a) interim or permanent preservation orders including injunctions;
>
> (b) prerogative orders;
>
> (c) award of damages;
>
> (d) compensation;
>
> (e) specific performance;
>
> (g) restitution;
>
> (h) declaration; or
>
> (i) costs.

43. The Respondents have objected to the Petition on the ground that the suit properties were situated within the County of Kilifi. Hence, according to them, it was the ELC at Kilifi that had the geographical and territorial jurisdiction to hear and determine the said Petition. However, despite all this, the Respondents failed to place any empirical documentary evidence such as a gazette notice, administrative circular or judiciary guidelines on the issue of territorial jurisdiction before the trial court. The Court will take judicial notice of the fact that this court is physically closer – within the local limits - to the suit property than Malindi Law Courts. The right to access to justice entails that a party seeking justice from court to be in a position to physically access a court to be able to file and prosecute their case. In my view, this court and the court sitting at Malindi have concurrent jurisdiction and the Petitioners had the option to file the suit in either court.

**Issue No. d). Whether the Petitioners have the "Locus Standi" to institute the Petition.**

44. The Respondents object to the Petition on the ground that the 1st Petitioner had no *Locus Standi* or legal capacity to institute these proceedings. They claim that the 1st Petitioner, though claims to be the son of the Late Chikombo Bunguu Baya aka Vidzunga he never had the Grant Letters of Administration *Ad Litem* to enable him institute the suit. Also, the case by the 2nd to the 5th Petitioner's was objected on the ground that, they too had no proper cause of action or claim against the

Respondents taking that their case was anchored on the 1st Petitioner. The 1st Petitioner has maintained that 'the *Locus Standi*" was no longer a ground for objection in the expanded scope of the Constitution of Kenya. The Petitioner submitted on the Supreme court findings in the case of:- "*Mumo Matemu - Versus - Trusted Society of Human Rights Alliance & 5 others* (2011) eKLR, where the court expanded the scope of Locus Standi and empowered every person to move the courts when contesting any contravention of the Bill of Rights or the *Constitution* in general.

45. The Supreme Court, in the case of:- "*Mumo Matemu - Versus - Trusted Society of Human Rights Alliance & 5 others* (2011) eKLR, held that: -

> "Article 2 and 258 of the *Constitution* provide that every person has the right to institute proceedings claiming that the Constitution has been contravened; and 'person' in this regard, includes one who acts in the public interest.... the three Articles (Article 22, 258 and 260 of the Constitution) give an enlarged view of locus standi, to the effect that every person including persons acting in the public interest, can move a court of law contesting infringements of any provisions in the Bill of Rights, or the Constitution."

46. Njoki Ndungu SCJ, in *Mumo Mutemu* (*supra*), held that: -

> "This was the Constitution's aim in enlarging locus standi in human rights and constitutional litigation. *Locus Standi* has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1) to interpret the Constitution in a matter that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance."

47. In the instant matter, the legal standing of the Petitioners was anchored on the fact that they were in physical occupation of the suit properties, which had been the subject to the Land adjudication process within the area. The 1st Petitioner had annexed a Certificate of Death for the late Chikumbo Bunguu Baya who died on 7th May 1987. The deceased was the registered proprietor of the Certificate of title dated 1st October 2009. The 1st Petitioner claimed that the late Chikumbo Bunguu Baya was his late father who occupied Buni/Kisimani 238, which had been subject to a disputed boundary reestablishment report dated 10th September 2020 which was before this court.

48. The existence and validity of the Certificate of title deed was challenged by the Interested Parties. Basically, his concern was how the 1st Petitioner would have acquired his father's title deed into his names without having the Grant Letters of Administration. The 1st Petitioner has annexed a certificate of death of the late Chikumbo Bunguu Baya, which indicated he died on 7th May 1987, and a certificate of title for Buni/Kisimani 238 in the name of Chikumbo Bunguu Baya dated 1st October 2009. The 1st Petitioner in his supporting affidavit has admitted that the 1st Respondent advised them to obtain the said title, however the same could not be obtained legally without Letters of administration confirming that indeed the 1st Petitioner was the duly appointed legal representative of his deceased father. Further, the Interested Party argued that the 1st Petitioner never explained how he acquired a title dated 1st October 2009 sometime in the year 2020, as per the timelines of his averments in his supporting affidavit.

49. Nevertheless, it is my view that the 1st Petitioner was before court with a proper locus standi to present his case to be heard on merit before court. The main subject matter and the claim by the Petitioner herein was one on the boundary reestablishment report dated 10th September 2020 which adversely affected the aspirations by the Petitioners to eventually assert ownership over the suit properties. For the Court to be dealing on such mundane issues of land ownership at this stage, it would be digress to the chagrin of the Petitioners and their case. It was therefore clear to court that they were equal participants in the proceedings of 30th June 2020. Essentially, the court needs to make a determination on whether the fundamental rights of the Petitioners were infringed, violated, threatened or denied during the said proceedings. It has been seen from the findings of the supreme court, the Constitution has enlarged the capacity to file a claim in defense of the Constitution thereby laying the basis for rights and constitutional enforcement. This court concurs with the findings of the Supreme court that 'the traditional structures of locus have been broken to allow every person the capacity to file a constitutional claim.'

**Issue No. e). Whether the boundary dispute report dated 10th September 2020 was unconstitutional and ultravires to the jurisdiction of this court.**

50. The Respondents averred in their Replying Affidavit sworn by M/s. Stella G. Kinyua, the Chief Land Registration Officer, Kilifi county on 28th October 2021; that the officer received an application for boundary dispute for plots Numbers 250 & 251, on 24th July 2020 from the surveyor, County of Kilifi marked as "SGK – 1". The deponent further stated that she proceeded to issue a notice to the parties concern for site visit to the Plot No. 250 & 251. On 22nd June 2020, where it is noted that there will be a site visit to determine the disputed boundary on 30th June 2020. The deponent contended the provision of Section 18 (3) of the *Land Registration Act*, read with Regulation 10 empowers her to resolve boundary disputes and confirm of amend common boundaries.

51. Indeed, it is within the jurisdiction of the 1st Respondent to handle disputes relating to general boundaries, and not even this Court or surveyors. Angote J, in the case of:- "*Abdalla Mohamed Salim & another – Versus - Omar Mahmud Shallo & another* [2014] eKLR held:-

> " The type of survey that generated the Registry Index Maps is what was known as "general boundaries" which has been defined in section 18(1) of the *Land Registration Act*, 2012 to mean "the approximate boundaries and the approximate situation only of the parcel." Indeed, most of the titles under the repealed Registered *Land Act* were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons."

52. Therefore, it follows the dispute between Plot. No 251 and 238 ought to be heard by the 1st Respondent, the Land Registrar for resolution in accordance with provision Sections 18 and 19 of the *Land Registration Act*, 2012 which states: -

18.

(1) Except where, in accordance with Section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*, Cap. 299.

18.

(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

53. Regulation 40 and 41 of the *Land Registration (General) Regulations*, 2017 lay the procedure to be followed in making an application for re - establishment of boundaries. It is stated: -

1. An Interested Person may apply to the Registrar for the ascertaining of a missing boundary or a boundary in dispute under section 18(3) of the Act in Form *LRA* 23 set out in the Sixth Schedule.
2. The Registrar shall issue a notice in Form LRA 24 set out in the Sixth Schedule to all persons appearing in the register that may be affected or such other persons as the Registrar may deem necessary for resolution of the dispute if a person has complied with paragraph (1).
3. The Registrar shall notify the office responsible for survey of land of the intended hearing of a boundary dispute and require their attendance if a person has complied with paragraph (1).
4. In determining a boundary dispute lodged in accordance with paragraph (1), the Registrar shall be guided by the recommendation of the office responsible for survey of land.
5. The Registrar shall, after giving all persons appearing for the hearing in accordance with the notifications sent under paragraphs (1) and (2) an opportunity to be heard, make a determination of the dispute and inform the parties accordingly.
6. Any party aggrieved by the decision of the Registrar made under paragraph (5) may, within thirty days of the date of notification, appeal the decision to the Court.
7. Upon expiry of thirty days, the Registrar shall —

    (a) cause to be defined by survey the precise position of the boundaries in question;

    (b) file a plan approved by the authority responsible for survey of land containing the necessary particulars; and

(c) make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel.

8. A dispute for determination of a boundary and or parcel shall, unless in the case of special circumstances, be completed within a period not exceeding six months from the date of filing the application.

Regulation 41

1. An interested person may apply to the Registrar for the ascertaining and fixing of boundaries of boundaries of land under section 19 (1) of the Act, in Form *LRA* 23 set in the Sixth Schedule.

2. The notice issued by the Registrar under section 19(1) of the Act shall be in Form *LRA* 24 set out in the Sixth Schedule.

3. When making a decision under Section 19(1) of the *Act*, the Registrar shall follow the procedure outlined in regulation 40.

54. The Petitioners being adversely affected persons were entitled to make an application to the 1st Respondent to resolve a boundary dispute. It is instructive, that the application ought to be as laid down in a prescribed Form LRA No. 23 of the *Land Registration (General) Regulations* 2017. It's unfortunate that the 1st Petitioner made an informal application to the 1st Respondent through a letter dated 16th March 2020 requesting for his boundaries to be established on Plot No. 238. The letter was followed by another letter dated 17th March 2020 by the Assistant Chief Mwele Kisurutini Sub-location to the 1st Respondent requesting on behalf of the 1st Petitioner for boundary establishment. Regulation 40, has clearly laid down the procedure to be followed by an Interested Party who wishes to have his boundaries reestablished by the 1st Respondent.

55. The Court is alive to the legal adage that "Ignorance is no defence" but when it comes to land matters this Courts insists on the disputes being handled on merit. Although the Petitioners failed to make the application to the 1st Respondent as laid down by prescribed Form LRA 23, this should not be main ground for this Honorable Court to fault the Petitioners at the chagrin of safeguarding their fundamental rights as enshrined in the Bill of Rights. The 1st Respondent as a holder of a public office – the Land Registrar, ought to have proper and professional advise to the Petitioners. Besides advising them to seek boundary establishment from her good offices, the 1st Respondent ought to have guided the Petitioners, who were clearly laymen unaware of the laid down procedure on which of the prescribed forms to be filled. I am therefore persuaded that the 1st Petitioner, acting with good intention and faith, where he evidently made an application to the 1st Respondent for boundary establishment and proceeded to pay for the same on 16th March 2020, as seen from the Cash Deposit Slip from the Kenya Commercial Bank dated 16th March 2020 for a sum of Kenya Shillings Three Thousand (Kshs. 3,000.00/-). He was even issued with an official receipt from the office of the 1st Respondent which clearly indicating that the amount paid was for 'Boundary reestablishment for Buni/Kisimani 238'.

56. The application for boundary dispute that the 1st Respondent refers to and marked as "SGK-1" appears to me as a report on the boundary dispute rather than an application for one. It was prepared by the District Surveyor Kilifi on 24th July 2020. It gives the impression that the 1st Respondent had requested for verification of the boundaries of Plot No. 250 & 251. I therefore do not understand on what basis this was an application for boundary dispute within the meaning of Regulation 40 of the *Land Registration (General) Regulations* of 2017.

57. Besides, in her Replying Affidavit, the 1st Respondent herein stated that after receiving the supposed application for boundary dispute, she issued a notice dated 22nd June 2020 for site visit on Plot

No. 250 & 251 in order to ascertain the general boundaries. This Court still finds it difficult to fathom the plausible reason a notice to visit a site visit would be made before the application for the boundary dispute has been presented. Definitely, there is something amiss here. Regulation 40 has clearly stipulated the procedure to wit that the application is first made to the 1st Respondent who then issues a notice to the registered proprietors and all persons deemed necessary. Why would the application be made on 24th July 2020 as claimed by the 1st Respondent, then a notice issued on 22nd June 2020? It is a case of putting the cart before the horse! The notice that the 1st Respondent ought to issue is stipulated in Regulation 40 (2), should be as set out in Form LRA 24. The notice that was issued by the 1st Respondent on 22nd June 2020 did not confirm with the law and consequently could not be considered by court as the notice required and as envisaged under the provision of Regulation 40(2).

58. Interestingly, the 1st Respondent stated in the background of her boundary dispute report dated 10th September 2020, that there was an application made to the Lands Offices at Kilifi vide a letter dated 26th June 2020 authored by Hassan Hamisi Gonzi, Saha Katumo Gonzi and Mwinga Dzonga Milinga as the duly appointed Legal Administrators of the estate of the late Katumo Gonzi Mwinga and Mwadzidza Baraka Tsuma, the legal and registered owners of Plot Nos. 250 & 251. This contradicts the averments made out by M/s. Stella Kinyua in her affidavit, where she claims that the 1st Respondent received an application for boundary dispute on 24th July 2020.

59. Upon critical reading of the decision by the 1st Respondent, it is clear that while reaching her determination to the effect that the main dispute was between Plot No 251 and 238, to find that Plot No. 238 had encroached onto Plot No. 251, the 1st Respondent solely relied on the Registered Index Map (RIM), surveyor's report dated 24th July 2020 and statements of the concerned parties and observations on the ground Where general boundaries are indefinable using existing physical features, the law is very clear that the views of the owners of adjacent plots must be included and consulted. In the case of '*Samuel Wangau – Versus - AG & 2 others* (2009) eKLR, it was held as that: -

> " However, it is common ground that such maps (R.I.M) are not authorities on boundaries. Both the District Land Registrar and the District land surveyor said as much.....It means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the R.I.M in solving the dispute."

60. What was at hand in the instant case were general boundaries. Therefore, for the 1st Respondent to determine a dispute in respect to general boundaries, the physical features existing on the ground were very critical. Thus, reference had to be made to features like hedges, fences and roads. However, in this regard, the Honorable Court faults the 1st Respondent for entirely relying on the RIM and disregarding all the other necessary features as envisaged in law to find that the 1st Petitioner sold a portion of Plot No. 251 without making reference to other physical features which demarcated the two plots. The 1st respondent ought to guide her findings on clear, visible and unmistakably physical features, she merely stated that there are permanent buildings on the area in dispute between Plot No. 251 and 238.

61. In the report dated 10th September 2020, the 1st Respondent stated that among the documents she relied upon when reaching a determination was the District surveyor report dated 24th July 2020. Turning to the report, which is surprisingly "SGK – 1", it inter alia finds that the map boundaries differ with the ground boundaries. In my view, the Surveyor's report is not of any evidential value considering that it was not produced through evidence by its marker, who would be best placed 'to explain in detail to court the rationale behind the methodology used, the observations and the conclusive findings made thereof. The District Surveyor, Mr. Athaman Ngoka who is documented to have attended the site visit

conducted on 30th June 2020 and also prepared the survey report dated 24th July 2020 never swore any affidavit as would have been expected. He would have served as an expert and his report an expert opinion to court easily to be produced and admissible evidence in support of the 1st Respondent's case.

62. The determination by the 1st Respondent goes further to find that the portion of Plot No. 251 encroached upon to be returned back to the families of Baraka Mwinga Tsuma. Indeed, it directed that the developers who erected buildings on the encroached portion ought to compensate the owners of Plot No. 251 and the said developments be deemed to be owned by the owners of Plot No. 251 after the process of restitution had been completed. The 1st Respondent also directed the Land Registrar, the Land Surveyor and the Government Land Valuer to visit the site and determine the extent of the alleged encroachment. She directed the Government Land Valuer to produce his report detailing the cost of each of the developments. In all these, the Petitioners were ordered to have vacated the building on the suit land within a period of 6 to 12 months from the date of the said report.

63. In my considered view, the 1st Respondent acted ultra vires her legal mandate. She has no powers whatsoever to issue those orders and give directions as she did. Regulation 40 (7) is clear on the legal mandate and powers of the Land Registrar can do and should do after making a determination of the dispute; Definitely, the issuance of eviction orders and compensation orders were not among these tasks. The 1st Respondent did usurp the powers of this court when she made a determination on developments on the disputed area. The powers that the 1st Respondent had been limited to making a determination on the boundaries. The question of the value of the developments on the disputed area, the rights and liabilities those affected were beyond the jurisdiction of a Land Registrar whose task was on hearing a boundary dispute.

64. The upshot of all this under this sub heading is that, the jurisdiction of this court has been determined over a decade since its inception and Section 13 of the *ELC Act*, No. 19 of 2011 is clear on what the court does. As has been demonstrated herein, any question that the 1st Respondent ostensibly made in the determination on other any than issue, though related to the boundary dispute was ultra vires the powers granted to her by the provisions of Section 18 of the *Land Registration Act*, No. 3 of 2012 and Regulation 40. I hold this Court is clothed with Jurisdiction to hear and determine the issues brought out in the filed Petition.

**Issue No. e). Whether the respondents violated the rights of the Petitioners during the hearing of the boundary reestablishment of all that parcel of land known as Land Reference Plot No. 251 and 250**

65. Under this sub heading, the Honorable Court underscores that the Petitioners claim that their fundamental rights were breached by the 1st, 2nd and 3rd Respondents herein. Under the provision of Article 22 of the Constitution guarantees every person right to institute court proceedings and claim that a right or fundamental freedom in the Bill of Right has been denied, violated or infringed or threatened. The 1st, 2nd , 3rd, 4th & 5th Petitioners herein averred that their fundamental right on fair trial as enshrined in the Constitution under the provision of Article 50 of the Constitution was violated. Counsel submitted that the 1st Respondent failed to personally attend the hearing of 30th June 2020. Instead she delegated the role to her representatives making the 1st and 2nd Petitioners not to be afforded a chance to be heard during the hearing. They held this was not provided for in any provision of the law. Further, it was submitted that the 1st Respondent failed to notify the 3rd to 5th Petitioners of the hearing date as provided by Section 19 of the *Land Registration Act*, that the registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question. The Interested parties objected to the Petitioners' sentiments and submitted that the 1st Respondent was within her mandate to delegate the hearing to her Deputy Registrar. However, regarding the Court of Appeal decision that

the Interested parties replied upon to buttress their point, the case of "*Christopher Kioi & another – Versus - Winnie Mukolwe & 4 others* [2018] eKLR, makes reference to the Court's Deputy Registrar and not the Deputy Land Registrar. Section 2 of the *Land Registration Act*, 2012 defines Registrar to mean, the Chief Land Registrar, the Deputy Land Registrar, County Land Registrars and Land Registrars appointed under Sections 12 and 13. Therefore, it was in order for Mr. Crispus Mwalandi, the Deputy Land Registrar to have attended the meeting.

66. The Land Registrar, failed to notify the occupiers of Plot No. 238 of her intention to conduct a sit visit for the purposes of resolving the boundary dispute. The Boundary Dispute Notice dated 22nd June 2020 makes reference to only registered owners of the suit properties and not the occupiers as envisioned in Section 19 of the *Land Registration Act*.

67. Further, the provision of Section 87 of the *Land Registration Act*, gives meaning to the opportunity of being heard. It provides that:-

    1. If this Act requires that a person be given an opportunity to be heard before a particular thing is to be, or may be done, that person shall be deemed to have been given such an opportunity—

        a. if the person attends before the Registrar personally or by an advocate or other agent, and is given such an opportunity; or

        b. if the person intimates, personally or by an advocate or other agent, that the person does not wish to be heard; or

        c. if the person has been served with a notice in writing specifying the nature of the thing to be done and appointing a day and time not less than seven days after service of the notice at which, if the person attends before the Registrar, the person may be heard.

    2. If a person or an advocate or other agent on the person's behalf attends before the Registrar concerning a matter on which the person is entitled to be heard, or fails to attend pursuant to such a notice, the Registrar may, adjourn the hearing from time to time, and, notwithstanding failure to attend, may, hear that person at any time.

68. At all times, when the Land Registrar rightfully moves into a disputed area to conduct a boundary dispute area, she is bound to comply with Section 19 of the Act and Section 87 on right to a fair hearing and due process. From the report, it has been noted that the 1st and 2nd Petitioners attended the site visit representing Mr. Chikumbo Bungu Baya and Daniel Gambo Mdeni respectively. Therefore, this Court is persuaded that the 1st and 2nd Petitioners were therefore given the right to be heard as envisaged under the provision of Section 87 of the *Land Registration Act*, No. 3 of 2012. However, the same cannot be said for the 3rd, 4th and 5th Petitioners herein. Undisputedly, they were served with the notice nor were they in attendance. The right to be heard is so cardinal that it cannot be wished away and any decision to made thereafter cannot stand. Thus, for this reason alone, the outcome of the boundary dispute violated and infringed rights of the 3rd, 4th and 5th Petitioners herein, as they were never accorded an opportunity to defend themselves yet the decision made greatly and adversely affected them.

69. The Petitioners have also submitted that their right to fair administrative action as envisioned in Article 47 of the Constitution was violated by the 1st Respondent for failing to hear and determine their application to fix their boundary within 6 months from the date of filing the application as stated in Regulation 40 (8). Further, the Petitioners claimed that without according them a fair trial, the 1st Respondent could not have granted them fair administrative action and the outcome decision ought to be nullified.

70. Article 47 of the *Constitution* states: -

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

71. The Supreme Court in the case of:- "*John Florence Maritime Services Limited & another – Versus - Cabinet Secretary, Transport and Infrastructure & 3 others* (2021) eKLR, held that, the right to fair administrative action builds on the right to fair trial, and the larger rules of natural justice which imposes the duty to act fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases. In the instant case, not only did the 1st Respondent failed to consider the 1st Petitioner's application for boundary reestablishment dated 16th March 2020 but also refused to provided explanation why the same was not determined as provided by law. The 1st Respondent ought to have, in the very least consolidated the two applications and make a joint determination rather than determining only the application made by the Interested Parties and leaving out the 1st Petitioner's.

72. The Petitioners have also claimed that by hearing and determining the Interested Parties' application dated 22nd June 2020 before that of the 1st Petitioner dated 16th March 2020, outrightly the 1st Respondent exercised favoritism, in an adjudication process that was only meant to confirm the rights of persons in occupation of the suit properties within a specific timeframe. The Counsel for the Petitioners submitted that favoritism was a form of discrimination and a violation of the provision of Article 27 of the *Constitution* on equality and freedom from discrimination. The Counsel argued and the Court concurs that equality in law required both applications to have received equal weight and dealt with simultaneously or within similar timelines.

73. Ideally, and as I have stated before, without a clear and precise reason as to why the 1st Petitioner referred to hear one application over another, the court finds that the petitioners right to equality and freedom from discrimination was violated. On this point, the Honorable Court wishes to rely on the Court of Appeal in the case of:- "*CKC & another (Suing through their mother and next friend JWN – Versus - ANC* [2019] eKLR, which held that: -

> "The Constitution of Kenya, 2010 has laid great emphasis on respect, enjoyment and protection of rights and fundamental freedoms of all persons. Unlike the former Constitution, it does not readily admit to derogation from those rights and freedoms, except in clear, exceptional and tightly controlled circumstances. Thus for example, right from the Preamble, the Constitution adverts to the aspiration of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 10, which sets out the notational values and principles of governance that bind all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret the law or make or implement public policy, expressly recognize human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized among those core values and principles.
>
> *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, the Supreme Court stated that those national values and principles of governance signify a value system, an ethos, a culture, or political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. The same Court added in Speaker of the Senate & Another v. Attorney

General & Others [2013] eKLR, that the national values and principles are also important anchors in the interpretation of the Constitution."

74. On the right to property as provided by the provision of Article 40 of the Constitution of Kenya, the Counsel for the Petitioners submitted, that the decision of the 1st Respondent dated 10th September 2020 requiring the Petitioners to vacate the suit properties amounted to arbitrary deprivation of property. The decision to deprive the Petitioners of their right to own property and the subsequent order of compensation was 'ultra vires' to the powers of the Land Registrar under the provision of Section 14 of the *Land Registration Act*, No. 3 of 2012. In my view, the Petitioners have failed to demonstrate to court that their right to own property was infringed by the acts of omission and commission by the Respondents because they never produced any prima facie evidence before court such as Certificate of title documents on the ownership to the suit properties in question. Further the Petitioners never demonstrated to court that the said decision to evict them was effectively executed and proof that they were driven out of their homes. If anything the legal rights of the Petitioners over the suit properties have not been determined by any Court or law.

75. As regards the provision of Article 35 on access to information, the Counsel submitted that the 1st Petitioner wrote to the 1st Respondent on 11th and 13th November 2020 respectively requesting for information that was used in the report and hence utilized for making the determination. However, he indicated nothing has been forthcoming and has not produced any information as to why the same should not be produced. A response from the 1st Respondent to the Petitioners on 2nd December 2020 was that the decision of 10th September 2020 was under review but the 1st respondent has not been forthcoming with the progress of the same. The significance of the provisions of Article 35 on access to information was echoed in the case of:- "*Katiba Institute – Versus - Presidents Delivery Unit & 3 others* [2017] eKLR, where it was held that:-

> "The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen's ability to access information held by public authorities. Where they don't know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country."

76. Additionally, in the case of "*Trusted Society of Human Rights Alliance & 3 Others – Versus - Judicial Service Commission* [2016] eKLR, the Court reaffirmed the position that the Constitution does not limit the right to access information when it stated:-

> "Article 35(1) (a) of the Constitution does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in The Public's Right to Know: Principles on Freedom of Information Legislation –Article 19 at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right

to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information".

77. The 1st and 2nd Petitioners sought to exercise their right to accessing information which was within the custody of the 1st Petitioner through a letter from their Advocates on record, the esteemed Law firm of Messrs. Njoroge & Katisya Advocates dated 11th November 2020. Plainly speaking, the letter requested the 1st Respondent to furnish the Petitioners with, copies of the application dated 26th June 2020, summons to the Chief for the site visit conducted on 30th June 2020, copies of the District Surveyor report dated 24th July 2020 as well as the statements collected and observations made the day of the site visit. The 1st Respondent made a response to the Petitioner's advocate vide a letter dated 1st December 2020 informing them that they were processing the matter and would make an official communication in two weeks thereafter. That was never to be. There is no contention that the 1st Respondent failed to respond to the pertinent issues that were raised by the Petitioners in their letter dated 11th November 2020. This failure amounted to lack of accountability, responsiveness and openness of a public office which is contrary to the national values and principles governance of; good governance, integrity, transparency and accountability as outlined in Article 10 (2) of the *Constitution of Kenya*. As a result, among other reasons thereof, it became impossible for the Petitioners to prefer an appeal against the decision of the 1st Respondent without the application dated 26th June 2020 or any other related information. I dare say that the right to access information is critical to the realization and enforcement of other rights in the Bill of Rights.

**Issue No. f). Who will bear the costs of the Petition.**

78. The Black Law Dictionary defines "Cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. It is trite law that the issue of Costs is the discretion of Courts. In the case of "*Reids Heweet & Company – Versus – Joseph* AIR 1918 cal. 717 & *Myres – Versus – Defries* (1880) 5 Ex. D. 180, the House of the Lords noted:-

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

79. The Supreme Court fortified this position in the case of "*Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others* [2014] eKLR thus:

> " so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit…The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

80. Based on this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The out come in the instant case is the 1st, 2nd, 3rd 4th & 5th Petitioners herein

have fully succeeded in his cases. For that very fundamental reason, therefore, the costs of this suit will be borne by the 1st, 2nd & 3rd Respondents herein.

**Conclusion & Disposition**

81. Ultimately and in long run after conducting such a robust and elaborate analysis to the issues framed herein, of the Petition and the responses to it, this honorable court concludes that the Constitution Petition has merit. Hence, the 1st, 2nd, 3rd, 4th & 5th Petitioners herein have been able to successfully prove their case. For avoidance of any doubt, I proceed to make the following declarations and orders: -

   a. That the Preliminary Objection through a Notice of Preliminary Objection dated 18th June, 2021 and filed on 21st June, 2021 by the Interested Parties be and is hereby dismissed for lack of merit.

   b. That Judgement be and is entered in favour of the 1st, 2nd, 3rd, 4th & 5th Petitioners on merit and against the 1st, 2nd & 3rd Respondents herein with Costs.

   c. That a declaration that the boundary dispute report dated 10th September 2020 by the 1st Respondent be and is found to be unconstitutional, invalid, null and ultra vires.

   d. That a declaration that the 1st Respondent boundary dispute report dated 10th September 2020 and the process through which the decision was reached violated the petitioners right to fair trial, right to fair administrative action, right to equality and freedom from discrimination and right of access to information.

   e. That an order of Certiorari be and is hereby issued, to remove to this Court and to forthwith quash the 1st Respondent boundary dispute report dated 10th September 2020 and all the processes following from the said decision.

   f. That an order be and is hereby issued compelling the 1st, 2nd & 3rd Respondents herein to forthwith provide, at the 1st, 2nd & 3rd Respondents' cost, all information sought by the 1st and 2nd Petitioners in their letter dated 11th November 2020.

   g. That an Order of Mandamus be and is hereby issued directing the 1st Respondent to cause a fresh Boundary dispute hearing for Plot No. Buni/Kisimani/238, 251 and 250 as provided by the *Land Registration Act*, 2012 within 30 days after the delivery of this Judgement.

   h. That an order be and is hereby made for 1st, 2nd & 3rd Respondents herein to forthwith within the next thirty (30) days from this date shall pay to the General Damages to the 1st, 2nd, 3rd, 4th & 5th Petitioners herein assessed at a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) without failure.

   i. That the costs of the Petition be borne by the 1st, 2nd & 3rd Respondents herein.

   It is ordered accordingly.

**JUDGEMENT DELIEVERED, SIGNED AND DATED AT MOMBASA THIS..............18TH ......DAY OF..........OCTOBER.......2022**

**HON. MR. JUSTICE LL NAIKUNI, JUDGE,**

**ENVIRONMENT & LAND COURT AT**

**MOMBASA**

In the presence of:

a. M/s. Yumnah & Mr. Omar, the Court Assistant.

b. Mr. Benjamin Njoroge Advocate for the 1st, 2nd, 3rd, 4th, and 5th Petitioners.

c. Mr. Mwandeje holding brief for Mr. Makuto Advocate for the 1st, 2nd and 3rd Respondents.

d. Mr. Anaya Advocate for the Interested parties.