



REPUBLIC OF KENYA



**Nyaga & 19 others (Suing on Behalf of the 150 Members of Kismayu Farmers Company) v Ngunyi & 6 others (Environment & Land Petition 17 of 2022) [2025] KEELC 3980 (KLR) (7 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3980 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION 17 OF 2022**

**JO MBOYA, J**

**MAY 7, 2025**

**BETWEEN**

**ABISHAG NYAGA ..... 1<sup>ST</sup> PETITIONER**  
**JANE KALEKYE MUSEMBI ..... 2<sup>ND</sup> PETITIONER**  
**FRIDA KAPERRE ..... 3<sup>RD</sup> PETITIONER**  
**JAMES KABUI ..... 4<sup>TH</sup> PETITIONER**  
**CAROLINE ACHIENG ..... 5<sup>TH</sup> PETITIONER**  
**JOSEPHINE KALEKE WAMBUA ..... 6<sup>TH</sup> PETITIONER**  
**JOHN MUINDE ..... 7<sup>TH</sup> PETITIONER**  
**BEATRICE WANJIRU ..... 8<sup>TH</sup> PETITIONER**  
**SANWEKU JTAKI ..... 9<sup>TH</sup> PETITIONER**  
**JULIUS NDONGA ..... 10<sup>TH</sup> PETITIONER**  
**NEWTON IBELHA ..... 11<sup>TH</sup> PETITIONER**  
**FESTUS GAKUO ..... 12<sup>TH</sup> PETITIONER**  
**JOHN M NJOROGE ..... 13<sup>TH</sup> PETITIONER**  
**MARK M JUSTO ..... 14<sup>TH</sup> PETITIONER**  
**TITUS MUTUKU ..... 15<sup>TH</sup> PETITIONER**  
**JOSEPH MAINA ..... 16<sup>TH</sup> PETITIONER**  
**JOSEPH OKARU ..... 17<sup>TH</sup> PETITIONER**  
**PAUL MUINDE ..... 18<sup>TH</sup> PETITIONER**



IRENE NYAWIRA ..... 19<sup>TH</sup> PETITIONER  
CECILIA WANJIRU ..... 20<sup>TH</sup> PETITIONER  
SUING ON BEHALF OF THE 150 MEMBERS OF KISMAYU FARMERS  
COMPANY

AND

MATIN NGUNYI ..... 1<sup>ST</sup> RESPONDENT  
DEPUTY COUNTY COMMISSIONER LANG'ATA SUB-COUNTY SARAH  
KINYANJUI ..... 2<sup>ND</sup> RESPONDENT  
OCS WILSON AIRPORT POLICE STATION ..... 3<sup>RD</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT  
THE NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT  
KENYA AIRPORTS AUTHORITY ..... 6<sup>TH</sup> RESPONDENT  
MASAAL GENERAL AGENCIES LIMITED ..... 7<sup>TH</sup> RESPONDENT

### JUDGMENT

1. The Petitioners approached the Court vide Petition dated the 4<sup>th</sup> March 2016 and which Petition was filed in the High Court. Subsequently, the subject Petition was transferred by the High court to the Environment and Land Court and thereafter same [Petition] was re-numbered.
2. Moreover, the Petitioners proceeded to and filed an Amended Petition dated the 15<sup>th</sup> October 2019 and which Amended Petition was subsequently re-amended resting with the further Amended Petition dated the 11<sup>th</sup> October 2022. Vide the further Amended Petition, the Petitioners have sought the following reliefs:
  - a. That this Honourable Court be pleased to make a declaration that the Actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' in evicting, harassing, intimidating, threatening and destroying the Petitioners' crops and other valuables is unlawful and unconscionable, malicious, unreasonable, unwarranted and infringement of the Petitioners Constitutional right provided and guaranteed under *the constitution*.
  - b. That this Honourable Court be pleased to issue a permanent Injunction that restrains the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and its officers from encroaching, evicting, fencing and/or in any other manner unilaterally forcefully evicting the Petitioners from the suit property conventionally called Kismayu Slums on LR NO. 2X9/10XX3.
  - c. THAT THE Honourable Court be pleased to Declare that the forceful eviction of the Petitioners from the suit premises by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was unlawful, un-procedurally and otherwise unconstitutional.
  - d. That this Honourable Court be pleased to Declare that the 5<sup>th</sup> and 6<sup>th</sup> Respondents action in laying claim to the parcel of land known as LR NO. 2X9/10XX3 contributed and/or led to the illegal eviction o the Petitioners.



- e. That this Honourable Court be pleased to issue a MANDATORY INJUNCTION compelling the Respondents, their servants and/or agents and servants to resettle the Petitioners back into the parcel of land known as LR NO. 2X9/10XX3
  - f. That in the alternative this Honourable Court be pleased to issue an Order for re-settlement of tall the Petitioners by the Respondents, their servants and/or their agents in an alternative parcel of land within Nairobi County and undertake the processing of their Titles without subjecting the Petitioners to payments of any statutory fees or any other payments whatsoever.
  - g. That this Honourable Court be pleased to grant the Petition an award in damages as follows:
    - i. The sum of Kshs. 51,986,160/= being the value of the property lost by the Petitioners' during the eviction process.
    - ii. The sum of Kshs. 7,797,924/=, being 15% of the value of the property lost to enable the Petitioners resettle to a new home.
    - iii. Interest in (i) and (ii) above at commercial rates.
    - iv. The Costs of this Petition.
  - h. That this Honourable Court be pleased to grant any further Orders it deems fit in protection of the Constitution and the Public in general.
3. The further amended Petition is supported by the Affidavit sworn by one Abishag Nyaga [the 1<sup>st</sup> Petitioner] and which is sworn on the 11<sup>th</sup> October 2022. In particular, the deponent has averred that the subject Petition has been filed and mounted by the current Petitioners on their own behalf and on behalf of 150 other members of Kismayu Farmers Company.
  4. Furthermore, the deponent of the Supporting Affidavit has averred that the Petitioners and the rest of the members of Kismayu Farmers Company entered upon and commenced to reside on LR NO. 2X9/10XX3 [hereinafter referred to as the suit property] sometime in the year 1982 or thereabout. In addition, the deponent has averred that subsequently, the suit property was allocated to Kismayu Farmers Company vide Letter of Allotment issued in the name of the company.
  5. Additionally, it was averred that by virtue of the Letter of Allotment dated the 18<sup>th</sup> June 1995 and coupled with the duration of occupation of the suit property, the Petitioners and the rest of the members of the company acquired lawful rights and interests over the suit property.
  6. Nevertheless, it was averred that on or about the 13<sup>th</sup> May 2019 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents led a group of Administration Police Officers to the suit property and thereafter destroyed the crops that had been planted by the Petitioner and the rest of the members of Kismayu Farmers Company. Besides, it was posited that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents also proceeded to and evicted the Petitioners and the rest of the members of Kismayu Farmers Company. In this regard, it was averred that the Petitioners and the rest of the members of the Company suffered extreme loses and thus same now seek recompense.
  7. The Respondents duly filed their responses to the Petition and wherein same denied the claims by and on behalf of the Petitioners. In particular, the Respondents denied that the Petitioners had been lawfully allocated the suit property either as claimed or at all. Moreover, the Respondents posited that the Petitioners had no rights to and in respect of the suit property.
  8. Pertinently, the 5<sup>th</sup> Respondent contended that the land which is claimed by the Petitioners herein fall within Wilson Airport. Furthermore, it was contended that the land in question sits on the Wilson Airport flight path.



9. The Petition came up for directions on various dated including the 6<sup>th</sup> February 2023 and the 11<sup>th</sup> May 2023, whereupon the Advocates for the Parties agreed to canvass and dispose of the Petition by way of viva Voce evidence. To this end, the Court proceeded to and issued directions in the manner sought by the parties.
10. The Petitioners' case is anchored on the evidence of two witnesses namely, Cyprian Kirera Riungu and Abishag Nyaga. Same testified as PW1 and PW2, respectively.
11. It was the testimony of PW1 [Cyprian Kirera Riungu] that same is a registered and practicing Valuer. Furthermore, the witness averred that same is a member of the Institution of Surveyors of Kenya. Besides, the witness added that same is also an Honorary fellow of the Commonwealth Association of Valuers.
12. In addition, the witness averred that same was instructed by the Petitioners to carry out inspection on the suit property and thereafter to prepare a Valuation Report. In particular, the witness averred that same received instructions to undertake the inspection and valuation from the Petitioners' Advocate.
13. Moreover, the witness averred that upon receipt of the Petitioner's instructions, same proceeded to the designated plot, namely, Kismayu area and thereafter inspected the demolished structures. In any event, the witness averred that same visited the locus in quo on two occasions.
14. It was the further testimony of the witness that same visited the locus in quo on the 19<sup>th</sup> May 2019 and the 20<sup>th</sup> May 2019, respectively. Furthermore, the witness testified that thereafter same prepared a valuation Report which has since been filed with the court. The witness further testified that the valuation Report is dated the 16<sup>th</sup> May 2019. However, the witness thereafter posited that the date of 16<sup>th</sup> May 2019 is erroneous and that the Report should [sic] read the 26<sup>th</sup> May 2019 and not 16<sup>th</sup> May 2019.
15. The witness thereafter sought to tender and produce the Valuation Report dated the 16<sup>th</sup> May 2019 before the court. There being no objection, the valuation Report was tendered and produced as an exhibit together with the three Appendices attached thereto. In particular, the witness adverted to the 1<sup>st</sup> Appendix which contained 63 number mabati houses. In addition, the witness also referenced the 2<sup>nd</sup> Appendix which referenced 45 number mabati houses; and finally the 3<sup>rd</sup> Appendix which referenced 27 number mabati houses.
16. It was the further testimony of the witness that after undertaking the valuation exercise, same computed the values and arrived at the sum of Kshs. 59,784,894/= only. In particular, the witness testified that the said value includes the value of the mabati houses, the household items and 15% resettlement expenses.
17. The witness further testified that same charged the sum of Kshs. 350,000/= only on account of professional fees. However, the witness clarified that the sum of Kshs. 350,000/= was exclusive of the Court attendance fees.
18. On cross examination by Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the witness averred that same was instructed on the 18<sup>th</sup> May 2019. Furthermore, the witness testified that his instructions related to undertaking valuation on the demolished properties at Kismayu area next to Wilson Airport, Nairobi.
19. It was the further testimony of the witness that same proceeded to and undertook the inspection and consequential valuation of the properties that had been damaged/destroyed. However, the witness



- averred that same did not value properties which were situated inside Wilson Airport. In any event, the witness averred that the area is located approximately 100 metres away from the Wilson Airport.
20. It was the further testimony of the witness that the area between Kismayu and the Airport had destroyed crops and concrete buildings which had been destroyed. Nevertheless, the witness testified that same did not ascertain who owns the land between Kismayu and the Airport.
  21. While still under cross examination, the witness averred that when he visited the area, same found destroyed crops and concrete slabs that had been destroyed. It was the further evidence of the witness that upon carrying out the inspection, same proceeded to and prepared the Valuation Report before the court. Nevertheless, the witness averred that same did not take photographs of the demolished structures or the crops.
  22. It was the further testimony of the witness that during the course of inspection and the valuation exercise, same met 10 Petitioners at the site. However, the witness averred that the names of the Petitioners whom same met at the site during the inspection have not been captured in the body of the valuation Report. Nevertheless, the witness added that the total numbers of the Petitioners whose properties he valued is 135.
  23. It was the further testimony of the witness that during the inspection and the valuation exercise, same met various Petitioners. In particular, the witness referenced Caroline Mbugua, Cicilia Wanjiru Gichuhi, Frida Kavere, William Musembi, Nelson Osindi, Pauline Kahiga, Margaret Kananu, Regina Wamboi and Kilonzo.
  24. On cross examination by Learned counsel for the 5<sup>th</sup> Respondent, the witness averred that same is indeed a registered and Practicing valuer. Moreover, the witness testified that before undertaking a valuation, it is imperative that the Valuer does ascertain the ownership of the property. Nevertheless, the witness testified that same valued the properties that were outside the Airport.
  25. On further cross examination, the witness testified that during the inspection and valuation exercise, same saw the runway at the Airport. At any rate, the witness testified that the properties were on the take-off side of the Airport. Moreover, the witness testified that the properties were beneath the take-off runway.
  26. The witness further testified that the Petitioners' properties had been destroyed on the 14<sup>th</sup> May 2019. On re-examination, the witness averred that during the valuation exercise same did not value any property inside the Airport. Nevertheless, the witness added that same valued the properties between the tarmac road and the fence of the Airport. In addition, the witness averred that same valued the structures that had already been demolished.
  27. While still under re-examination, the witness testified that the structures which same valued were pointed out and identified by members. In any event, the witness averred that same has tendered and produced before the court the schedule relating to the numbers of the structures that were valued.
  28. The witness further averred that during the site inspection and valuation exercise, same met 10 of the Petitioners. In particular, the witness averred that the 10 Petitioners were comprised of 7 men and 3 women.
  29. Additionally, it was the testimony of the witness that same did not enter upon the land belonging to the Airport.
  30. The 2<sup>nd</sup> Witness who testified on behalf of the Petitioners is Abishag Wambati Nyaga. Same testified as PW2.



31. It was the testimony of the witness that same is the 1<sup>st</sup> Petitioner in respect of the instant matter. Furthermore, the witness averred that by virtue of being the 1<sup>st</sup> Petitioner same [Petitioner] is therefore conversant with the facts of the matter. In addition, the witness averred that same has similarly recorded and filed a witness statement dated the 17<sup>th</sup> March 2021 and which witness statement the witness sought to adopt and rely on as her evidence in chief. Instructively, the witness statement under reference was thereafter adopted and constituted as the evidence in chief of the witness.
32. Moreover, the witness referenced the list and bundle of documents dated the 17<sup>th</sup> March 2021 containing a total of 30 documents and which documents the witness sought to tender and produce before the court. Suffice it to state that the various documents save for the photographs which had not been accompanied with the electronic Certificate, were duly produced and marked as exhibits P1 – P28; and P30, respectively. Nevertheless, the photographs at the foot of item 29 of the Petitioners’ list and bundle of documents were marked as PMF 29.
33. It was the further testimony of the witness that same is aware of and knowledgeable of the facts concerning the subject matter. In particular, the witness averred that same entered the area in question on or about the year 1982. Furthermore, the witness testified that the area was bushy. It was the further testimony of the witness that the first time the Respondents went to the site was in the year 2016. Furthermore, the witness averred that the Respondents went to the site and thereafter destroyed the Petitioners’ crops.
34. It was the further testimony of the witness that the Respondents went back to the locus in quo on the 13<sup>th</sup> May 2019.
35. On cross examination by Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the witness averred that same [Witness] is the 1<sup>st</sup> Petitioner in the matter. In addition, the witness averred that same came to Nairobi in the year 1980 and worked as a house help before venturing into grocery business. In addition, the witness testified that same moved onto and commenced to occupy the suit property around the year 1982.
36. While still under cross examination, the witness testified that same is conversant and familiar with one William Musembi. In particular, the witness averred that the said William Musembi is a resident of City Cotton.
37. It was the further testimony of the witness that same is the current Chairperson of Kismayu Farmers Company. Nevertheless, the witness averred that the Chairperson in the year 1995 was Mzee Kilonzo.
38. While under further cross examination, the witness testified that Kismayu Farmers Company was registered in the year 2016. Furthermore, the witness testified that the Company was registered to enable same [the witness] and the other members of the Company to pursue the registration of the Land.
39. The witness further testified that the officials of the Company visited the Survey office. In addition, the witness averred that the officials of the Company visited the Directorate of Survey with a view to seeking to be allocated the land in question. Furthermore, the witness averred that the land in question is where Mitumba village is situated. Furthermore, the witness averred that Kismayu Farmers Company Limited was duly issued with a Letters of Allotment. In this regard, the witness referenced the Letter of Allotment dated the 18<sup>th</sup> June 1995.
40. It was the further testimony of the witness that even though the Letter of Allotment was issued in the name of the company, the Company under reference was not registered in the year 1995. In addition, the witness testified that the Company was registered in the year 2016.



41. While still under cross examination, the witness testified that even though the Company was issued with a Letter of Allotment same [witness] has not produced the copy of the Application seeking to be allocated land. Besides, the witness averred that same has not also tendered a copy of the acceptance of the Letter of Allotment. In any event, the witness averred that same is not even aware whether the Company accepted the Allotment.
42. While still under cross examination, the witness testified that same is also not aware whether the Company paid the standard Premium and the consequential Statutory Levies shown in the body of the letter of allotment.
43. It was the further testimony of the witness that the land in question is near the Airport. Nevertheless, the witness clarified that the land is not within the Airport.
44. Additionally, the witness testified that even though the letter of allotment shows the name of the Company, the company itself has however, not filed the case. In particular, the witness averred that the case has been filed by the Petitioners who are shareholders of the company. Moreover, the witness averred that the Petitioners herein have not filed the resolution by and on behalf of the Company.
45. On further cross examination, the witness testified that the Company was also issued with a Deed Plan. Nevertheless, the witness testified that the Deed Plan has not been produced before the Court.
46. It was the further testimony of the witness that initially same [witness] lived at Mitumba village but later same went to Kismayu village. In particular, the witness averred that she went to Kismayu village in 1982. Furthermore, the witness testified that she built a mabati house of 10ft by 10ft.
47. It was the further testimony of the witness that same had various items in the mabati house. To this end, the witness referenced a bed, tables and various utensils.
48. On cross examination by Learned Counsel for the 4<sup>th</sup> Respondent, the witness averred that same [Petitioners] have joined the National Land Commission as a party. In particular, the witness added that the commission has been joined because, same [Commission] was involved in the matter. In any event, the witness added that the Petitioners took the dispute before National Land Commission but same was unable to resolve the dispute.
49. On cross examination by Learned Counsel for the 5<sup>th</sup> Respondent, the witness averred that there was a meeting which was held between the Petitioners herein and Kenya Airports Authority. In particular, the witness averred that same attended the meeting. In addition, the witness testified that same has availed the minutes of the meeting.
50. The witness further testified that upon the filing of the original Petition, the Petitioners sought for and obtained a Conservatory Order. Besides, the witness averred that the conservatory Order was served on Kenya Airports Authority.
51. In any event, the witness averred that the Order in question was duly served upon Kenya Airports Authority.
52. While still under cross examination, the witness averred that the Company [Kismayu Company Limited] applied for a Certified copy of the Deed Plan. The witness averred that same has neither tendered nor produced a copy of the Deed plan.
53. It was the further testimony of the witness that the Police came onto the land and invaded the Petitioners' premises. Furthermore, the witness averred that same has also stated that the 1<sup>st</sup> and 2<sup>nd</sup>



- Respondents are the ones who invaded the land. In particular, the witness acknowledged that same has not referenced the 5<sup>th</sup> Respondent as one of the persons that invaded the land.
54. On further cross examination, the witness averred that same has accused the 5<sup>th</sup> and 6<sup>th</sup> Respondents because the said Respondents are laying a claim to the suit property albeit without Certificate of title. Nevertheless, upon being shown a copy of the Certificate of Title on behalf of the 5<sup>th</sup> Respondent, the witness averred that same could not confirm or deny whether the Certificate of title was lawful.
  55. On re-examination, the witness averred that the Certificate of title which same was shown by Learned counsel for the 5<sup>th</sup> Respondent relates to a separate and distinct land. In particular, the witness averred that the land at the foot of the Certificate of Title is different from LR NO. 2X9/10XX3 [the suit property].
  56. It was the further testimony of the witness that the Petitioners herein held a meeting with the management of the 5<sup>th</sup> Respondent. To this end, the witness averred that the minutes of the meeting have been tendered and produced before the Court. Moreover, the witness averred that the land in question is outside the Airport.
  57. On further re-examination, the witness testified that the Petitioners were issued with a Letter of Allotment. However, the witness clarified that the Letter of Allotment was issued in the name of Kismayu Farmers Company limited and not in the names of the Petitioners.
  58. It was the further evidence of the witness that before the year 2016 the Company had not been formally registered. However, the witness averred that the company was registered in the year 2016 and thereafter same was issued with a Certificate of Incorporation.
  59. While under further re-examination, the witness averred that in the year 2016, the Petitioners were issued with a Court Order barring eviction against the Petitioners.
  60. However, the witness testified that the Order of Stay was disregarded and disobeyed by the Respondents. In addition, the witness averred that the 5<sup>th</sup> Respondent was aware of the said Court Orders. In any event, the witness testified that the 5<sup>th</sup> Respondent was served with the Court Order.
  61. With the foregoing evidence, the Petitioners' case was closed.
  62. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents case is premised on the evidence of 1 witness, namely, Elias Muthomi Kaburu. Same testified as RW1.
  63. It was the testimony of the witness [RW1] that same is currently the Assistant Director Land Administration. In addition, the witness averred that same is a Civil Servant currently employed by the Ministry of Lands, Public Works, Housing and Urban development. In particular, the witness averred that same has more than 20 years' experience while working with the designated Ministry.
  64. It was the further testimony of the witness that by virtue of his portfolio/office, same [witness] is therefore privy to the facts of this matter. Furthermore, the witness averred that same has since recorded and filed a witness statement dated the 1<sup>st</sup> February 2024 and which statement the witness sought to tender and adopt as his evidence in chief. To this end, the witness statement was duly admitted and constituted as the evidence in chief of the Witness.
  65. On cross examination by Learned Counsel for the Petitioners, the witness averred that same is currently the Assistant Director of Land Administration. Nevertheless, the witness averred that same is not conversant with the ground location of the suit property. In particular, the witness stated that the office of the Directorate of Land Administration does not deal with preparation of the Survey Plain [FR].



- Nevertheless, the witness testified that the land in question had been surveyed. Besides, the witness testified that the land in question was not allocated to the Petitioners.
66. It was the further testimony of the witness that same [witness] does not have any records pertaining to and concerning the land in question. In any event, the witness testified that the land being claimed by the Petitioners is not part of their records.
  67. It was the further testimony of the witness that Deed Plans are ordinarily prepared by the Director of Survey. In this regard, the witness averred that if there was a deed plan for LR NO. 2X9/1055, same could be traceable at the offices of the Directorate of Survey.
  68. While still under cross examination, the witness averred that the land in question was never allocated to the Petitioners herein. Further, the witness averred that the Letter of Allotment availed by the Petitioners is not genuine. In particular, the witness averred that the letter in question did not emanate from their offices.
  69. It was the further testimony of the witness that a letter of Allotment cannot issue and/or be issued without the requisite Deed Plan. Furthermore, it was the testimony of the witness that the Letter of Allotment dated the 18<sup>th</sup> June 1995 which was issued to (sic) the Petitioners was a forgery. To this end, the witness testified that the Letter of Allotment dated the 18<sup>th</sup> June 1995 was fraudulent.
  70. Moreover, the witness averred that the letter of allotment had been forwarded to the SPRO for cross checking. Besides, the witness added that the letter in question has several notations thereon and whose contents indicate that the letter of Allotment is fraudulent.
  71. While still under cross examination, the witness averred that the signature on the letter of allotment is also not genuine. In particular, the witness contended that the author of the Letter of Allotment did not sign the letter. Nevertheless, the witness acknowledged that same has not tendered a forensic report before the Court to show that the Letter of Allotment is a forgery.
  72. While still under cross examination, the witness averred that same has seen a copy of the Revenue Receipt before the court. Nevertheless, the witness testified that the Revenue Receipt is lawful. On re-examination, the witness averred that same has never visited the land in question. In any event, the witness testified that his job description does not include visitation of parcels of land.
  73. On further re-examination, the witness testified that the letter of allotment before the court relates to a Company. However, the witness averred that the Letter of Allotment under reference is not lawful.
  74. It was the further testimony of the witness that the Letter of Allotment being referenced by the Petitioners does not form part of the record of the Directorate of Land Adjudication. Furthermore, the witness added that same could not tell whether the land in question was duly and lawfully allocated to anyone.
  75. With the foregoing testimony, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' case was closed.
  76. The 4<sup>th</sup> Respondent [National Land Commission] intimated that same shall not be calling any witness. In this regard, the 4<sup>th</sup> Respondent's case was duly closed without any evidence having been tendered and/or adduced.
  77. The 5<sup>th</sup> Respondent called two witnesses namely, Rashid Abdulahi and Margaret Munene. Same testified as RW2 and RW3, respectively.
  78. It was the testimony of RW2 [Rashid Abdulahi] that same is currently the Manager, Planning, Research and Budgeting at Kenya Airports Authority. Furthermore, the witness averred that same is



- also a licensed and registered Surveyor. To this end, the witness averred that his registration Number is 255. Furthermore, the witness testified that same is also a member of the institution of Surveyors in Kenya. In this regard, the witness referenced his membership number as 1007.
79. It was the further testimony of the witness that by virtue of his position and involvement in this matter, same is privy to and conversant with the facts of this matter. In addition, the witness averred that same has since recorded a witness statement dated the 23<sup>rd</sup> May 2023 and which witness statement the witness sought to adopt and rely on as his evidence in chief. To this end, the witness statement was duly adopted.
80. The witness further referenced a Report dated the 23<sup>rd</sup> May 2023 and which Report the witness sought to tender and produce before the Court. There being no objection to the production of the Report, same [Report] was tendered and produced as Exhibit 1 on behalf of the 5<sup>th</sup> Respondent.
81. On cross examination by Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the witness averred that same is conversant with the land in dispute. In particular, the witness testified that by the time same prepared the Report same [witness] had visited the disputed plot.
82. It was the further testimony of the witness that the land in question, namely LR NO. 2X9/10XX3, [the suit property] falls within Wilson Airport.
83. Additionally, the witness averred that the land in question extends on to Mombasa Road.
84. On cross examination by Learned counsel for the Petitioners, the witness averred that his report has referenced two Titles namely LR NO. 2X9/13080 AND LR NO. 2X9/10XX3, respectively. In particular, the witness averred that LR NO. 2X9/13080 is registered in the name of the 5<sup>th</sup> Defendant. However, the witness added that same did not carry out any Search over LR NO. 2X9/10XX3.
85. It was the further testimony of the witness that the Wilson Airport Land was surveyed on the 25<sup>th</sup> March 1987. In any event, the witness clarified that Wilson Airport Land had even been surveyed before the said date. Furthermore, the witness averred that the land belonging to Wilson Airport is clearly demarcated on the ground.
86. It was the further testimony of the witness that the Survey of the land belonging to Wilson Airport was undertaken by the Directorate of Survey. Moreover, the witness averred that the Directorate of Survey also prepared a Deed Plan. To this end, the witness referenced Deed Plan No. 129283. Additionally, the witness testified that even though the Wilson Airport land was surveyed by the Directorate of Survey, same [witness] averred that he was not involved.
87. It was the further testimony of the witness that he nevertheless procured and obtained a Survey Plan [FR] from the Directorate of Survey.
88. While still under cross examination, the witness averred that the Claimants/Petitioners herein are not in occupation of the land. In any event, the witness testified that the Kenya Airport Authority undertook the fencing of the Wilson Airport Land.
89. The witness further testified that the land being claimed by the Petitioners falls within the flight path. Furthermore, the witness added that the land in question belongs to the Airport. Besides, the witness averred that the land under reference was not available for allocation or at all.
90. Moreover, the witness testified that the Kenya Airports Authority was issued with a Grant in respect to its land. To this end, the witness averred that the Grant was issued in 1986.



91. While still under cross examination, the witness averred that same has referenced LR NO. 2X9/10XX3. Besides, the witness acknowledged that he has indicated in the report that the said parcel of land has encroached onto LR NO. 2X9/1380.
92. The witness further testified that the portion of land, namely, LR NO. 2X9/10XX3 is developed. Furthermore, the witness averred that the area in question is developed with permanent structures. In any event, the witness testified that the permanent structures are being occupied by the staff of Kenya Airport Authority.
93. The second witness who testified on behalf of the 5<sup>th</sup> Respondent was Margaret Munene. Same testified as RW3.
94. It was the testimony of the witness that same is a Legal Counsel working with the 5<sup>th</sup> Respondent. Furthermore, the witness averred that same has since sworn and filed an Affidavit. In particular, the witness referenced the Replying Affidavit dated the 6<sup>th</sup> June 2023.
95. The witness thereafter sought to adopt and rely on the contents of the Replying Affidavit under reference. Instructively, the Affidavit was adopted and constituted as the evidence in chief of the witness.
96. On cross examination by Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the witness averred that the Replying Affidavit has referenced LR NO. 2X9/10XX3. Furthermore, the witness averred that the said parcel of land was not available for allotment.
97. Regarding the Letter of Allotment issued to the Petitioners, the witness averred that the letter of allotment is dated the 18<sup>th</sup> June 1995. In any event, the witness stated that the Letter of Allotment on the face of it shows that same was issued to Kismayu Farmers Company Limited. However, the witness testified that the said Company was not in existence in the year 1995.
98. It was the further testimony of the witness that the Petitioners herein have filed various cases against the 5<sup>th</sup> Respondent. Nevertheless, the witness conceded that same had not mentioned/enumerated the various cases in her replying Affidavit.
99. On cross examination by Learned Counsel for the 4<sup>th</sup> Respondent, the witness averred that the Petitioners herein have not been residing on LR NO. 2X9/10XX3. In any event, it was stated that the said land which is claimed by the Petitioners falls on the flight path.
100. It was the further testimony of the witness that same is not conversant with the structures [if any] that were constructed by the Petitioners. Furthermore, the witness testified that the documents at page 75 of the Petitioners' list and bundle of documents is a letter from the Office of the Counsel for the Petitioners. The witness averred that the letter in question was copied to the Manager of Wilson Airport.
101. Regarding the document at page 76 of the Petitioners' list and bundle of documents, the witness averred that same is a copy of a Court Order. In any event, the witness testified that the Order under reference was issued by the High court.
102. It was the further testimony of the witness that there were evictions that were undertaken against the Petitioners. However, the witness posited that the 5<sup>th</sup> Respondent was not involved in the said evictions.
103. It was the further testimony of the witness that the 5<sup>th</sup> Respondent only undertook the fencing of the land. For good measure, the witness averred that there was no eviction[s] of anyone.



104. While under further cross examination, the witness testified that same was not present at the time when the fencing was being undertaken. However, the witness averred that the 5<sup>th</sup> Respondent was represented by the Manager of Wilson Airport.
105. Regarding the Letter at page 70 of the Petitioners' list and bundle of documents, the witness averred that the said document was copied to the 5<sup>th</sup> Respondent. Nevertheless, the witness averred that the 5<sup>th</sup> Respondent was not involved in any eviction.
106. As pertains to the documents at pages 71 – 74 of the Petitioners' bundle and list of documents, the witness averred that same are the Minutes of a meeting held on the 4<sup>th</sup> July 2016. In particular, the witness averred that the Minutes involved the Petitioners and the 5<sup>th</sup> Respondent.
107. While still under cross examination, the witness averred that the 5<sup>th</sup> Respondent did not evict the Petitioners. However, the witness stated that the 5<sup>th</sup> Respondent only undertook the fencing.
108. Additionally, it was the testimony of the witness that same is conversant with Kismayu Village. Nevertheless, the witness averred that the land occupied by the Petitioners had encroached onto the land belonging to the 5<sup>th</sup> Respondent. Furthermore, the witness testified that LR NO. 2X9/10XX3 forms part of the Airport land.
109. On re-examination, the witness averred that same adopts and reiterates the contents of the Replying Affidavit sworn on behalf of the 5<sup>th</sup> Respondent. Furthermore, the witness testified that the 5<sup>th</sup> Respondent did not undertake any eviction against the Petitioners.
110. Moreover, the witness testified that the evictions which are complained of were undertaken in 2012. In addition, it was averred that the evictions were undertaken by the National Government.
111. Regarding the document at page 76 of the Petitioners' list and bundle of documents, the witness averred that the document is a copy of the Court Order. Nevertheless, the witness clarified that by the time the said Order was issued the 5<sup>th</sup> Respondent was not a party to the suit.
112. Other than the foregoing, the witness testified that the land comprising of LR NO. 2X9/10XX3 lawfully belongs to the 5<sup>th</sup> Respondent. Furthermore, the witness added that the 5<sup>th</sup> Respondent is also the owner of LR NO. 2X9/13080.
113. With the foregoing testimonies, the 5<sup>th</sup> Respondent's case was closed.
114. The 6<sup>th</sup> Respondent did not call any witness. In any event, the 6<sup>th</sup> Respondent intimated to the Court that same shall not be tendering [leading] any evidence in the matter. In this regard, the 6<sup>th</sup> Respondent proceeded to and closed its case.
115. Following the conclusion of the hearing, the Advocates for the parties sought for time to file and exchange written submissions. In this regard, the Court proceeded to and granted the parties timelines to file their written submissions.
116. The Petitioners filed written submissions dated the 16<sup>th</sup> December 2024 and wherein the Petitioners have highlighted and canvassed five [5] issues for consideration. The issues raised by the Petitioners are namely: whether the Petition complied with the mandatory legal requirements under the *Oaths and Statutory Declarations act*; whether the Petitioners have established any legal and equitable right[s] to occupy the suit property [LR NO. 2X9/10XX3] ; whether the Respondents have violated the Petitioners' Constitutional Rights in any manner under Articles 28, 40, 46 and 47 of *the constitution*, 2010; whether the 5<sup>th</sup> Respondent has established a valid claim to the suit land [LR NO. 2X9/10XX3]; and whether the Petitioners are entitled to the reliefs sought.



117. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed written submissions dated the 6<sup>th</sup> February 2025 and wherein the said Respondents have highlighted three issues namely, whether the Petitioners are the same as the Applicant of the Letter of Allotment; whether there was an eviction and whether the Petitioner proved their claim for damages and compensation or otherwise.
118. The 4<sup>th</sup> Respondent filed written submissions dated the 31<sup>st</sup> January 2025 and wherein the 4<sup>th</sup> Respondent has canvassed two [2] issues, namely, whether the 4<sup>th</sup> Respondent has been properly impleaded in respect of the instant matter or otherwise and whether the Petitioners are entitled to the reliefs sought as against the 4<sup>th</sup> Respondent.
119. The 5<sup>th</sup> Respondent filed written submissions dated the 3<sup>rd</sup> February 2025 and wherein same has highlighted three issues for consideration. The issues raised by the 5<sup>th</sup> Respondent are namely: whether the suit property was available for allocation to the Petitioners or otherwise; whether the Letter of Allotment issued in favour of the Kismayu Farmers Company Limited has conferred upon the Petitioners any lawful rights to the suit property or at all; and whether the Petitioners claim discloses any reasonable cause of action against the 5<sup>th</sup> Respondent.
120. The 6<sup>th</sup> Respondent filed written submissions dated the 10<sup>th</sup> January 2025 and wherein same has highlighted three[3] issues, which are essentially the same as the issues canvassed by the 5<sup>th</sup> Respondent. In particular, the 6<sup>th</sup> Respondent has contended that the Petitioners herein have neither acquired nor accrued in the lawful rights and/or interests to the suit property.
121. Having reviewed the further amended Petition, the Affidavit in support thereof and the documentation filed on behalf of the Petitioners; having taken into account the responses filed by the Respondents; having appraised the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the subject Petition turns on three key issues, namely, whether the Petitioners herein had acquired or accrued any legal or equitable rights to the suit property and whether the Petitioners are entitled to the protection vide Article 40 (3) of *the Constitution* or otherwise; whether the Petitioners have proved and demonstrated illegal eviction and if so, the person[s] responsible for (sic) the impugned eviction; and what reliefs [if any] ought to issue.
122. Regarding the first issue, namely, whether the Petitioners herein had acquired or accrued any legal or equitable rights to the suit property, it is imperative to take cognizance of the contents of paragraph 16 of the further Amended Petition wherein the Petitioners have highlighted their contention that the suit property was lawfully allocated to the Petitioners vide Letter of Allotment dated the 18<sup>th</sup> June 1995.
123. Moreover, the Petitioners have contended that Kismayu Farmers and the residents of Kismayu village are the lawful allottees of the suit property. In addition, the Petitioners have contended that other than the letter of Allotment, the Petitioners and the rest of the residents of Kismayu village have been in occupation of the suit property for more than 30 years.
124. Arising from the foregoing, the Petitioners have thereafter posited that same have since acquired clear legal rights to the suit property which are actionable in law and hence the state was under obligation to protect and promote their rights. Pertinently, the Petitioners are contending that same [Petitioners] and the rest of the residents of Kismayu village were and are entitled to the protection of their rights.
125. Other than the contents of paragraph 16 which have been highlighted in the preceding paragraphs, the substratum/crux of the Petitioners' claim is also captured at the foot of paragraph 17 of the further Amended Petition. In particular, the Petitioners have repeated and reiterated that the Respondents have violated their rights to land as prescribed vide Article 40 of *the Constitution*.



126. My reading and understanding of the Petitioners' claim is to the effect that same had acquired and accrued lawful rights to and in respect of the suit property on the basis of (sic) the Letter of Allotment dated the 18<sup>th</sup> June 1995; and on the basis of the longevity of occupation thereof.
127. I beg to address the Petitioners' claims as pertains to their rights over and in respect of the suit property in a five- pronged manner. Firstly, I beg to highlight that the Letter of Allotment which the Petitioners have referenced, namely, the letter of Allotment dated the 18<sup>th</sup> June 1995, is said to have been issued to and in favour of Kismayu Farmers Company. For good measures, the said Letter of Allotment was never issued to and in favour of the Petitioners herein.
128. Moreover, even though the Petitioners have contended that same are the ones who were operating under the name and style of Kismayu Farmers Company [sic] the allottee of the Letter of Allotment, the Petitioners have neither tendered nor produced any Certificate of registration to demonstrate that Kismayu Farmers Company was ever registered as at 18<sup>th</sup> June 1995. Furthermore, the Petitioners have also not brought forth the any evidence to show who were/are the members of Kismayu Farmers Company.
129. In the absence of any evidence of registration of Kismayu Farmers Company and coupled with the absence of any List of members of the said Organization, it is difficult to connect the Petitioners herein to the letter of allotment dated the 18<sup>th</sup> June 1995.
130. Secondly, it is important to observe that the letter of allotment is purported to have been issued in favour of Kismayu Farmers Company, which was neither registered nor incorporated as at the time of the purported issuance of the letter of allotment. The question that does arise and which must be answered, is whether a Letter of Allotment can issue and/or be granted in favour of a non-existent body or organization.
131. Sadly, the answer to the question highlighted in the preceding paragraph is in the negative. For good measures, a Letter of Allotment which constitutes an offer by the Government [through the Commissioner of Lands] constitutes an offer which can only issue to a Legal entity and or body, whether animate or inanimate. The bottom line is that a Letter of Allotment can only issue to a legal person in the eyes of the law and not otherwise.
132. Thirdly, the Petitioners through PW1 testified that Kismayu Farmers Company Limited which is purported to have been issued with the Letter of Allotment dated the 18<sup>th</sup> June 1995 was only incorporated in the year 2016. To this end, the witness tendered and produced a copy of the Certificate of incorporation of the said Company. The Certificate of incorporation of the Company shows that same was incorporated on the 2<sup>nd</sup> February 2016.
133. To my mind, the question that comes to the fore is whether a letter of allotment could legally have been issued to a Company [if at all] prior to and before its incorporation. Certainly, no contract could be entered into prophetically with a person who was neither birthed nor conceived at the time of (sic) the contract.
134. The 4<sup>th</sup> perspective pertaining to and concerning the Petitioners' claim to ownership of the suit property or better still, whether the Petitioners have accrued any lawful rights to the suit property turn[s] on the question of whether the Letter of Allotment which underpin the Petitioners' claim is legitimate and valid.
135. Instructively, though the Petitioners contended that same acquired lawful rights to the suit property, there is no gainsaying that the Petitioners did not tender and/or produce the part Development Plan [if any] that was ever issued to anchor the impugned letter of allotment. Suffice it to posit that no letter



of allotment can issue and/or be granted in the absence of a Part Development Plan. For good measure, a part Development Plan is the precursor to the issuance of a letter of allotment. [See the provisions of Section 3 of the Physical Planning Act, Chapter 286, Laws of Kenya, now repealed.]

136. Furthermore, the significance of a part Development Plan in the process of allocation and alienation of Public land was highlighted by the Supreme Court in the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment)

104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR as follows: "...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013* where Njagi J held as follows: "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed..."

105 .This process is restated in *African Line Transport Co Ltd v Attorney General, Mombasa, HCCC No 276 of 2003* [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.

106. We note that the suit property was allocated to HE Daniel T Arap Moi who was not a party to the suit. The 2<sup>nd</sup> to 6<sup>th</sup> respondents on the other hand at the trial court in the replying affidavit of Gordon Odeka Ochieng in response to ELC Petition 12 of 2017 stated that certain documents that were required to support the allocation of the suit property to HE Daniel T Arap Moi were missing. These were, "the letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land; and a Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land."



107. We are careful to note that this court has no jurisdiction to revisit the factual findings of the superior courts, and we are limited to the court's jurisdiction under article 163(4)(a) in this case. It has not been disputed that indeed there was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the suit property by the first registered owner, and there was no PDP before the survey was done. We therefore agree with the trial court and the appellate court that the allocation of the suit property to HE Daniel T Arap Moi was irregular.
137. Yet again, it is evident that the Petitioners' contention that same acquired and/or accrued legal and equitable rights over and in respect of the suit property is vitiated by want of requisite Part Development Plan. Absent part Development Plan, the letter of allotment which underpins the Petitioners' claim to the suit property is rendered void and invalid.
138. The 5<sup>th</sup> perspective which is critical relates to whether a letter of allotment like the one being relied upon by the Petitioners can vest and/or confer any legal rights or otherwise to the Petitioners or any other person. To start with, it is worthy to recall that PW2 testified that even though the Company was issued with a Letter of Allotment, the Company neither accepted nor paid the Standard Premium.
139. For ease of appreciation, it is imperative to revert to the evidence of PW2 while under cross examination by Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
140. The witness testified as hereunder:
- “I don't have any letter of Application for the land before the court. I have not tendered or produced any letter seeking to be allocated the land. I don't have any acceptance letter before the court. I am not even aware that we were to accept the letter of allotment. We did not pay the monies at the foot of the letter of allotment.”
141. From the evidence tendered by PW2, what becomes apparent is that the Company which is indicated to have been allocated the suit property did not comply with and/or meet the terms of the letter of allotment. To this end, there is no gainsaying that the impugned letter of allotment lapsed and stood extinguished by effluxion of time.
142. The legal position that a letter of allotment whose terms are not complied with and/or adhered to stands extinguished has been highlighted in a plethora of cases. Instructively, this Court in the case of *Joseph Kamau Muhoro v Attorney General & another* [2021] KEELC 1457 (KLR) stated and observed as hereunder:
33. In my humble view, by the time the Plaintiff/Applicant herein, was purporting to pay the stand premium and the annual rent, which were mandatory conditions to the letter of Allotment, the allotment in question was already extinguished and was thus incapable of attracting any payment and/or being activated whatsoever.
34. Besides, I also hold the humble opinion that having not formally accepted the Letter of Allotment, [in writing as required], the Letter of Allotment, on which the Plaintiff/Applicant has premised his claim, was rendered void and non-existent.



35. In support of the foregoing holdings, it is important to take cognizance of the Decision in the case of *Dr. Syedna Mohammed Burhannuddin Saheb & 2 others vs Benja Properties & 2 others* [2007] eKLR; “In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant’s argument, that the expired letter, when acted upon, had been “revived” through conduct. The letter had expired. It was dead. There was nothing to “revive”.
143. Moreover, the legal import and implication of failure to comply with the special terms and conditions at the foot of a letter of Allotment was also highlighted by the Supreme Court in the case of *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) where the Court found and held that a letter of allotment whose terms are not complied with lapses and stands extinguished.
144. For coherence, the Court stated thus:
57. The respondent also challenged the letter of allotment on grounds that at the time of its transfer, the conditional thirty (30) days acceptance period had lapsed. As it turned out, the letter was also silent on whose behalf the commissioner of lands had made the allotment. Noting that the Commissioner of Lands by an allotment letter dated December 19, 1999 purported to allocate the suit property to Renton Company Limited. Thereafter, by a letter dated April 25, 2001, Renton Company Limited sought approval from the Commissioner of Lands to transfer the same to the appellant. The appellant’s ownership is traced back to this allotment Letter even if subsequently registered under the Registration of Titles Act cap 281 (Repealed) on April 26, 2001.
58. So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In *Dr Joseph NK Arap Ng’ok v Justice Moiyo Ole Keiyua & 4 others* [CA 60/1997](#) [unreported]; and in *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows: “It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all” [Emphasis added].
59. The pronouncement in *Gladys Wanjiru* and *Dr Joseph NK Arap Ng’ok* (supra) has been echoed in various Environment and Land Court decisions post the 2010 Constitution, including; *Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & another*, Environment and Land Case No 471 of 2010; [2022] eKLR; *John Elias Kirimi v Martin Maina Nderitu & 4 others*, Environment and Land Suit No 320 of 2011; [2021] eKLR; and *Kadzoyo Chombo Mwero v Ahmed Muhammed Osman & 11 others*, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few.
60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions



include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfilment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter. In *Peter Wariire Kanyiri v Chrispus Washumbe & 2 others*, Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows: “[15]. In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences” [Emphasis added].

61. While we agree with the general tenor of the learned Judge’s foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.
  62. Back to the facts of this case, the allotment letter issued to Renton Company Limited was subject to payment of stand premium of Kshs 2,400,000.00, annual rent of Kshs 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.
145. It is imperative to highlight and underscore that any person, the Petitioners not excepted, seeking to appropriate the protection enshrined vide Article 40 (3) of *the Constitution*, 2010, is obligated to demonstrate that same has since acquired and accrued legal or equitable rights, over and in respect of the designated property. Instructively, the provisions of Article 40 of *the Constitution*, 2010, only spring into action to vindicate and protect property rights which have since accrued and not otherwise.
  146. Put differently, a party the Petitioners not excepted, cannot implead and/or invoke the aid of Article 40 of *the Constitution*, 2010, where same have not procured and/or acquired legal rights to the property in question. For good measure, the provisions of Article 40 of *the Constitution*, 2010; cannot be invoked to vindicate illusory, inchoate and/or imaginary property rights.
  147. The Court of Appeal in the case of *Nelson Kazungu Chai & 9 others v Pwani University College* [2017] KECA 135 (KLR) captured the obtaining legal position as hereunder:
    22. Before we conclude, we need to say something about Dr. Khaminwa’s submission about the appellants’ human rights being violated, and also on forceful evictions. A right can only be protected when it exists in reality and not where it remains an illusion or a mere expectation. Right to property is not one of those rights that inhere to every human being upon birth. They are



acquired in different ways after one comes into this world. One cannot acquire property rights over another's property other than in a manner prescribed in law. In this case the appellants' claim to the suit property was in our view merely aspirational or rhetorical. This is so both under our very progressive Constitution and also under International Law. Indeed, other than call in aid International Law, learned counsel Dr. Khaminwa did not cite any specific instrument that the appellants can leverage on to elevate the appellant's right to practice and enjoy their culture on the respondent's property over the respondent's rights under Article 40 of *the Constitution*. In the absence of any right under the doctrine of legitimate expectation and of any other valid colour of right, the trial court could not have arrived at any other finding. Our conclusion is that the learned Judge arrived at the right decision based on the evidence placed before him, and he cannot be faulted.

148. Flowing from the foregoing, I come to the conclusion that the Petitioners' claim as pertains to breach and/or violation (sic) their property rights under Article 40 of *the Constitution*, 2010, are imaginary and illusory. In any event, there is no gainsaying that a Court of law like the one beforehand can only protect rights which have crystalized, accrued and not otherwise.
149. Moreover, there is no gainsaying that it is not the business of this Court or any other court in the Republic of Kenya to confer and/or vest rights in a party. On the contrary, it is the mandate and jurisdiction of a Court of law to protect, enforce and vindicate rights that have been acquired and/or accrued.
150. To this end, it is instructive to reference and highlight the provisions of Article 20 (3) of *the Constitution* 2010.
151. For ease of appreciation, the said provisions state as hereunder:  
Application of Bill of Rights.
- (1) The Bill of Rights applies to all law and binds all State organs and all persons. *Constitution of Kenya, 2010*
  - (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
  - (3) In applying a provision of the Bill of Rights, a court shall—
    - (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
    - (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
152. Other than the Petitioners' claim predicated on the basis of the letter of allotment, there is yet another aspect that merits mention and a short interrogation. The aspect herein related to the contention by the Petitioners that same have also been in occupation of the suit property for more than 30 years.
153. To this end, the Petitioners have propagated and espoused a claim pertaining to rights acquired on the basis of occupation and possession.



154. For ease of appreciation, the Petitioners have contended thus:

“ 16 b. The Kismayu Farmers and residents have been residing and farming on the said parcel of land for over 30 years without any claim or interference whatsoever by the Administration Police or any private individual.”

155. My understanding of the claim underpinned by paragraph 16 [b] of the Further amended Petition drives me to the conclusion that the Petitioners’ claim is also anchored on longevity of occupation. The question that does arise is whether the duration of occupation of Public land by anyone, the Petitioners not excepted, can vest the occupant with any legal or equitable right thereto.

156. I am afraid that the claims based on the longevity of occupation, which is akin to a claim for adverse possession and prescription, does not lie as pertains to Public land. For good measure the suit property, which is being claimed by the Petitioners was and remains Public land insofar as same has never been alienated in accordance with the law.

157. The fact that claims based on longevity of occupation do not apply to public land is espoused vide the provisions of Sections 41 of the Limitations of Actions Act. The said section stipulates thus:

41. Exclusion of public land This Act does not—
  - a. enable a person to acquire any title to, or any easement over—
    - (i) Government land or land otherwise enjoyed by the Government;
    - (ii) mines or minerals as defined in the *Mining Act* (Cap. 306); [Rev. 2012] Limitation of Actions CAP. 22 L19 - 23 [Issue 1]
    - (iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);
    - (iv) water vested in the Government by the *Water Act* (Cap. 372);
    - (v) land vested in the county council (other than land vested in it by section 120(8) of the Registered *Land Act* (Cap. 300)); or
    - (vi) land vested in the trustees of the National Parks of Kenya; or
  - b. affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.

158. Arising from the foregoing analysis, it is now appropriate to answer issue number one. Instructively, my answer to issue number one is four fold. Firstly, the Petitioners herein are separate and distinct from Kismayu Farmers Company Limited and hence same cannot purport [for whatever its worth] to ride on the basis of a letter of allotment (sic) issued in the name of the Company.

159. Secondly, the letter of allotment which is purported to have been issued in the name of the Company long before same was incorporated, was issued in favour of a non-existent Legal entity. The letter of allotment was thus a nullity.

160. Thirdly, even if the letter of allotment could prophetically issue in favour of a Company that had neither been conceived nor birthed at the material point in time, same lapsed by effluxion of time when the terms/conditions thereunder were not complied with timeously.



161. Lastly, a letter of allotment by and of itself does not confer and/or vest any legal rights to the bearer thereof. Pertinently, a claim pertaining to land only accrues upon the issuance of a letter of allotment, compliance with the terms thereof and ultimately upon the issuance of a Certificate of Title or Lease, whichever is applicable. [ See *Wreck Motor Enterprises v Commissioner of Lands & 3 others* [1997] eKLR.
162. As pertains to the second issue, namely, whether the Petitioners have proven that same were evicted from the suit property and if so, by whom, it is imperative to recall and reiterate that it is the Petitioners who raised the complaint that same were illegally and unlawfully evicted from the suit property. To this end it is the Petitioners who are charged with the obligation of placing before the Court plausible, cogent and credible evidence to demonstrate that there was an eviction levied against same.
163. Moreover, it is also imperative to underscore that other than proving eviction, the Petitioners would also be obliged to prove the persons, if any, that were culpable for the impugned eviction.
164. The legal position that the burden of proof lays at the doorstep [shoulders] of the Petitioners, namely, claimant is trite and established. For good measures, the provisions of Sections 107, 108 and 109, of the *Evidence Act*, Chapter 80 Laws of Kenya, are succinct and apt.
165. Moreover, the legal position highlighted in the preceding paragraph was underscored by the Supreme court in the case of *Gwer & 5 others v Kenya Medical Research Institute & 3 others* (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment) where the Court stated thus:
49. Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
50. This Court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”
51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1<sup>st</sup> respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.
166. Bearing in mind the established position of the law as pertains to the burden and standard of proof, it is now appropriate to revert to the subject matter and to discern whether the Petitioners have indeed proven their claim touching on the question of eviction from the suit property.
167. To start with, it is important to highlight that the further amended Petition adverts to the position that the eviction that is complained of was allegedly undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. To this



end, it is imperative to reproduce paragraphs 14, 15 and certain aspects of paragraph 16 of the further amended Petition.

Paragraph 14:

On or about the 13<sup>th</sup> May 2019 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents led a group of Administration Police together with other unknown individuals to the said parcel of land and destroyed all the crops that had been planted thereon by the Petitioners' families and further removed the Petitioners forcefully from the area, without advising them of any reasons or justification for their actions.

Paragraph 15:

That the said 1<sup>st</sup> Respondent personally oversaw the fencing of the said parcel by unknown private developers and which fencing is still going on [went on] under his armed guard of Administration Police who are under his command and watch.

Paragraph 16:

The actions by the said 1<sup>st</sup> and 2<sup>nd</sup> Respondents are not only unlawful and illegal but unjustifiable in the circumstances.

168. It is apparent that the Petitioners contention is to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the ones responsible for the offensive destruction of the crops, structures and eviction. In this regard, it was therefore incumbent upon the Petitioners to place before the Court credible evidence to justify the foregoing averments.
169. Did the Petitioners prove that same were evicted from the suit property? In an endeavour to discern whether or not the Petitioners have tendered and placed before the Court credible evidence, it is important to revert to the evidence of PW2.
170. PW2 contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents led a group of Police Officers to invade the suit property. In this regard, it suffices to reproduce the pertinent aspects of the evidence of PW2 while under cross examination by Learned Counsel for 5<sup>th</sup> Respondent.
171. The witness stated thus:

“I have stated that the Police came onto the land and invaded our premises. I have also indicated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the ones who invaded the land. I do confirm that I have not referenced the 5<sup>th</sup> Respondent in my witness statement. I have indicated that the land was taken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.
172. Though the witness had initially made similar contention during her evidence in chief, it is worthy to recall that an attempt to produce photographs [photographic evidence] to vindicate the impugned eviction was objected to. Moreover, the objection to the production of the photographic evidence was upheld by the Court on the basis of the provisions of Sections 106 B of the *evidence Act* Chapter 80, Laws of Kenya.
173. Following the failure to tender and produce the photographic evidence, what becomes apparent is that the testimony of PW2 as pertains to eviction was not corroborated. In any event, the averments by PW2 did not meet the statutory threshold pertaining to the evidential burden of proof.
174. Other than the evidence of PW2 an endeavour to demonstrate eviction was also adverted to by PW1, namely, the Valuer. It was the testimony of PW1 that same was instructed and retained by the Petitioners to undertake inspection and valuation in respect of the structures and items that had been destroyed. In addition, PW1 ventured forward and testified that pursuant to the instructions, same



proceeded to the locus in quo and undertook the valuation exercise culminating into the preparation of the Valuation Report dated the 16<sup>th</sup> May 2019.

175. Nevertheless, even though PW1 contended that same went to the site and found that the structures had been demolished, same however conceded that the valuation Report did not contain photographs of any demolition, if at all, that had been undertaken on the locus in quo that was visited by himself [PW1].

176. While under cross examination by Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, PW1 stated thus:

“When I visited the area, I found destroyed crops and concrete slabs that had been destroyed. I prepared a Report. The report is before the Court. There are no photographs that I took. I also don’t have any schedule of the destroyed items.

177. To my mind, PW1 who visited the locus in quo has conceded [admitted] that despite inspecting the suit property, same neither took nor availed photographic evidence to underpin his claim that there were destructions that had been done on the suit property.

178. In my humble view, the absence of photographic evidence showing the alleged destructions, negated proof of the claim. Nevertheless, it is not lost on me that the standard of proof is on a balance of probabilities, or better still, the preponderance of probabilities.

179. Additionally, it is also important to recall that the claim pertaining to eviction was also contested by the 5<sup>th</sup> Respondent. For good measure, the 5<sup>th</sup> Respondent posited that the eviction that underpins the claim beforehand was undertaken in the year 2012 by the National Government and not otherwise. Instructively, the evidence that was tendered by RW3 [Margaret Munene] was not controverted.

180. The said witness is on record stating as hereunder while under re-examination

“I am privy to the contents of the Affidavit sworn before the Court. I do wish to add that the 5<sup>th</sup> Respondent herein did not evict anyone. The 5<sup>th</sup> Respondent has never evicted the Petitioners.

I wish to clarify that the evictions were undertaken in the year 2012. The evictions were undertaken by the National Government.

181. Furthermore, there is yet another curious perspective that does arise and which impacts on the authenticity of the claim that the Petitioners were evicted from the suit property and in particular, the area known as Kismayu Village.

182. During the course of her testimony, PW2 testified that the suit property wherein the impugned eviction is said to have been undertaken is the same land which housed Mitumba Village.

183. To this end, it is important to revert to the evidence of PW2 while under cross examination by Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.

184. The witness stated as hereunder:

“We were seeking to be allocated the land in question. The land in question was the land where Mitumba Village is situated.

185. It is instructive to recall that Mitumba Village related to the land where the previous eviction was undertaken culminating into the filing of the famous Mitu-bell Welfare Society case, which ultimately



went to the Supreme Court of Kenya. [See *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment)]

186. In my humble view, the fact that the land in question is contended to be the same land where Mitumba Village was located brings to question the bona fides of the contention that the Petitioners herein were evicted. To my mind, the subject Petition seems to be a disguised attempt by the current Petitioners to re-agitate the same cause of action, which was addressed in the Mitu-bell case.
187. Perhaps, what the Petitioners have done is to undertake some cosmetic changes and facelift by pushing to the front persons who were not parties in the previous case merely and in an endeavour to camouflage the true identity of the dispute.
188. The foregoing fear[s] and suspicion is fortified again by the involvement of one William Musembi who is stated to have been a resident of City Cotton Village, but same has also been introduced into the subject matter as one of the beneficiaries whose (sic) structures are said to have been demolished.
189. Surely, the said William Musembi who featured prominently in the *William Musembi Versus Moi Educational Centre* case, cannot be omnipresent in all the evictions.
190. To vindicate the foregoing observation, it is imperative to revert to the evidence of PW2 while under cross examination by Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
191. The witness stated thus:

“I erected the temporary house on the land where Mitumba Village was. I was a member of Mitumba Village. I am conversant with one called William Musembi. The said William Musembi is a resident of City Cotton.

192. Notwithstanding the foregoing testimony, namely, that William Musembi is a resident of City Cotton, it is worthy to underscore that William Musembi is also indicated as one of the beneficiaries in respect of the instant matter. For good measure, the name of William Musembi is reflected as number 109 in the table highlighted under paragraph 17 of the further amended Petition.
193. I entertain grave doubts as to the bona fides of the claim underpinning the subject Petition. It is evident that the instant Petition appears to be a scheme intended to propagate some falsehood[s] merely to accrue recompense.
194. Finally, I also wish to state that it is not enough for the Petitioners to state that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are the ones who occasioned and propagated the demolition and eviction without substantiating the claims. Instructively, even where the adverse party does not file any rejoinder, the burden still rests with the claimant.
195. In the case of *Daniel Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] KECA 642 (KLR), the Court of Appeal stated as hereunder:

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.



196. Save for the evidence that the fencing of the land belonging to the 5<sup>th</sup> Respondent and wherein Wilson Airport is located was undertaken, I have no credible evidence to underpin the contention that any evictions was undertaken at (sic) Kismayu Village. Indeed, lack of photographic evidence to demonstrate the claim by the Petitioners has negated proof of the Petitioners' claim.
197. Regarding the third issue, namely, what reliefs [if at all] ought to be granted, it is imperative to state that the Petitioners herein have sought a plethora of reliefs. To start with, the Petitioners herein have sought for a Permanent Injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from encroaching, evicting, fencing and/or in any other manner evicting the Petitioners from the suit property.
198. Nevertheless, despite seeking an order of permanent injunction, PW2 conceded that the Petitioners were (sic) removed from the suit property. Instructively, the contents of paragraphs 5 and 6 of the Affidavit in support of the further amended Petition are apt.
199. For ease of appreciation, it is appropriate to reproduce the contents of paragraphs 5 and 6 of the Supporting Affidavit under reference.
200. Same state as hereunder:
5. That on or about the 13<sup>th</sup> May 2019, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents led a group of Administration Police together with other unknown individuals to the said parcel of land and destroyed all the crops that had been planted thereon by our families and further removed them from the area without advising us of any reason or justification for his actions.
  6. That the 1<sup>st</sup> Respondent personally oversaw the fencing of the said parcel by unknown private developers and which fencing went on under his armed guard together with Administration Police under his command and watch.
201. My understanding of the contents of the paragraphs which have been reproduced hereinbefore drives me to the conclusion that the Petitioners are no longer on (sic) the suit property. In this regard, an Order of Permanent Injunction cannot issue to restrain an act which has since occurred.
202. Moreover, the Petitioners have also sought for a declaration that the forceful eviction of the Petitioners from the suit property was unlawful, un-procedural and unconstitutional. Nevertheless, I beg to underscore that while dealing with issue number two elsewhere hereinbefore, I have found and held that the Petitioners were not evicted from (sic) the suit property, either in the manner contended or otherwise.
203. The other claim by the Petitioners relates to a declaration that the 5<sup>th</sup> and 6<sup>th</sup> Respondents claim to the suit property prompted or led to the illegal eviction of the Petitioners. Suffice it to posit, that the Petitioners herein have no legal or equitable rights to the suit property.
204. Other than the foregoing, I have also found and held that the Petitioners did not place before the Court plausible and credible evidence to demonstrate the impugned eviction.
205. Furthermore, the Petitioners have also sought for an Order of Mandatory Injunction compelling the Respondents to re-settle the Petitioners back on the suit property. Notably, the suit property comprises of Public land which is duly alienated on the basis of reservations for use by the 5<sup>th</sup> Respondent.
206. For good measure, evidence abound that what constitutes the suit land falls on the flight path/take off lane of Wilson Airport. In this regard, an Order for re-settlement of the Petitioners on the suit land would be contrary to Public Policy, Public interests and safety.



207. Other than the foregoing, it is also imperative to posit that the prayer for re-settlement falls outside the purview of the Respondents who have been sued and/or impleaded. To my mind, a Court of law can only make an Order directed to and against persons who are Statutorily charged with the duty to implement same and not otherwise. In this regard, the prayer for re-settlement falls by the wayside.
208. The Petitioners have also sought for an alternative order that the Respondents do avail an alternative land within the City of Nairobi and thereafter process Titles in favour of the Petitioners without subjecting the Petitioners to payments of any Statutory fees or any other payments whatsoever.
- 2X9. I am afraid that the question of allotment and/or alienation of Public land belongs to the Jurisdiction of National Land Commission. Furthermore, whosoever wishes to partake of and/or benefit from allotment of Public land must make the requisite application to National Land Commission. See the provisions of Article 67 [2] as read together with Article 62 [3] and [4] of *the Constitution* 2010. [See also Sections 9 and 12 of the *Land Act*, 2012 [2016].
210. Moreover, it is not lost on me that National Land Commission which is chargeable with the mandate to administer and manage Public land, including allocating same is an independent Constitutional Commission and by virtue of its portfolio, same is immune to the directions of any person or body as pertains to the manner in which it discharges its mandate. Certainly, it does not fall within my jurisdiction to direct the Respondents, least of all the 4<sup>th</sup> Respondent to allocate land. Such an Order would be illegal and void. [See Article 249[2] of *the Constitution*, 2010].
211. Finally, the Petitioners herein have sought compensation in the sum of Kshs. 59,784,894/= only on account of (sic) the mabati structures that are said to have been demolished as well as the household items. The claim pertaining to compensation is underpinned by the Valuation report dated the 16<sup>th</sup> May 2019.
212. However, it is worthy to recall that though the valuation report which was tendered and produced as exhibit P1 is dated the 16<sup>th</sup> May 2019, PW1 however, indicated that same was instructed on the 18<sup>th</sup> May 2019. Furthermore, PW1 testified that upon receipt of instructions same visited the locus in quo on the 19<sup>th</sup> May 2019 and the 20<sup>th</sup> May 2019, respectively.
213. No doubt, the valuation Report dated the 16<sup>th</sup> May 2019 was prepared, dated and signed prior to receipt of instructions and visitation to the locus in quo. Notably, there does arise a discrepancy which negates the probative value of the Report.
214. Be that as it may, I am alive to the testimony of PW1 wherein same contended that the date shown on the report is an error. In addition, the witness contended that the report should have been dated the 26<sup>th</sup> May 2019. However, despite the explanation that was tendered by PW1, there is no gainsaying that the report [written document] which was tendered and produced was never amended.
215. To this end, what comes to the fore is that there is a variance between the oral evidence that was tendered by PW1 and the Documentary evidence [namely valuation report]. The variance under reference similarly impacts on proof and probative value of the report.
216. Additionally, it is imperative to highlight that the Petitioners had stated and pleaded at the foot of the further amended Petition that same have annexed a valuation report dated the 16<sup>th</sup> May 2019 giving a detailed account of the said loses and damages. [See paragraph 17 of the further amended Petition].
217. Having pleaded the foregoing position, there is no gainsaying that the Petitioners are bound by their pleadings. To this end, if any evidence was tendered that contradicts the pleadings, then such evidence goes towards proving no issue. [ See Order 2 Rule 6 of the Civil Procedure Rules, 2010]. [See also



Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ). [see also IEBC –vs- STEPHEN MUTINDA MULE [2013] eKLR.

218. Finally, it is also instructive to speak to the merits of the report. To start with, the valuation report is an expert document and thus same can only be prepared and produced by a qualified, registered and practicing Valuer. On the face of the report, it is shown to have been prepared by a Valuer. However, the entirety of the report that was tendered and produced in Court does not contain/include the requisite Professional Certificate and Licence. These are very critical documents.
219. Absent such documents, a Court of law cannot be able to authenticate and/or verify whether or not the witness namely, PW1 was truly qualified and licensed. I must point out that it is not the duty of the court to search for evidence from the parties. On the contrary, it is the parties and their witnesses to place before the Court evidence to vindicate their competence or otherwise. [See Ethics and Anti-Corruption Commission –vs Stanley Mombo Amuti [2019] Eklr, at paragraphs 83, 84 and 85, respectively.
220. In a nutshell, I am not persuaded that the valuation report which was tendered and produced on behalf of the Petitioners suffices to prove the compensation adverted to. In any event, it is also not lost on me that the valuation report also did not advert to the methodology, if any, that was deployed by the valuer.
221. Moreover, it is also worthy to recall that the valuation report appears to have taken the words of the Petitioners as the plain truth. I say this because the valuer purports to have assessed beddings, kitchenware and other domestic chattels, which same did not see.
222. Simply put, PW1 was told I had them and he [sic] believed the statements.
223. Sadly, a valuation report that does not speak to the methodology deployed and relied upon is contrary to the prescribed professional and International standards. To this end, the impugned valuation report is incapable of underpinning the compensation sought.

#### **Final Disposition.**

224. Flowing from the analysis, which has been highlighted in the body of the Judgment, I come to the conclusion that the Petitioners beforehand have neither established nor proved their claim to the requisite standard. Instructively, it is the Petitioners who were charged with the burden of proving their claim.
225. Arising from the foregoing, I come to the conclusion that the Petition beforehand is devoid and bereft of merits.
226. In the premises, the final Orders of the Court are as hereunder:
  - i. The Petition be and is hereby Dismissed.
  - ii. Nevertheless, each party shall bear own costs taking into account the nature of the issues and coupled with the fact that the award of Costs is at the discretion of the Court.

It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI this.....7<sup>th</sup> day of May 2025**

**OGUTTU MBOYA, FCI Arb**

**JUDGE**

