



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 28 OF 2020

JUSTUS CHAI MBARU & 12 OTHERS.....PETITIONERS

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

NATIONAL LAND COMMISSION..... 1ST INTERESTED PARTY

BUXTON POINT APARTMENTS LIMITED....2ND INTERESTED PARTY

KHALIFA MOHAMED & 17 OTHERS.....3RD INTERESTED PARTIES

JUDGMENT

(Petition by thirteen residents of Buxton Estate in Mombasa seeking to stop the implementation of an urban renewal and regeneration project that proposes to demolish the houses that they reside in and in place build new ones with the tenants being given a first option to purchase; petitioners claiming that the project violates their fundamental rights and freedoms including the right to housing; issue of res judicata raised that the issues had previously been heard and determined; res judicata in constitutional petitions; court finding that most issues determined save only for the aspect of the execution of the project executing the vacation of the tenants from the premises; court finding that there is no violation of any constitutional provision as there was public participation and the tenants given compensation to allow them get alternative accommodation for the duration of the project; petition dismissed)

PART 1: INTRODUCTION AND PLEADINGS

Introduction

1. The County Government of Mombasa, the respondent in this petition, has proposed a project dubbed ‘**Urban Renewal and Redevelopment of Old Estates within Mombasa County**’ (hereinafter referred to as ‘the project’) which project is aimed a rehabilitating 10 or so housing estates within Mombasa, with one of the affected estates being Buxton Estate. Buxton Estate is located in Mombasa Town, off Digo Road and stands on a portion of 14 or so acres, said to be within the land parcels MI/XVII/985, MI/XVII/625, and MI/XVII/98. The project proposes to demolish the 520 flats in Buxton Estate, and in place, build about 1500 new residences. This intended action is opposed by the 13 petitioners who claim that undertaking the project will violate several of their constitutional rights. They have therefore sued the County Government of Mombasa to have the project stopped. There are however other persons, who comprise residents of Buxton Estate and residents of other estates in Mombasa, who have no problem with the intended project and actually support it. They sought to be enjoined to this petition which application was allowed. They are 18 persons in total, and for ease of reference, they are collectively referred to as the 3rd interested parties. The 1st interested party is the National Land Commission (NLC) whilst the 2nd interested party is the contractor engaged by the respondent to undertake the project to its completion.

2. The 13 petitioners commenced this Petition on 28 September 2020. The Petition was initially filed in the High Court at Mombasa in the Constitutional and Human Rights Division. It was placed before Honourable Justice Ogolla, the Presiding Judge of the High Court of Kenya in Mombasa, who was of opinion that the issues raised lie for determination in the Environment and Land Court and thus proceeded to order the transfer of the matter to this Court. That is how I came to be seized of this matter. Alongside the petition, the petitioners did file an application seeking conservatory orders pending the hearing and determination of the petition. Parties agreed to have the status quo maintained pending hearing of the petition, and thus the project, in so far as it relates to Buxton Estate, is yet to commence.

The Petition

3. In the petition, the petitioners, aver that they are residents of Buxton Estate (the Estate). They state that the flats in the Estate are leased out to them and to other tenants at a highly rebated monthly rent, being Kshs. 3,662/= for a two bedroom house and Kshs. 2,810/= for a one bedroom house. They contend that the said units have always been meant to be occupied by persons of low income. The petitioners claim that the Estate was built by the Kenyan Government in partnership with the then Municipal Council of Mombasa, to provide decent and affordable housing for the less fortunate members of the society who are from poor backgrounds. They aver that through the said partnership, the National Government constructed houses in various other Estates, and they cite Khadija Estate, Tudor Estate, Kaa Chonjo Estate, Likoni Estate and Tom Mboya Estate, all within Mombasa County, for use by the less privileged members of the community.

4. The petitioners state that the respondent, the County Government of Mombasa, is one of the organs in the Government of Kenya, and collects rent from the petitioners and other tenants of the Estate, which means that the houses stand on Government land. They contend therefore, that the Estate sits on public land, and consequently, the said land is subject to the control of the 1st interested party, the National Land Commission (NLC).

5. The petitioners state that the 2nd interested party is a private investor in partnership with the respondent, whose role is to undertake the construction of the new houses. The petitioners aver that the tender for the said project was floated by the respondent sometime in June 2019 via BID NO. CGM/PRO/T/002/2019 whereby the 2nd interested party was the only party that took part in the said bid, and the tender was subsequently awarded to it. The petitioners aver that the said project was to commence in January 2021 and the petitioners were already served with a 90 days notice to vacate from the said flats in order to pave way for the said construction works to take place. The petitioners claim that if the arrangement between the respondent and the 2nd interested party takes place, it will mean as follows :-

a. The said 14 acres of public land will have been alienated by the respondent without the approval of the NLC in favor of a joint venture business arrangement that will be for the benefit of the respondent and the 2nd interested party. The petitioners do not see justification for them to be evicted from their secure accommodation so as to allow a private developer to reap huge profits out of their plight.

b. The current tenants in the said flats at the Estate will lose their secure accommodation as the houses which they currently occupy will be demolished and instead other houses will be erected thereon which will be sold to any willing buyer at commercial rates. The petitioners state that many of them will not have the opportunity of purchasing any such houses as they are people of low income means.

c. A private party, to wit, the 2nd interested party, will make profits by using public land, yet the same has not been sanctioned by the 1st interested party (NLC). Furthermore, the said public land will have been alienated by the respondent without involving the NLC.

6. The above points are also pleaded as constituting the “particulars of illegalities and violation of the petitioners’ constitutional fundamental rights.”

7. The petitioners aver that they are aggrieved by the aforesaid decision of the respondent as the same will translate to a number of illegalities and violation of some of the petitioners’ fundamental rights. Moreover, they state that the said decision will result in a number of constitutional principles being violated by the respondent and therefore this petition is filed to ensure that the said illegalities and other constitutional fundamental rights are not degraded. The petitioners list the said illegalities and violations of the petitioners’ fundamental rights and other constitutional principles as follows:-

a. A survey map from the Lands Registry indicates that Buxton Estate stands on a portion of 14 acres of public land. The powers to manage and alienate public land is vested in the NLC as per Article 67 (2) (a) of the Constitution and Section 5(2) (a) of the National Land Commission Act. A county government cannot therefore usurp the powers of the NLC to alienate public land. This amounts to the violation of Article 10, 47 and 67 of the Constitution. Any project that is to be carried out on public land must be subject to the approval of the NLC.

b. A public body, no matter how well-intentioned, may only do what the law empowers them to do which is the essence of the principle of legality. The petitioners state that the respondent acted unlawfully by purporting to alienate a portion of public land to a private investor without the approval of the NLC as enshrined under Article 67 of the Constitution in execution of the Public Private Partnership between the respondent and the 2nd interested party.

c. The demolition of the existing flats in Buxton Estate and the intended construction of some 1500 units will create a lot of disturbances that will have a huge social, political and economic implications. The petitioners state that they did not participate in the deliberations that led to the decision that has such heavy ramifications.

d. The respondent unlawfully used the Public Private Partnership Act to confer a benefit over the use of the said public land on the 2nd interested party which renders the said decision illegal.

e. No Environmental Impact Assessment was carried out and therefore the issue of sustainability of the said project has not been analyzed. This is a violation of the Environmental Management and Coordination Act.

f. The respondent has completely failed to supply the petitioners with necessary documents with regard to the said project even though in *Mombasa High Court Petition No. 39 of 2016* the respondent was ordered to do so. Moreover, the same further amounts to violation of Article 35 of the constitution.

8. The petitioners contend that the respondent has failed to carry out a comprehensive feasibility study and Environmental Impact Assessment (EIA) to establish the adverse effects that the said project is likely to visit on the people of Buxton Estate. They aver that this is

especially so in relation to the relocation costs that the residents are set to incur to relocate to other areas. They state that the respondent, on an *ex-parte* basis, resolved to compensate each tenant an amount of Kshs. 300,000/= for relocation for a period of two years, pending completion of the said project. They claim that a valuation report carried out on the neighboring areas has indicated that the rent for a two bed roomed house for a period of two years would cost Kshs. 576,000/= which is almost twice the amount being offered by the 2nd interested party. They contend that the petitioners and the residents are supposed to purchase the flats at commercial rates. The petitioners state that there is no assurance that the houses will be completed in two years and even more serious is the fact that they will not be in a position to buy the houses at the commercial rate that they will be sold at. They plead that this will contravene the principle of sustainable development, in that, the developer should ensure that the affected people are not left in a worse situation than they were in before the commencement of the project. The petitioners plead that if the intended project proceeds, they will be rendered homeless, which will translate to a violation of their fundamental rights to human dignity, and the rights to reasonable housing, under Articles 28 and 43 on the Constitution.

9. The petitioners state that the tender in issue was first floated in 2016, when a meeting was held with the respondent, and they aired their concerns, which were to be addressed by the respondent and the party that would eventually win the bid. They say that this never materialized and so the eventual award of the tender to the 2nd interested party came as a surprise to them, as no such tender would have been awarded without them having participated. They claim that the award was done discreetly and in an opaque manner which lacked transparency. They contend that their concerns and grievances have not been addressed. The petitioners claim that the respondent purports to have carried out a public participation forum on 16 August 2020 at the Wild Waters Mombasa. They state that they were not served with any notice for the said meeting and only came to learn of the same through the grape vine, and as such, only a few members of Buxton Estate were able to attend the said meeting. The petitioners aver that the agenda of the said meeting turned out to be a lecture by the respondent and not public participation as had been insinuated. They say that in the subsequent meetings held on 3rd, 4th, and 5th September, 2020, at Tononoka Social Hall, various pressure groups from Bombolulu, Kisauni and Bamburi areas, were sponsored to attend the said meetings to support the initiation of the project. The petitioners state that the said groups of people are not in any way going to be affected by the said project and that the concerns raised by members of Buxton Estate who were present in the meeting were never addressed at all. They therefore assert that the implementation of the said project is in contravention of the constitutional principles of public participation and claim a violation of Article 174 of the Constitution.

10. The petitioners plead that Kenya is a state party to the International Convention on Economic, Social and Cultural rights (ICESCR), the International Convention on Civil and Political rights (ICCPR) and The Universal Declaration of Human Rights (UDHR), and that this means that the respondent is under an obligation to comply with Article 11 (1) of ICESCR, Article 9(1) and Article 17(1) of the ICCPR, and also Article 1, 7, 8, 12, 21 and 25 of the UDHR, in so far as the right to housing and human dignity is concerned.

11. The petitioners also contend that the respondent has not conducted a Tenant Eviction Impact Assessment on the residents of Buxton Estate and that the intended eviction will create serious and adverse impacts on the petitioners since the respondent has failed to address their grievances, which include, a relocation plan, compensation for the eviction, the come-back plan, the tenant purchase plan, and the payment rates for the new apartments. The petitioners plead that the respondent has failed to issue proper guidelines on the comeback plan for the residents in the event that the project is successfully completed. They reiterate that they are from poor backgrounds and cannot afford to purchase the new apartments at the market rates. They contend that the respondent has failed to heed to their request to draw a favorable plan on the payment method of the new flats. They state that they are protected tenants as they pay the sums of Kshs. 3,662/= and Kshs. 2,850/= for a two bedroom and single bedroom flat respectively. They point out that the Estate is strategically located near local amenities such as the Coast General Hospital; public schools, such as Ronald Ngala Primary, Tudor Day Secondary School, Coast National Polytechnic and Technical University of Mombasa; Kongowea and Majengo markets; and their eviction will therefore interfere with their social lives and compromise their personal dignity, which is a fundamentally protected right under Article 10 (2) (b) of the Constitution.

12. The petitioners state that in **Mombasa High Court Petition No. 39 of 2016** and in **Court of Appeal Civil Appeal No. 46 of 2017** it was held that they are entitled to information which right has been violated. They state that in light of this, this petition should not be defeated by the plea of *res judicata*.

13. The petitioners plead that the respondent is cunningly using the concept of Public-Private Partnership captured in the Public Private Partnership Act, 2013, as a vehicle to carry out a fraudulent and illegal alienation of public land. They reiterate that public land is vested in the 1st interested party and that any alienation thereof without the consent of the 1st interested party would render such alienation unlawful.

14. Arising from the above grievances, the petitioners pray for the following orders:

- a. A declaration that the respondent has acted in violation of Articles 10, 47, 43 and 67 of the Constitution of Kenya, 2010 in the manner in which it has vested public land on the 2nd interested party.
- b. A declaration that the 2nd interested party does not have the capacity to deal with any portion of the said 14 acres of land where Buxton Estate stands.
- c. A declaration that the petitioners have a fundamental right to quietly and peacefully continue occupying the flats in Buxton Estate and that the respondent and the 2nd interested party do not have the power to interfere with the petitioners' quiet and peaceful occupation thereof.
- d. The court do issue such orders and give directions as it may deem fit to meet the end of justice.
- e. Costs of the petition be provided for.

15. The petition is supported by the affidavit of Justus Chai Mbaru. In it, he deposes that the petitioners have been resident in Buxton Estate for over 40 years. He states that the Estate is managed by the respondent who collects rent for revenue of the County of Mombasa and that they have faithfully been paying their rents, and never had an issue with the respondent over their tenancy. He has annexed samples of their

tenancy agreement and rent payment receipts. He has deposed that the Estate comprises of 520 units which are fully occupied. He has annexed a survey plan, the topocadastral map, and the Registry Index Map, and a report by Edward Kiguru, registered surveyor, to demonstrate that the units sit on the plots No. MI/XVII/985, MI/XVII/625, and MI/XVII/981. He stated that they have already been served with a 90 days notice to vacate the units so that the project may commence. He has deposed that when the idea of the project was first shared in the year 2016, the petitioners were assured that before implementation, they would be paid a monthly allowance of Kshs. 24,000/= for a period of 2 years, totaling to Kshs. 576,000/=, for purposes of allowing them obtain alternative accommodation pending completion of the project. He has stated that the tenants were also informed that they would be relocated back into the finished apartments with an offer to purchase the same at a subsidised price. He has deposed that the residents were not opposed to the idea, and were indeed thrilled to have the project carried out, but they were later informed that the tender has been cancelled, and the project was not materialized.

16. He has deposed that the tender was floated again in June 2019, via BID NO : CGM/PRO/T/002/2019 and the petitioners later came to learn that the 2nd interested party has won the tender and that the project was set to commence in January 2021. He has annexed a copy of the tender document. He has deposed that the 2nd interested party was incorporated in December 2019, whereas the tender for the project was awarded to the same 2nd interested party in June 2019. He has thus averred that the respondent awarded the tender to a non-existent company which is an element of fraud. He has annexed a copy of the CR-12 for the 2nd interested party.

17. He has deposed further that the project is a joint venture partnership between the respondent, a public institution, and the 2nd interested party as a private investor. He has stated that the Estate stands on public land, which means that it can only be alienated for the benefit of the public and not for private persons. He avers that the petitioners do not see the justification of removing them from their secure accommodation so as to allow a private developer to reap huge profits out of their plight.

18. On public participation, he has more or less repeated what is in the petition, that is that they were never served with notice of the meeting held at Wild Waters, Mombasa, and that the subsequent meeting at Tononoka Social Hall did not address their grievances. He has deposed that the 2nd interested party resolved to compensate each tenant with an amount of Kshs. 300,000/= for the 2 year relocation period, translating into Kshs. 12,500/= per month. He has referred to a valuation report which indicates that rent in neighbouring areas ranges between Kshs. 22,000/= to Kshs. 30,000/= per month, and that the petitioners will not be able to sustain such rental payments, meaning that they will be rendered homeless. He annexed the valuation report. He avers that they should not be left in a worse situation than they were in before the commencement of the project.

19. On the right to information, he deposed that the respondent and 2nd interested party, out rightly refused to furnish the petitioners with documents relating to the project in contravention of Article 35 of the Constitution. He annexed various letters written by members of the Estate requesting for information which he avers were never responded to. He deposes that this is despite the decision in **Mombasa High Court, Petition No. 39 of 2016, Legal Advice Center & 2 Others vs County Government of Mombasa** and **Court of Appeal, Mombasa Civil Appeal No. 46 of 2017**. He annexed the judgments in the said two cases. He deposes that failure to avail information raises questions of integrity, accountability, transparency, sustainable development and viability of the project.

20. He has deposed that no EIA was carried out nor a Tenant Eviction Impact Assessment. He has stated that their right to accessible and adequate housing stands to be affected and their eviction will interfere with their social lives as they live in a strategically located Estate. He has reiterated the failure to avail a come-back plan as pleaded in the petition.

Reply of the Respondent

21. In response to the petition, the respondent filed a replying affidavit sworn by Jimmy Waliaula, its County Attorney. He avers that the matters arising from the petition are *res judicata*. He deposes that the matters herein were directly and substantially in issue in **Mombasa High Court Petition No. 39 of 2016 Legal Advice Centre & 3 Others v. County Government of Mombasa and 4 others [2016] eKLR** with the parties litigating under the same title on behalf of the residents, and that the issues herein were raised, heard, and finally determined, through a judgment delivered on 23 December 2016 by P.J Otieno J, with the suit being dismissed for want of demonstration of any constitutional violation and/or alleged breaches of statutory provisions. He avers that an appeal, was lodged, being, **Mombasa Civil Appeal No. 46 of 2017, Legal Advice Centre and 3 others vs. County Government of Mombasa & 4 others**, and that the Court of Appeal by its judgment delivered on 5 July 2018 upheld all the findings of the High Court. He deposes that notwithstanding such dismissal, on 2 February 2017, another similar constitutional petition was lodged, being, **Mombasa High Court Petition No. 6 of 2017, Peter Obhunga Wakoyo and 87 Others vs. County Government of Mombasa and 3 others**. He avers that by a ruling delivered on 4 August 2020, this petition was struck out by Ogola J, on account of being *res judicata*.

22. The respondent states that the petition does not disclose any colorable claim for a constitutional violation capable of engaging the constitutional jurisdiction of this Honorable Court, and that there are statutory mechanisms for the ventilation of alleged statutory violations relied upon by the petitioners.

23. The respondent denies being an organ of the Government of Kenya as alleged by the petitioners, but an independent devolved government, established under Article 176 of the Constitution and Section 6 of the County Government Act, 2012 with authority to acquire, purchase or lease land. The respondent accepts being the registered owner, as lessee, of the Plot Nos. MI/XVII/625, MI/XVII/981 and MI/XVII/985, on which Buxton Estate is located. Mr. Waliaula deposes that the Estate was constructed solely by the respondent and was not a joint project with the National Government as alleged; that further, the respondent constructed various other estates on its properties within Mombasa County, on which, as is the case of Buxton Estate, it has sub-let those housing units to residents of Mombasa County at heavily subsidized rents. These estates include, Khadija Estate, Miritini Greenfield, Changamwe Estate, Tudor Estate, Mzizima Estate and Likoni.

24. The respondent avers that there is an acute dearth of affordable housing in Mombasa County, while those available, are not just inadequate, but in some cases in dilapidated states. To this end, the respondent, in consultation with various affected interested parties, is in the process of undertaking a programme of urban regeneration, tapping on the skills and resources of the private sector, not only to increase the housing and related amenities available within the County, but to redress and avoid potential urban blight. Mr. Waliaula has deposed that :-

a. The respondent, through its Urban Renewal & Regeneration Programme dubbed as “Mombasa Urban Renewal & Re-development of Old Estates” targets the upgrading of 10 of the County’s Estates which had been erected in the 1970s and were in deplorable condition. These estates include : Khadija Estate, Miritini Greenfield, Changamwe Estate, Tudor Estate, Mzizima Estate, Buxton Estate, Likoni Estate, Nyerere Estate, Tom Mboya Estate and Kaa Chonjo Estate.

b. The project entails demolition of old and run-down buildings, construction of up to date housing, and putting in place proper infrastructure, which would raise the living standards of residents therein as well as open up new economic opportunities. Through this programme, the respondent aims at actualizing the right to adequate and affordable housing to the residents of Mombasa County as provided under Article 43 of the Constitution.

c. The respondent, following the Kenya Affordable Housing Programme : Development Framework Guidelines, 2018 sought private sector funding by inviting partners and financiers who had capacity and expertise to undertake the project to completion.

d. Due to the magnitude and cost implication of the said project, the respondent invited the general public to bid for the tender vide a newspaper advertisement published on 3 February 2016, pursuant to Section 33 of the Urban Areas and Cities Act No. 13 of 2011 and Section 6 of the County Government Act, 2012 to carry out the project as a joint venture (the newspaper advertisements are annexed).

e. The respondent through a competitive tendering process awarded the tender CGM/PRO/T/002/2019-2020 to the 2nd interested party to construct 1500 houses in Buxton Estate (a copy of the award is annexed).

f. That subsequently, on 15 January 2020 the respondent and the 2nd interested party entered into a joint venture Agreement detailing the implementation of the project (the joint venture agreement is annexed).

25. Mr. Waliaula has continued to depose that Buxton Estate devolved from the Municipal Council of Mombasa to the County Government of Mombasa, and that the land upon which it is located is not public land, and does not therefore come within the ambit of the NLC as alleged by the petitioners. He has deposed that the respondent’s predecessor in title leased the suit property on 10 September 2010, from the Government of Kenya for a term of 99 years (renewable) at a peppercorn rent and was issued with a Certificate of Lease as proof of ownership. It is thus averred that there is no alienation of public land and the joint venture is properly and legally undertaken under the Public Private Partnership Act. The respondent pleads that the suit properties are exclusively owned by the respondent, as lessee from the Government of Kenya, and repeats that the property is not public land. Mr. Waliaula has referred this Court to the definitions of public land in Article 62 of the Constitution and has invoked Article 64 dealing with private land. Mr. Waliaula contends that the petitioners have wrongfully classified the suit properties as public land and further contends that the subject properties are private property as ordained by Article 64 (b) of the Constitution as read together with Section 25 of the Land Registration Act, 2012. He has pointed out that the mandate of the NLC does not extend to private land as provided in Article 67 of the Constitution. He has thus refuted all issues in the petition that have their basis on the claim that the land is public land.

26. The respondent avers that the project is being undertaken in compliance with all the relevant statutes with the 2nd interested party either obtaining or in the process of obtaining all relevant approvals, permissions and/or licenses, required from all the relevant authorities, be it under the Environmental Management and Coordination Act, CAP 287, (EMCA) or the Physical Planning Act, 2019, the commencement of the works being scheduled for January 2021. The respondent contends that in the circumstances, the petitioners’ complaints, such as alleged violation of EMCA, have been improperly raised, as this court lacks jurisdiction to entertain such complaints in constitutional petitions, and further, such claims are premature as well as factually and legally baseless. Mr. Waliaula has deposed that construction is (was) not set to commence until January 2021 and that the 2nd interested party is undertaking the EIA process and has obtained the relevant terms of reference from the National Environment Management Authority (NEMA). He has annexed a copy of the EIA terms of reference approval by NEMA.

27. The respondent states that following consultations with the residents, it made arrangements to provide alternative accommodation for the existing tenants from the date of demolition of the Estate until the date of completion of the project. Mr. Waliaula points out that the petitioners have admitted that the respondent has offered to compensate each tenant the sum Kshs. 300,000/= for relocation for the two year period within which the project will be undertaken which sum is adequate compensation.

28. The respondent denies breach of Article 174 of the Constitution on the principles of devolution. In response thereto, the respondent states that it has conducted adequate public participation by consulting the petitioners and availed to them the designs, scope and scale of the project, and has had public discussions. Particularly, the respondent states that it conducted adequate public participation on various dates including 16 August 2020 at Wild Waters Mombasa; 3 September 2020, 4 September 2020 and 5 September 2020, at Tononoka Social Hall. It is said that the turnout and attendance in the meetings was overwhelming and all the participants were accorded the opportunity to make contributions on the implementation of the project. Mr. Waliaula has annexed copies of the public participation attendance list and minutes of the meetings. He has pointed out that the petitioners admit these meetings.

29. The respondent has denied violation of the international instruments referred to by the petitioners and has asked that this petition be dismissed with costs to the petitioner and interested parties.

Response of the 1st Interested Party

30. The 1st interested party, the NLC, did not enter appearance, and filed nothing towards this petition. Neither did it participate in any other way, despite being duly served.

Response of the 2nd Interested Party

31. The 2nd interested party opposed the petition by filing a Response to Petition. It denied the description and understanding on what constitutes Government and/or a public land as stated in the Petition. It stated that the definition has been given without having due regard to the definition of public land as envisaged in Article 62 of the Constitution and Section 2 of the Government Land Act (repealed) that was in effect at the time of entering into the lease. It is pleaded that the respondent is a state organ as defined under Article 260 of the Constitution, and a body corporate established under the Constitution, thus capable of holding the said parcel of land as its private property for the remainder of the term of its Lease; that by virtue of Article 67 (2) (a) of the constitution the NLC has no business of whatever nature to intermeddle in any matters concerning private land; that the petitioners' allegation pegged on the land being public is rendered otiose and of no legal consequence, with the ultimate result that the petition itself cannot stand but fall. The 2nd interested party has pleaded that :-

- a. Buxton Estate property known as MI/XVII/625,981 and 985 are all held on leasehold tenure by the respondent;
- b. As at the time of these proceedings, that lease is still in force, and unexpired;
- c. The subject properties are therefore private property as ordained by Article 64 (b) of the Constitution.

32. The 2nd interested party states that in the petition, the petitioners complain that they have not been supplied with any information on the project, as was so ordered in **Petition No. 39 of 2016**. It avers that if that is so, the petitioners know the correct forum in which to enforce such orders and this does not include a process of filing a new suit or petition; that if the petitioners are desirous of obtaining any information from the respondent, they ought to exhaust the procedures contained in the Access to Information Act, No. 31 of 2016, which is a derivative of Article 35 of the Constitution and which establishes a robust mechanism, which the petitioners ought to exhaust and they ought not have filed this petition.

33. In addressing the issue of Environmental Impact Assessment, the 2nd interested party states that this was exhaustively dealt with in **Petition No. 39 of 2016**. It pleads that this aspect of the complaint properly belongs to the realm of abuse of court process. It is further pleaded that EMCA exhaustively provides how complaints and other disputes relating to the environment are to be resolved, and that there is the National Environment Tribunal (NET), tasked with resolving such disputes. It is thus contended that the petitioners are not properly before this Court to complain about NEMA licences relating to the subject project.

34. On the question of the tender, the 2nd interested party has pleaded that matters relating to tenders are dealt with at an appropriately created forum in enactments provided and made by Parliament and that the petitioners have not provided any explanation for skipping these fora.

35. On the complaint of violation of international Human Rights Instruments, the 2nd interested party has pleaded that the petitioners must specifically demonstrate which particular provisions have been infringed, and more importantly, if such infringement has not been catered for by the Municipal or other written laws of Kenya.

36. The 2nd interested party states that due to the fact that Buxton Estate stands on private land, there is no basis and or foundation upon which any of the petitioners, or any other tenant in Buxton Estate, can claim entitlement to any fund to enable his/her relocation, or any compensation of whatever nature, in the manner that the petitioners postulate in their petition. It pleads that the relocation and or compensation plan that has been put in place has been done purely on humanitarian grounds, which gesture the petitioners would want to exploit to the detriment and disadvantage of the other tenants in the estate. The 2nd interested party states that the correct position on the relocation is not as put forth by the petitioners. It avers that the relocation sum to be paid to each tenant is Kshs. 240,000/= which works out at a monthly rent of Kshs. 20,000 per month. That at that rate, the tenants will be able to access reasonable accommodation for a period of 12 months, being the estimated period of the project. It contends that the allegation by the petitioners that any reasonable accommodation will cost each of them at least Kshs. 30,000/= a month is an exaggeration. It is further pleaded that there is also a sum of Kshs. 60,000/= which will be paid for each tenant, as a deposit towards the purchase of the subject houses, once they are complete. It is pleaded that this sum, added to the amount of Kshs. 240,000/= brings the cumulative total payable to the tenants, as well as on their behalf, to the sum of Kshs. 300,000/=. The 2nd interested party has pleaded that the petitioners have intentionally failed to disclose that they will be paid these sums of money. It has pointed out that the payment of the deposit for each tenant, automatically guarantees such tenant an allocation of a house in the completed project. The 2nd interested party finds it ironical that the petitioners would resist a noble project which will transform them from 'tenant' to 'owner ' of property in the completed project. It has pleaded that it is worth noting that the current Buxton Estate comprises of 520 units and the petitioners have been given a first right of purchase. The extra 980 units will be given to other residents in Mombasa who it said are also in need of housing, in the same manner, if not more so, as the petitioners. It is pleaded that the resistance put forward by the petitioners against the project is an epitome and perfect example of human self centredness, and virtual failure by the petitioners to love their intended 980 neighbours as they love themselves, and that this ego must be resisted. The 2nd interested party has asked that this petition be dismissed with costs.

Response of the 3rd Interested Parties

37. The 3rd interested parties (it will be recalled that the term 3rd interested parties refers to the 18 persons who are residents of the Estate and Mombasa County and who oppose this petition) filed two replying affidavits, one sworn by Khalifa Mohamed and the other by Janet Ndago Ekumbo. Khalifa Mohamed is the Chairperson of Buxton Estate Welfare Group (the Group), a self-help group registered under the Ministry of Gender, Children & Social Development. He has averred that the Group was registered for purposes of safeguarding, protecting and advancing the welfare of the tenants of Buxton Estate. He avers that that they are in support of the respondent's project.

38. He states that the respondent is not only the manager but the registered owner of Buxton Estate. He states that the respondent issued notice to the residents to vacate the premises and that this notice was issued after the respondent had lengthy exhaustive discussions which culminated in the following agreement :-

- i. All the tenants would be paid Kshs. 240,000/= relocation costs calculated at Kshs. 20,000/= monthly rent for 12 months being the period within which the project is expected to be completed.
- ii. The tenants were given the first priority to purchase a unit, and if anyone was ready to do so, he/she would be given Kshs. 60,000/=, to be paid as deposit towards the purchase of the unit;
- iii. The tenants would be given a waiver of rent for the month of October, November and December, 2020 and would not be required to pay rent for the said months;
- iv. The tenants would quit and vacate the premises by 21 December 2020 to pave way for the ground breaking for the project.

39. He has deposed that contrary to the allegations in the petition, the respondent first engaged the tenants at the initial stages and its position was as follows :-

- i. The relationship between the respondent and the tenants was that of a periodic tenancy terminable by one party giving the other a one (1) month notice as stipulated by Clause 5(b) of the tenancy agreements;
- ii. The houses at Buxton Estate were old and in a dilapidated state and needed extensive repairs whose costs were huge and uneconomical.
- iii. The tenants were not entitled to any compensation for them to vacate the houses but were entitled to be given first priority to purchase the newly developed units.

40. He has stated that subsequent discussions were held to persuade the respondent to agree to a relocation amount of Kshs. 240,000/= and a deposit of Kshs. 60,000/= for those who would exercise their right to purchase a housing unit from the respondent. He has deposed that the tenants have always engaged the respondent and the 2nd interested party. He has stated that the issue of the tender was raised in **Petition No. 39 of 2016** and the court found no merit in the same and this court cannot re-litigate the issue. He has deposed that the land is alienated land registered in the name of the respondent; that the 2nd interested party is only a development partner and is not registered as the owner of the project land; the project is intended to benefit the tenants and residents of Mombasa.

41. On public participation, he has deposed that adequate notice of the meetings of 16 August 2020, 3 September 2020, 4 September 2020 and 5 September 2020, was given to all tenants and all the residents of Mombasa and those who were serious with the project attended. He states that he was present in the meetings, and also the officials of the Welfare Group attended, and that the concerns of the tenants were addressed culminating in the agreement for relocation; the price of the units (Kshs. 3,500,000/= for a two bedroom unit and Kshs. 4,500,000/= for a three bedroom unit); an offer letter to the tenants to purchase; and vacation notices for tenants to vacate by 31 December 2020. He avers that the status of the tenants will be upgraded from periodic tenants to property owners at affordable prices; that the tenant shall be financially assisted to relocate to premises that fetch rent of Kshs 20,000/= though at liberty to look for cheaper accommodation and thus use some of the relocation money towards paying the deposit for the units; and that the tenants would further be assisted with Kshs. 60,000/= to pay the deposit on the units. He has stated that all the necessary information was availed to the tenants contrary to the claims of the petitioners. He has averred that protracted litigation will cause suffering to the tenants who support the project and may disentitle them from becoming property owners. He states that the prices of the units offered for such a locality is affordable and reasonable. He denies that any rights have been violated. He has annexed the relocation agreement signed and the letters of offer to tenants. He avers that this petition has frustrated the said arrangements and has caused the tenants unforeseen agony because some tenants had already made arrangements and found new accommodation and were awaiting the relocation monies to pay deposit for the new accommodation. He laments that this petition has forestalled the said agreements. The 3rd interested party asks that this petition be dismissed.

42. Janet Ndago Ekumbo (one of those among the 3rd interested parties) is a resident of Likoni in Mombasa County. She has averred that as a resident of Mombasa County, she has keenly been following the Mombasa County Urban Renewal and Regeneration Programme and has participated by giving her views. She states that she has always had a legitimate expectation that one day the respondent would develop affordable houses, and that she would be offered an opportunity to become an owner of a housing unit at an affordable price, with convenient payment arrangements, thereby changing her status to a house owner within the central business area. She holds the opinion that Buxton Estate needs to be redesigned and redeveloped into modern day housing units and offered for sale to the residents of Mombasa. She has deposed that to this end, the respondent brought on board the 2nd interested party through an open tender process under the Public Procurement and Asset Disposal Act; that it carried out public hearings, collected and collated the opinion of the tenants as well as the residents of Mombasa County; explained the design and number of units intended to be developed, the cost of each unit, the relocation plan of the tenants and guarantee to tenants to be given first option of purchase. She has averred that the project is intended to take one year for the units of the tenants and two years for the units to other persons. She fears that delay may escalate the cost. As a resident of Mombasa, she is in full support of the project and points out that it will give approximately 1,000 persons the chance to own houses at an affordable cost.

PART 2: SUBMISSIONS OF COUNSEL

Submissions of Counsel for the Petitioners

43. The petitioners are represented by two counsel. Dr. Khaminwa, learned counsel, appears for the 1st and 10 petitioners, whereas Mr. Gikandi, learned counsel, appears for the rest of the petitioners. In his written submissions, Mr. Gikandi inter alia referred this Court to the Certificate of Lease of the properties where the Estate is located. He pointed out that the same indicate that the lessee is the Municipal Board of Mombasa who became registered as lessee on 10 September 2010. Counsel posed the following questions :- Is the Municipal Board of Mombasa the same as the County Government of Mombasa? Did the County Government of Mombasa take over the affairs of the Municipal Board of Mombasa? Did there exist in law at all, any legal entity in the year 2010 known as the Municipal Board of Mombasa? Counsel submitted, that assuming that the respondent took over the assets of the Board, it acquired it subject to the agreements in the lease, the entries

in the register, and the overriding interests therein. He submitted that until the registered lease is produced in court, it is impossible for the respondent to allege that it has the power to alienate the said property and enter into a joint venture agreement with the 2nd interested party.

44. Counsel submitted that the joint venture agreement, as annexed by the respondent, states that the property offered to the 2nd interested party for the joint venture agreement is known as Mombasa/Block XVII/1776 which he argued is a different property. He further submitted that the EIA documents refer to a property known as Mombasa/Block XVII/625 and Mombasa/Block XVII/985. Counsel referred to the report by Kiguru Land Surveyors to assert that Buxton Estate stands on Government land and submitted that it cannot be alienated without the consent of the NLC. He submitted that the respondent has no capacity to create a joint venture agreement over land that it does not possess absolutely. Counsel referred to the case of *Munyu Maina v. Hiram Gathiha Maina [2008] eKLR* for the proposition that when the integrity of a claimant's title to land is in question, it is not enough for the claimant to wave the certificate of title, for in such a case, the claimant has a duty to prove the root of that title. Counsel also cited the cases the case of *Timsales Limited vs. Harun Thuo Ng'ung'u [2010] eKLR* to argue that where a party does not produce material in his possession, the presumption would be that the same would be prejudicial to his case. He also referred me to the case of *Republic vs. Chairman National Land Commission and 5 others Ex Parte Cordison International (K) Limited [2018] eKLR* to support the position that disposal of public land can only be through the NLC. Counsel submitted that the joint venture is therefore a nullity for want of legal power by the respondent to deal with the land. He submitted that the respondent is a lessee and cannot pretend to be the lessor with power to deal with the properties. He submitted that the action of the respondent is a fraud, and the 2nd interested party is a recipient of an unlawfully acquired benefit, and the said benefit is a poisoned fruit. He submitted that the respondent, as lessee, cannot part with possession or alienate the property without the lessor's consent.

45. In addressing the issue of public participation, Mr. Gikandi submitted that public participation flows from the sovereign principle espoused in Article 1 of the Constitution and is a key pillar in the object of devolution under Article 174 of the constitution. Counsel referred me to various decisions on public participation including the cases of *Republic vs. County Government of Kiambu Ex-parte Robert Gakuru & another [2016] eKLR*; *Association of Kenya Medical Laboratory Scientific Officers vs. Ministry of Health & another [2019] eKLR* and *Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others (2014) eKLR*. Counsel submitted that there was no proper public participation with regard to the project under consideration. He submitted that the respondent has not produced any newspaper report or notices that were sent out as public announcements made over the media on televisions, radios or any daily newspapers, inviting the general public to participate in a public discussion over the Buxton project.

46. In addressing his claim of lack of an Environmental Impact Assessment Report, Mr. Gikandi submitted that EMCA requires that such a project should have an EIA licence otherwise carrying out the same would be an illegality. Counsel further submitted that the documentation availed to NEMA refer to the Plot No. Mombasa/XVII/625 and 985, while the joint venture agreement relates to the Plot Mombasa/Block XVII/1776. He submitted that the respondent is hiding too much and therefore unreliable. He submitted that notwithstanding the lack of an EIA licence, the respondent has issued notices requiring the petitioners to vacate the houses by 31 December 2020.

47. Mr. Gikandi reiterated that the respondent and 2nd interested party have utilized public land contrary to Article 67 of the Constitution; that the lack of public participation is a violation of Article 174 of the Constitution; that the fact that there is no EIA license renders the project illegal; that all these contravene Articles 10, 43 and 47 of the Constitution. Mr. Gikandi submitted that what the respondents propose to pay, that is Kshs. 300,000/= will be consumed as rent in one year, following the valuer's report, and wondered what would happen to the petitioners after that. He relied on the decision *Satrose Ayuma & 11 others vs. Registered Trustees of the Kenya Railways staff retirement benefit Scheme & 3 others [2010] eKLR* where the court expounded on the UN Basic Principles and Guidelines on Development Based Eviction and Displacement (2007). He basically submitted that there was a violation of the right to housing.

48. On the issue of whether the Petition herein is *res judicata*, Mr. Gikandi submitted that this petition is fundamentally based on the fraudulent and illegal actions of the respondent, and when fraud and illegality are brought to the attention of the court, it matters not whether there has been any pronouncement made in the matter in previous proceedings. He submitted that the issue becomes encompassed by the *extupia causa non oritur action* doctrine and relied on the case of *Mistry Amar Singh vs. Serwano Wofunira Kulubya* and the case of *Lazarus Estates Ltd vs. Beasley [1956] 1QB 702 at 712-713*. He otherwise submitted that the issues herein have never been raised in any other forum, and that they are new issues that cannot be locked out, as fraud and illegality cannot be shut out by the application of the *res judicata* rule. Counsel finally submitted that if this project is allowed to proceed, the petitioners will be rendered homeless which may result in social ills. He submitted that interfering with the petitioners would be a forced eviction, and because it involved a large group of people, it qualifies to be a crime against humanity. He asked for cross-examination of the deponents and a visit to the site.

49. Dr. Khaminwa, in his submissions, fully concurred with, and adopted, the submissions of Mr. Gikandi. He urged the court to consider the public element in this petition, particularly the submissions on the International Treaties and the decision of *Satrose Ayuma & 11 Others vs Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others (Satrose Ayuma case)*. He submitted that the respondent has not demonstrated that it would be in the public interest to interfere with the petitioners' current secure accommodation for the sake of the economic gain of the 2nd interested party. Counsel submitted that there is lack of consistency on which parcel of land is part of the joint venture agreement. He urged that when things do not add up, that is evidence of things that are being doctored, and it is evidence of corruption, therefore a violation of Articles 10 and 47 of the Constitution. He submitted that the joint venture agreement was executed long before any public participation exercise was carried out. Counsel referred to the decision in the case of *Docks Workers Union & 2 others vs. Attorney General & 2 others; Kenya Ports Authority & 4 others (Interested Parties) [2019] eKLR* for the proposition that when the project proponents does not prove that there was proper public participation, the ensuring decision is a nullity for want of compliance with Article 174 of the Constitution. He also submitted that the principle of *ex turpi causa* applies against the respondent and the 2nd interested party.

Submissions of the Respondent

50. On the part of the respondent, Mr. Amoko, learned counsel, first reviewed the substratum of the matter, which is the project, and the affidavit evidence. He submitted that as far as could be seen, the petition is filed by the minority in Buxton Estate. He wondered how raising the number of units, while making *ex gratia* payments to existing tenants, so that they can find alternative accommodation, violates their right to housing. He submitted that there is need to make the most efficient use of the limited land mass of Mombasa thus the Urban Renewal & Regeneration Programme which targets to upgrade 10 of the County's Estates. He submitted that through this Programme, the respondent

aims at actualizing the right to adequate and affordable housing to the residents of Mombasa County as provided by Article 43 of the Constitution and has sought assistance of the private sector. He submitted that the respondent, following the *Kenya Affordable Housing Programme : Development Framework Guidelines, 2018*, sought out the help of the private sector. He submitted that legal challenges to the programme have all failed and referred to **Petition No. 39 of 2016** and the Court of Appeal decision, and **Petition No. 6 of 2017** dismissed as *res judicata*. He submitted that a tender was floated for the project, and it was won by Gulf Cup Africa Limited. The 2nd respondent, a special purpose vehicle, was then created following the terms of proposal, and a joint venture agreement (JVA) entered into with the respondent. He submitted that the respondent went over and above its obligations to the tenants under the JVA as demonstrated by the affidavits of the 3rd interested party and negotiated the payments to the tenants. He asserted that these were agreed terms, not rammed down anyone's throat.

51. Mr. Amoko pressed the importance of the doctrine of *res judicata* and submitted that each and every one of the grounds relied on by the petitioners were unsuccessfully raised (or could have been raised) in **Petition No. 39 of 2016**, on behalf of all the existing tenants of all the respondent's ten estates, that were subject to the regeneration programme. He submitted that the issue of want of public participation, right to information, right to housing, breach of Public Private Partnership Act, breach of EMCA, breach of International Human Rights instruments, were all raised in this case and determined. He submitted that in **Mombasa High court Petition No. 6 of 2017 Peter Obhunga Wakoyo and 87 others v. County Government of Mombasa and 3 others**, a group of 88 residents of Khadija Estate (another one of the ten estates targeted for regeneration), attempted to revive the issues resolved in Justice Otieno's judgement, as well as the Court of Appeal's, under the guise of challenging the tenants 'eviction', but the case was dismissed by Ogola J for being *res judicata*, as the parties were litigating under a similar title as the one litigated in **Petition No. 39 of 2016**. He submitted that even in this case, the petitioners are recycling the same grounds raised in the previous suits, which were considered and rejected. He submitted that the parties herein are vexing the respondent despite its prior success when first faced with similar complaints. Counsel cited the case of *John Florence Maritime Services Limited & another v. Cabinet Secretary for Transport and infrastructure & 3 others (2015) eKLR* to expound on the plea of *res judicata*. Counsel submitted the petitioners' response to *res judicata* objection, invoking the private law defence of illegality- *ex turpi causa, non oritur actio* is wrong. He submitted that in cases where *res judicata* objection is raised, the inquiry is directed not at whether the complaints in the subsequent proceeding are valid, but rather, whether those complaints are either similar to those raised before, and decided, or could have been raised in earlier proceeding. He asserted that all the petitioner's complaints on which their charge of illegality are founded run afoul of the *res judicata* rule and this honorable court is barred from addressing them. He added that the illegality defence, bars a plaintiff pursuing a suit founded on an illegality, and that this has nothing to do with *res judicata*. Counsel relied on the case of *Patel vs. Mirza [2016] UKSC 42* to ventilate the *ex turpi causa* doctrine. Counsel further submitted that the other private law concepts invoked, such as 'no one can benefit from its own wrong', also have nothing to do with *res judicata*, whose foundation, as explained in *Kamunye & others v. Pioneer General Assurance Society Ltd (19710 E.A. 263*, is the integrity of the legal system.

52. In addressing the issue of public participation, Mr. Amoko relied on Justice Otieno's judgement in **Petition No. 39 of 2016** where the Honourable Judge stated as follows;

“...I have no doubt there was public participation...Having found that there is no litmus test for what is the exact quality of public participation, and that what was expected of the respondent was a genuine and real chance for stakeholders to express views and that indeed opportunity was so availed, I find that what was done was sufficient and therefore the first issue is answered in the affirmative.”

Counsel pressed the point that this decision was upheld by the Court of Appeal. He nevertheless submitted that the affidavit evidence availed herein demonstrates that there was public participation, and that it through these engagements, that the relocation sums and arrangements were mutually agreed.

53. On the question of the land being public land, counsel adopted the explanation given in the replying affidavit of Mr. Waliaula and the 2nd interested party's response, which position is that the property in issue is not public land. He reiterated that only public land comes under the jurisdiction of the NLC under Article 67 of the Constitution. He submitted that a lease is capable of being transferred and the periodic tenancies of the petitioners do not constitute an overriding interest. He submitted that there is nothing unlawful or unethical that the 2nd respondent is in the venture to make some profit. He submitted that the essence of public-private partnership is that both the public and the private partners benefit, and private partners cannot enter into private-public partnerships if they are not making anything for themselves. Counsel yet again invoked the decision in **Petition No. 39 of 2016** where Otieno J stated that private partners are entitled to some reasonable returns on their investment and have no constitutional obligation to provide free housing for the poor.

54. In response to the issues raised by counsel for the petitioners regarding the identity of the land, Mr. Amoko submitted that this is a red herring. Firstly, he submitted that this is an unpleaded issue and to allow its pursuit would violate the right to a fair trial as the respondent cannot respond to it. He relied on the case of *Owira & 23 Others vs Attorney General & Another ; Kenya National Commission on Human Rights & 4 Others (Interested parties) (2020) eKLR* where it was held that submissions cannot be used as an avenue to raise new issues not raised in the pleadings. Counsel nevertheless submitted that the Municipal Board of Mombasa (MBM) is the colonial predecessor of the Municipal Council of Mombasa (MCM), in whose name the original lease was issued and registered and then extended in 2010; that at independence, all of MBM's property were vested in MCM; that on the establishment of the respondent, by operation of law, all MCM's assets and/or properties were vested in the respondent, upon the establishment of the counties pursuant to, inter alia, Section 3(d) of the Transition to County Government Act, 2012.

55. Mr. Amoko collectively addressed the complaint regarding the right to housing, right to information, and alleged violation of international instruments. He submitted that the petition does not disclose precisely what alleged violation may be laid at the feet of the respondent. He submitted that the issue of the right to housing was addressed in **Petition No. 39 of 2016** where Otieno J, stated as follows :-

“63. In the matter before me there is no demonstration how the project, which is intended to increase provision of modern housing units ten-fold is likely to threaten anybody's rights under the provisions of the Constitution. (64) I find not substance in this complaint and rather I hold the view that the project clearly aims at achieving the constitutional function and obligation of the 1st respondent not only Article 43 (1) (b) but also sections 2 (g) and 8 (d) of Third Schedule.”

He submitted that the above still holds true.

56. Counsel refuted the claim of the petitioners that they are being evicted. He submitted that to enable the project proceed, the respondent is terminating the periodic tenancies on mutually agreed terms following negotiations. He submitted that the reference to the case of *Satrose Ayuma* and the *UN Basic Principles and Guidelines on Development Based Evictions and Displacement (2007)* was therefore misplaced. On the alleged violation of statute, counsel submitted that violation of statute does not constitute a constitutional violation. He submitted that if there was a statutory violation, there are alternative remedies that ought to be explored with respect to each statute. He supported his argument that a statutory violation is not a constitutional violation by citing the case of *Turkana County Government & 20 Others v. Attorney General & Other (2016) eKLR*. He further relied on the Court of Appeal decisions in *Republic vs. National Environmental Management Authority [2011] eKLR* and *Bethwell Allan Omondi v. Telekom Ltd & 9 Others (2017) eKLR* where the Court of Appeal held that a party must first exhaust the processes available by other statutory dispute resolution organs, which are by law established, before moving to the High Court by way of constitutional petitions.

57. Counsel submitted that it was upheld in earlier proceedings that the project herein was being done with full compliance of the law and he cited the following dictum from the decision of the Court of Appeal in **Mombasa Civil Appeal No. 46 of 2017** :-

“... Last but not least, we cannot help but note that it was deposed on behalf of the 3rd respondent that none of the private partners who would be brought on board would be exempted from complying with the existing regulatory regime. We also note that the project would be undertaken in stages and at respective stages relevant permission/authority or compliance would be required under the statutory regime mentioned by the appellants. As at the time, the appellants filed the petition in the High Court some if not all the stages requiring the consent/authority and/or compliance under the said legislation were yet to commence. Consequently, to that extent we agree with the respondents that this complaint was premature. In any event, where a violation of any of the provisions of the legislations in question occurs, there are elaborate mechanisms under the respective legislations to deal with such violations. Hence, those mechanisms ought to be exhausted first before approaching the High Court.”

58. On the petitioners' assertion that there is no EIA, Mr. Amoko submitted that there is no EIA yet, as the 2nd interested party is in the process of undertaking it, and that in conformity with the law, NEMA has issued the relevant terms of reference under which the EIA is to be undertaken. He submitted that any challenges to this process must at first instance be made in terms of EMCA to either NET or the National Environmental Complaints Committee and relied on the case of *Kibos Distillers Limited & 4 Others vs Benson Ambuti Adegga & 3 Others (2020)eKLR*.

59. Counsel also raised issue on the petitioners' separate representation. He pointed out that the Petition was filed by the law firm of M/s Gikandi & Company Advocates, and the 1st petitioner swore an affidavit on behalf of all petitioners, but during the course of the proceedings, two of the petitioners, the 1st-10th, filed a Notice of change, appointing M/s Khaminwa & Khaminwa Advocates to act for them. Mr. Amoko took objection to this, on the basis that as a matter of basic practice before court, it is not permissible to have separate, independent representation, of joint petitioners, without first seeking and obtaining leave of court demonstrating there exists exceptional circumstances to necessitate such representation. Counsel referred to the case of *Christopher Kipkorir Lebo & 331 others v. Kenya Power & Lighting Company Limited (2008) eKLR* where Ibrahim J (as he then was) stated :-

“In this case, the plaintiff purport to be represented by three law firms. The plaintiffs are 332 in number. I foresee a minefield of inconsistencies and future chaos to allow more than one advocate to act for them on this record. One can imagine if each of the 332 co-plaintiffs retains his/her advocate in this suit. It will be impossible and impracticable to manage the suit. I see no problem if they chose other advocates to lead or assist the advocate on record. This is common practice.”

60. Counsel added that disallowing parties from playing lottery with the judicial process by such multiple representation does not breach the right of access to justice. To add some emphasis to his argument, counsel cited the case of *Kabutha & 5 others v. Nairobi Railways African Cooperative Society-Civil Case No. 2641 of 1976 (unreported)* where the court stated that there can only be one solicitor for the plaintiffs unless otherwise specifically ordered.

Submissions of the 2nd Interested Party

61. On the part of the 2nd interested party, submissions were filed by the law firm of M/s Hassan Alawi & Company. Counsel first reiterated the contents of his client's response to petition. He submitted that the petitioners' prayers are mainly declaratory in nature and they are predicated upon assertion that the subject is an allocation of public land and that the respondent has vested public land on the 2nd interested party. Counsel submitted at length to urge the position that the subject land is not public land. Counsel referred me to Article 62 of the Constitution on the definition of 'public land' and Section 2 of the Government Land Act (repealed) on the definition of 'government land'. He added that under Article 260 of the Constitution, the respondent is a state organ, and as per Section 6 of the County Government Act, the respondent is a body corporate capable of owning and disposing of property. He submitted that the respondent is the registered lessee of the parcel of land that Buxton Estate is located on, that is, MI/XVII/625, MI/XVII/981 and MI/XVII/985, thus the subject land is private, as provided for in Article 64 (b) of the Constitution. Counsel submitted that the respondent is not in violation of Article 67 of the constitution as there is no need to indulge the NLC on any dealings with the subject land since it is private land. He submitted that once the respondent was registered as a proprietor of a lease, it immediately became the absolute and indefeasible owner of the same. He submitted that pursuant to Section 6 of the County Governments Act, the respondent is a body corporate, and it is capable of holding property, in its name, in its private capacity, as a body corporate. He referred to Article 64 on the definition of private land specifically, Article 64 (b) that is, land held by any person under leasehold tenure, which he submitted applies in this instance.

63. In addressing the issue of access to information, counsel reiterated the contents of his client's response to petition, by stating that the petitioners have chosen the wrong forum of enforcing compliance of orders of the court that were given in already concluded proceedings. Counsel submitted that, where there is an alleged non-compliance or disobedience of a court order, there exists separate substantive and procedural mechanisms in the law, for a party to enforce compliance, hence this court has no original jurisdiction to entertain any complaints

on access to information. He submitted that the Access to Information Act provides for the Commission of Administrative Justice and procedure to be followed when approaching the commission. Counsel cited the case of *Patrick Kabundu & 2 others vs. Mombasa County Government (High Court at Mombasa, Petition No. 198 of 2018)*. He submitted that the facts in this case were similar to those in the proceedings herein, in that the petitioners sought the information through court proceedings, without following to modalities set out in the Access to Information Act, and the court held that there was no original jurisdiction vested in the court. Counsel also referred to the case of *Charles Apudo Obare vs. Clerk County Assembly of Siaya [2020] eKLR* and the Court of Appeal decision in *Secretary, County Services Board vs. Hulbhai Gedi Abdille [2017] eKLR*. He pointed out that both of these cases had similar outcomes, that parties ought to seek redress under the provided for statutory regimes.

64. In addressing the issue of the EIA, counsel submitted that this court does not have original jurisdiction to entertain complaints, or make orders under EMCA. He urged that EMCA provides for the Environmental Complaints Committee under Section 31 and 32, and also the National Environmental Tribunal at Section 129 and 130. He submitted that this Honorable Court only has Appellate jurisdiction on matters arising from EMCA. To buttress his submissions, counsel referred to the Supreme Court decision in the case of *Benson Ambuti Adege & others vs. Kibos Distillers Limited & 5 others (2020) eKLR*.

65. Counsel submitted that on matters of procurement, Parliament has enacted the Public Procurement & Asset Disposal Act, No. 33 of 2015, and any complaints and grievances concerning tenders and other procurement matters are preserved in that Act. He expounded that any such complaints are to be dealt by the Public Procurement Administrative Review Board.

65. Counsel submitted that despite the petitioners' claim that Article 10 (2) of the Constitution was violated, the project actually promotes human dignity, equity, social justice and inclusiveness, by endeavoring to build more housing for the residents of Mombasa County. Counsel also submitted that the respondent and the 2nd interested party have not violated Article 43 (1) (b) of the Constitution, and to the contrary, they have actualized and observed its provisions to the letter, as the project will provide accessible housing to the petitioners and all residents of Buxton Estate, who have automatic allocation of the apartments. He added that the adequacy of the apartments is shown in the number of rooms available in each apartment to suit the taste of each tenant, and also, that the houses will have sanitary facilities, modern in nature.

Submissions of the 3rd Interested Parties

66. On the part of the 3rd interested parties, Mr. Aboubakar, learned counsel, first pressed the point that this Court has no jurisdiction to determine this petition. He submitted that the prayers sought by the petitioners are of a claim of violation of the fundamental rights and freedoms of the petitioners, as well as a violation of the provisions of the Constitution, and as such, jurisdiction is conferred to the High Court, and not the Environment and Land Court. He referred to Article 165 (3) (b) and (d) of the Constitution. Counsel relied on the case of *HCCP No. 18 of 2018 Sollo Nzuki vs. Salaries and Remuneration Commission & 2 others* where the court stated that specialized courts should exercise their jurisdiction on issues arising from their area of specialization. To buttress his argument, counsel also cited the case of *Daniel N. Mugendi vs. Kenyatta University & 3 Others* and the Court of Appeal case of *Judicial Service Commission vs. Gladys Boss Shollei & another*. Counsel referred to Article 162 (2) on the jurisdiction of the Environment and Land Court (ELC) and contended that this Court has no jurisdiction. Counsel submitted that the nature of the petition is based *inter alia* on the claim that the respondent has no powers to alienate public land to itself, jointly with the 2nd interested party. He submitted that this should not place this petition within the jurisdiction of this court. He submitted that this will only suffice if the allegations by the petitioners were true. He averred that the evidence of the petitioners themselves is that the project is being carried out on alienated private land. In addition, counsel submitted that the issue of the EIA should not give an impression that this court has jurisdiction.

67. He argued that on the principle of justiciability, the court should still decline jurisdiction. Counsel submitted that the project emanates from a political decision of the respondent, and owing to the doctrine of separation of powers, this court is prevented from interfering with that decision. He referred me to the case of *Council of Civil Service Unions vs Minister For The Civil Service (1985) AC 374* as quoted in *ELC Petition Case No. 02 of 2019*. He submitted that political decisions that are unpopular with the electorate call for political redress, such as impeachment of the County Executive, or recall of a representative. He urged that the petitioners could have asked their Member of County Assembly (MCA) to exercise oversight over the County Executive proposal on the implementation of the project but they never did so.

68. Counsel submitted that the 3rd interested parties and other tenants have a legitimate expectation of owning houses through this project, and that this petition is intended at taking away this expectation. Counsel relied on among other cases, the case *JR. Misc. Application No. 461 of 2016 Republic vs. Principle Secretary, Ministry of Transport, Housing and Urban Development Ex-parte Soweto Residents Porum CBO* in addressing his argument on the doctrine of legitimate expectation, where the High Court declined to prohibit the respondent from proceeding with the Kibera Housing Project.

69. Counsel submitted that under the Constitution, Fourth Schedule, Part 2, Clause 8(d), it is the respondent's duty to plan and develop housing in the County and that is the main objective of the project.

Replying Submissions of Counsel for the Petitioners

70. In response to the submissions filed by the respondent and interested parties, joint submissions were filed by Mr. Gikandi and Dr. Khaminwa on behalf of the petitioners. On the submissions by counsel for the 3rd interested parties, that this matter is wrongly before this Court, it was submitted that this petition was indeed filed before the High Court, and it is the High Court Judge, who on his own motion, transferred the matter to this Court. They submitted that assuming that the 3rd interested parties are right on jurisdiction, this Court should simply return the petition to the High Court. Counsel submitted that if the court determines that this Petition is properly before the court, then the second aspect of the matter to be considered is the question whether this petition should have been presented before other forums as opposed to court. Counsel submitted that the forums are said to be The Commission of Administrative Justice as per the Access to Information Act, Environmental Complaints Committee as per the Environment Management and Coordination Act, and Public Procurement Administrative Review Board as per the Public Procurement and Asset Disposal Act. Counsel stated that in their view, the submissions by

the 2nd interested party is totally untenable for the simple reason that the petitioners cannot be expected to segment the different issues relating to the same subject matter and present different segments in respective forums. Counsel relied on the decisions in the cases of *William Odhiambo Ramogi & 2 others vs. Attorney General & 5 others*, *Ken Kasinga vs Daniel Kiplagat Kirui & 5 Others (2015) eKLR* and *Lydia Kaguna Japheth & 2 Others vs Mbesa Investments Limited (2020) eKLR*.

71. On the issue of *res judicata*, counsel submitted that it has not been demonstrated that any of the petitioners herein was a party in the previous two suits. Counsel further pressed that on the basis of the *ex-turpia causa non oritur actio* doctrine, *res judicata* cannot apply. On the EIA, counsel submitted that it is admitted that the project proponents do not have an EIA and have thus put the cart before the horse, and that carrying out the project would be illegal. They urged that the project proponents should not be allowed to take even one more step with regard to the intended evictions before an EIA licence is issued. They submitted that it is not the petitioners who have presented this petition prematurely, but it is the respondents who have prematurely embarked on a project when they have not complied with the requirements of the law.

72. On the issue of justiciability, counsel submitted that this petition passes the test of legality. Counsel submitted that in this suit, the petitioners have demonstrated that the intended project has a number of huge holes that make the project lack the seal of legality. On the issue of reasonable and legitimate expectation raised by the 3rd interested parties, counsel refers to a book titled, '*Judicial Remedies in Public Law, 4th Edition*' authored by Clive Lewis, on the place of judicial review remedies. They reiterated that forced evictions raise various issues of law, and the court should take into account the precautionary principle, that execution of the project may result in a lot of injuries and/or losses. Counsel again raised the question of the land subject to the project that they had earlier brought up in their initial submissions and wondered how the court can allow a project to continue when it has no idea on which property the project is to be carried out.

73. Apart from the written submissions, counsel also made oral submissions in court, to highlight their salient points. I do not see the need of rehashing the same, for they more or less follow what is in the written submissions. I have nevertheless taken them into account and consideration.

PART 3 :ANALYSIS AND DECISION

74. Despite the rather lengthy pleadings and submissions, which I thought prudent to capture as put by the parties, I will try as best as I can, to be brief and precise, in my analysis of the issues and in my decision.

75. Parties did not draw up issues, but in my view, the following issues are up for consideration :-

- a. Jurisdiction and Justiciability;
- b. Whether the petition is *res judicata*;
- c. If not *res judicata*, whether the petitioners have proved a violation of their constitutional rights or international instruments;
- d. Who should bear the costs of this petition.

76. The question of the jurisdiction of this court, has been raised, rather strongly, by the 3rd interested parties and I opt to deal with it first, for if I find that I have no jurisdiction, then I have to down my tools.

77. It is contended that this Court, that is, the Environment and Land Court (ELC), does not have jurisdiction to determine the issues that have been raised. It is the position of the 3rd interested parties that the petition herein involves a claim of violation of the fundamental rights and freedoms of the petitioners and therefore, jurisdiction is vested in the High Court, pursuant to Article 165 (3) (b) and (d) (ii) and (iii) of the Constitution. It is secondly contended by the 3rd interested parties that the issues are not justiciable.

78. Let me quickly dispose of the justiciability issue because I really do not see much substance in it. The petitioners claim a violation of their rights. That by itself would make this matter justiciable. There are indeed claims of violations of rights which this court needs to look at. The issues raised, in my view, are not political in nature and are properly before court.

79. Turning to the question of jurisdiction, the jurisdiction of this court is fundamentally derived from Article 162 of the Constitution which provides as follows :-

162. System of courts

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

80. It will be discerned from the above, that pursuant to Article 162 (2) (b) of the Constitution, Parliament was directed to create a court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Parliament, following the dictate of the said provision, did establish the Environment and Land Court, through the Environment and Land Court Act, Act No. 19 of 2011 (ELCA). It will further be noted that under Article 162 (3), Parliament was obligated to determine the jurisdiction and function of the Court. While enacting the ELCA, Parliament did provide for the jurisdiction of the ELC within Section 13 thereof, which is drawn as follows :-

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

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

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

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

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

81. It is not the position of the law, as submitted by the 3rd interested parties, that the ELC cannot hear a constitutional petition claiming a violation of fundamental rights within the Constitution. So long as the matter can be characterized as being one relating to the environment, and the use and occupation of, and title to, land, then the ELC would have jurisdiction, irrespective of the manner in which the case was commenced. Such case may be commenced by way of plaint, petition, originating summons, or any other means, but so long as it ties itself to the issues that fall within the jurisdiction of this court, then this court has the power to hear such a case. This has been held in various decisions. One such case is that of *Omar Tahir Said vs Registrar of Titles & Another, Mombasa High Court Petition No. 22 of 2012, (2013) eKLR*, which case was a petition filed in the High Court at Mombasa, vide which the petitioner claimed that the cancellation of his title by the Registrar of Titles breached various of his constitutional rights. He asked for various declarations which were founded on the act of cancellation of his title. A preliminary objection was raised that the matters in the suit fell squarely within the jurisdiction of the ELC

pursuant to the provisions of Section 13 of ELCA as read with Article 162 (2) (b) of the Constitution of Kenya, 2010. The petitioner argued that by virtue of Article 23 of the Constitution, it was the High Court which had jurisdiction to hear a petition for the enforcement of the bill of rights. The court held that jurisdiction in the matter lay with the ELC and not the High Court. Tuiyott J in his ruling stated as follows :-

"The E and L Court has juridical likeness or similarity with the High Court. In this juridical likeness, the E and L Court would have authority to entertain applications for the redress of a denial, or violation, or threat to a right or fundamental freedom in the Bill of Rights in matters falling under its jurisdiction. It is in acknowledgement of this, I suggest, that the Legislature, by Section 13(3) of the E and L Court Act, expressly recognized the authority of the Court to enforce the fundamental rights specified in Section 13(3) of the Constitution. Yet to limit the Court's authority to the fundamental rights specified in Section 13(3) would be to unduly constrict the Constitutional intent of establishing a Court Under Article 162(2) (b) that would determine disputes relating to the Environment and the use and occupation of, and title to, land."

The judge thereafter proceeded to transfer the petition to the ELC at Mombasa for determination.

82. In the case of *Prof. Daniel N. Mugendi vs Kenyatta University & 3 Others (2013) eKLR* the appellant, who was an employee of the 1st respondent, filed a constitutional petition in the High Court arising from the termination of his employment. The court dismissed the petition for lack of jurisdiction. He appealed and argued that a breach of fundamental rights was justiciable in the High Court as of right. The Court of Appeal assessed the issue and did not find any fault in the determination by the Judge that she had no jurisdiction, as the reference before her was essentially a breach of terms of employment, for which the Employment and Labour Relations Court was the Court with jurisdiction. The Court however held that it would have been more justiciable for the Judge to transfer the case to the correct court rather than dismiss it. In addressing the jurisdiction of the Courts created by Article 162 (2), the Court of Appeal stated as follows :-

"In the same token we venture to put forth the position as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects."

83. It will thus be seen from the foregoing, that the argument of the 3rd parties that this court cannot deal with matters relating to fundamental rights and freedoms is legally flawed. This court would have jurisdiction, so long as the subject matter relates to the issues that this court was created to determine.

84. When one looks critically at this petition and the prayers thereto, it will be observed that issues of EIA and disposal and/or use and occupation of land are raised. In fact, the main issue in this petition is on occupation of the units in Buxton estate. That is clearly a matter that is within the four corners of the jurisdiction of this Court, for the jurisdiction of this Court explicitly includes the question of occupation of land. I am not therefore persuaded by the submissions of the 3rd interested parties that this Court has no jurisdiction and it is indeed my finding that it is this Court which is vested with jurisdiction to determine the issues raised in this petition. Having found that I have jurisdiction, I will proceed to determine the dispute herein.

85. The next issue that I need to resolve is whether this petition is *res judicata*. I need not, within this petition, write a thesis on the principle of *res judicata*. It is a common law principle that is well recognized within the jurisprudence of this country, and indeed, Mr. Amoko's submissions were very elaborate on this principle, with his authorities being on point. But in a nutshell, the principle of *res judicata* is one which bars the re-litigation of an issue that has already been litigated upon and a decision made. This is founded on public policy, for if a Court has already pronounced itself on an issue in contention, it would be unfair to have the victorious party, being dragged yet again to litigation over the same point. If the principle of *res judicata* was not firmly applied, then litigation would never come to an end, and parties would continuously be in court over the same issue that has already been decided. *Res judicata* is basically founded on the principle of finality of decisions, such that once a court makes a determination, the avenue is not to file another suit, hoping to having the same issue re-opened, for the decision on that issue is considered final, only subject to appeal or review where permissible.

86. In our country, the common law principle of *res judicata* has found statutory approval in the Civil Procedure Act, Cap 21, Laws of Kenya, at Section 7 thereof, which provides as follows :-

7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

The *res judicata* principle is probably considered so critical that the Civil Procedure Act has proceeded to give explanation on what would constitute a former suit. It is indeed one of the few sections that the Civil Procedure Act has thought befitting of an explanation. The explanations are 6 and they are as follows :-

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have

been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made

ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

87. Though the *res judicata* principle is contained in the Civil Procedure Act, it is a principle that has been found to also obtain in other sorts of litigation outside the ambit of the Civil Procedure Act, including Constitutional Petitions. This was indeed the holding in the decision of John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR where the Court of Appeal stated as follows :-

“... *res judicata* being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that *res judicata* being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of *res judicata*. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.”

88. I am guided by the above dictum which affirms that *res judicata* can be applied in constitutional petitions, just as it would apply, to an ordinary civil suit. It will however be seen that the Court of Appeal was alive to the fact that some issues involving constitutional rights may come into play after the previous decision, and recognized that rights may evolve, mutate, or assume other multifaceted dimensions. These will certainly encompass rights that have arisen after the decision of the court, and in my view, such rights, unless they could have been capable of being raised in the previous suit, can be a basis for a new cause of action, in which event, the *res judicata* doctrine cannot apply.

89. The position of the respondent and the 2nd and 3rd interested parties is that this suit is *res judicata* and they have pointed me to two decisions of the High Court, being the suits **Mombasa High Court Petition No. 39 of 2016** and **Mombasa High Court Petition No. 6 of 2017**. The respondent, and 2nd and 3rd interested parties argue that the issues in this suit have already been determined in those two previous suits. I will proceed to analyse what was determined in those suits and whether the issues that have been raised herein were addressed in those suits, or whether there are some mutated matters that could not have been addressed in the previous litigation.

90. Petition No. 39 of 2016 was commenced on 5 August 2016 by, Legal Advice Centre, Haki Yetu St. Patricks, Transparency International, and Jack Maina. The pleadings in that petition averred that the respondent herein has launched the *Urban Renewal and Redevelopment of Old Estates Project* which sought to demolish and reconstruct ten (10) housing estates within Mombasa County, namely, Buxton Estate, Nyerere Estate, Tudor Estate, Chagamwe Old Estate, Mvita Estate, Likoni Customs Estate, Kisauni Estates, and Tom Mboya Estate. The petitioners therein contended that the implementation of the project was being done without compliance with crucial legislation including the Constitution. It was argued inter alia that the project was being undertaken without public participation; that it will violate the rights of the tenants therein to housing pursuant to Articles 28 and 43 (1) of the Constitution; that the respondent failed to provide relevant information; that the respondent failed to do a clear development outcome and cost implications to the residents; that there was failure to comply with Sections 58 and 59 of EMCA i.e to conduct an EIA prior to the project initiation; that the project was being done without public participation; that the project contravened Article 7 of the Universal Declaration of Human Rights (UDHR); that the respondent totally failed to follow the legal processes in the Public Private Partnership Act; that there was no competitive bidding and the contract lacked transparency; that the proposed sale of the units was synonymous with the privatization of urban housing. In that petition, the petitioners inter alia sought a declaration that the undertaking of the project by the County Government of Mombasa, through a joint venture partnership, is a violation of the right to public housing; that the project violates the provisions of EMCA; that the project violates the Public Private Partnership Act; and that there should issue a permanent injunction restraining the County Government from implementing the project through joint venture partnership. Within that petition, four issues were framed, being :-

(1) Whether the “Mombasa County Urban Renewal And Redevelopment Of Old Estates Programme” was conceptualised and formulated with public participation under articles 10 & 174 of the constitution as well as sections 87 and 11(1) of the County Government Act?

(2) Whether the Respondents breached the Petitioner's' constitutional rights to access information under Article 35 of the constitution.

(3) Whether the “Mombasa County Urban Renewal And Redevelopment Of Old Estates Programme” threatens the rights to adequate housing under Article 43(1) b of the constitution.

(4) Whether the programme, (Mombasa County Urban Renewal and Redevelopment of Old Estates Programme) is in breach of various statutory provisions listed in the petition – if this is answered in the negative whether the petition is an abuse of the Court process.

91. The petitioners in that case argued *inter alia* that the project breached the provisions of EMCA, the Privatization Act, the Public Procurement and Asset Disposal Act, and the Physical Planning Act. In his judgment delivered on 23 December 2016, P.J. Otieno J, found as follows :-

- a. On public participation - that there was adequate public participation though the court also appreciated that public participation would be continuous given the nature of the project;
- b. On the right to access information – that this would be tied to the continuous nature of public participation and supply of documents may themselves be the tools to facilitate such participation;
- c. On whether the project threatened the right to adequate housing under Article 43 (1) (b) – that there was no demonstration how the project, which intended to increase provision of modern housing units ten-fold is likely to threaten anybody’s rights under the Constitution. The court indeed found that the project clearly aimed at achieving the constitutional function and obligations of the respondent.
- d. Whether the project was in breach of the various statutes mentioned in the petition – that there are specialized institutions created under the statutes with clear mandates and are best equipped to ensure that the provisions of the statutes are followed.

In the end, the court declined to grant the prayers sought and they were all dismissed.

92. This judgment provoked an appeal to the Court of Appeal, which is **Court of Appeal at Mombasa, Civil Appeal No. 46 of 2017 (2018) eKLR**. The Court of Appeal was persuaded that the High Court was correct in its findings and proceeded to dismiss the appeal.

93. The other suit referred to me is the suit **Mombasa High Court, Petition No. 6 of 2017**. This was a petition filed on 2 February 2017 by 87 persons, being residents of Khadija Estate, one of the estates that is subject to the Mombasa *Urban Renewal and Redevelopment of Old Estates Project*. The petitioners therein sought to restrain the respondent from evicting them from their houses. They cited the right to human dignity, the right to property, the right to accessible and adequate housing, and the right to fair administrative action. A preliminary objection was raised that the petition is *res judicata* and **Petition No. 39 of 2016** and the Court of Appeal decision arising therefrom were cited. Ogolla J, was persuaded that the case was *res judicata*, and in his holding, found that it did not matter that the parties before court were different, for they were litigating under the same title as those in the previous litigation. The result was that the petition was dismissed for being *res judicata*.

94. My view of the dispute before me is that it cannot raise issues regarding the wholesome concept of the project, for that was an issue that was raised and determined in previous litigation. In this regard, the issue of whether the project violates the right to housing has already been determined, with the concept of the project being given the green light and having been held not to violate the right of any person to housing. The question whether there was public participation before the project was rolled out has also been determined. So too the issue of access to information. On whether the project violated EMCA, the Public Private Partnerships Act, the Privatization Act, or the Public Procurement & Disposal Act, the parties were advised to seek remedy within those statutes and follow the dispute resolution mechanisms provided in the said statutes.

95. I do not think that there can be any question, that the issue of whether or not the *Mombasa Urban Renewal and Redevelopment of Old Estates* is a project that should proceed or be stopped, has already been determined in the previous two suits in the High Court. Buxton Estate, which this petition relates, was one of the Estates that was the subject of **Petition No. 39 of 2016**. There has already been finding that there was adequate public participation and that the project as envisaged does not violate the right to housing. It follows that the requirement for the tenants to give vacant possession of the premises that they occupy has already been found not to violate their right to housing. There has also been finding that in so far as there is alleged violation of statutory provisions, then the avenue is to commence proceedings following the dispute resolution mechanism provided in the subject statutes alleged to have been violated. I am afraid that these are issues that I cannot re-open afresh, for if I do so, then I will be contravening the principle of *res judicata*.

96. In this petition, the petitioners have complained that the award of the tender to the 2nd interested party is riddled with corruption and is not transparent. They have also contended that the project seeks to take away public land and vest the same in a private individual. In my view, these are issues that have already been determined in previous litigation, and if they have not, then the issues ought to be pursued within the mechanisms provided for by statute, as advised by Otieno J, in **Petition No. 39 of 2016**. It will be recalled that the judgment of Otieno J was upheld by the Court of Appeal. These are thus issues that I cannot hear afresh.

97. One may argue that at the time that the litigation in **Petition No. 39 of 2016** was made, the award of the tender for Buxton Estate, to the 2nd interested party had not been made and thus a decision on the constitutionality of the tender has not been subjected to previous litigation. That may be so, but the parties were advised to proceed to the dispute resolution mechanism provided by statute. The issues that have been raised regarding the tender award to the 2nd interested party, in my view, are issues that can very well be raised within the mechanisms provided for in the Public Procurement and Disposal Act, or the Public Private Partnerships Act, or the Privatization Act, or other applicable statutes. The issue regarding EIA was already decided and I cannot reopen it. The parties were already advised to follow the mechanism provided for in EMCA. The issue that the project as envisaged will lead to a disposal of public land without involvement of the NLC is an issue that was in the previous petition, but even if it were not, the complaint is that the disposal of public land is being done without following the law. In that event, recourse should be within the Public Procurement and Disposal Act, or the statutes that I have mentioned earlier, which touch on disposal of public property. The avenue was not to file this petition.

98. I am aware that elaborate submissions were on whether the land in issue is private or public, but I need not, within this petition, make any finding on that. It is because the project, as a whole touching on the 10 estates, has already been given the go-ahead in **Petition No. 39 of 2016**, and I cannot now stop it, based on the question whether the land is public and not private. That is why I say that this is not argument that I can entertain in these proceedings, for if I do so, then I will be violating the *res judicata* principle. In any case, if the petitioners are

saying that this is not the mode of disposing public land, then the Public Procurement and Disposal Act, or the Public Private Partnerships Act, mechanism is available to them as has been held before.

99. There was submission by counsel for the petitioners that the parties herein are different from the parties in the previous litigation and therefore the principle of *res judicata* cannot apply. In my view, the principle of *res judicata* would still apply, irrespective of whether the parties are different, so long as the issues are the same. This would especially apply where the issue is one affecting the general public so that any person is capable of filing action. If one person files action and fails, with the issue being addressed and dismissed, another person cannot now re-litigate the issue, claiming that he was not a party in the previous suit. This is what is indeed captured in explanation (6) of Section 7 of the Civil Procedure Act, which I reproduced above, but which for ease of reference I will yet again copy herebelow; it provides as follows :-

Explanation (6): Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right, shall for the purposes of this section, be deemed to claim under the person so litigating.

100. The previous two suits were certainly public interest litigation suits. The orders that were sought in those suits were not orders that were restricted to the parties therein, but were orders that were going to affect the general populace of tenants and residents within Mombasa County. The petitioners herein were certainly among those to be affected by any orders issued in those suits and they must thus be deemed as claiming under the persons that litigated before. Indeed, if the litigants in **Petition No. 39 of 2016** had succeeded, then this litigation would have been completely unnecessary, for the petitioners would have obtained, within the parameters of the previous litigation, the very orders that they seek in this suit. This is irrespective of the manner in which the orders in this suit are couched or drafted. The net effect of the orders sought in the previous suit and in this suit, in so far as the overall project is concerned, is the same. This is the very reason why **Petition No. 6 of 2017** failed. Ogola J dismissed it as being *res judicata*, and in his decision he stated as follows :-

(24) It is clear that the Petitioners have couched their pleadings in the different forums but seeking similar remedies. In Edwin Thuo vs Attorney General & Another Nairobi Petition No. 21 of 2012 (unreported), the court stated :

“The courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’

101. It is the same scenario in this case. It matters not that there are new parties, or some sort of difference in the way in which the orders sought are drawn. These are nothing but cosmetic touches to disguise this suit as different from the previous litigation. This suit, in so far as it touches on the overall design of the project, and whether the petitioners need to move out of their residences, is *res judicata*, and I so hold.

102. It actually does appear that the petitioners were alive to the fact that their suit may very well be *res judicata*. That is why they have attempted to seek refuge in the doctrine of *ex turpi causa non oritur actio*. I have not been shown any precedent by the petitioners where the principle of *res judicata* can be overridden by the doctrine of *ex turpi causa* doctrine. Speaking for myself, I doubt whether the principle of *res judicata* can be overridden by the doctrine of *ex turpi causa*. The doctrine in essence bars a party from bringing an action if such action arises as a result of his own illegal act, such as attempting to enforce an illegal contract. It is a doctrine that is generally used as a defence to such action. If it were to apply, it is actually the respondents and interested party who would be availed of such defence, and I do not see how such defence can be deemed to vest upon the applicants. I am in a nutshell not moved by the attempt to clutch at the doctrine of *ex turpi causa*.

103. Having said all the above, I still need to analyse whether there is an evolved issue that may not have been handled in **Petition No. 39 of 2016**, and which may be subject of a new issue, as advised in the case of *John Florence Maritime Services Limited*.

104. My analysis of this petition, is that the only issue that is novel, is the manner in which the petitioners are being asked to vacate the premises, which issue in my view, did not arise, and may not have been brought up, in previous litigation. It will be recalled that in **Petition 39 of 2016**, the Court was alive to the fact that the project was still at its nascent stages and execution of it was yet to commence. Now, the project is actually being executed, and I think that an issue may arise as to whether it is being executed in a manner that violates the constitutional rights of the tenants therein. That, to me, is the sole issue that this court may determine, otherwise all the other issues are *res judicata* as I have taken a significant amount of time to demonstrate in the preceding paragraphs.

105. I have analysed the manner in which the petitioners are proposed to be removed from their units and I see no violation of any of the Constitutional rights of the petitioners. Contrary to their allegation that there was no public participation, on the issue of how, when, and the manner in which they would need to vacate, I have seen ample evidence of it. I have seen the public notices displayed in the affidavit of Mr. Waliula, and the 3rd interested parties also confirm that meetings were called and held. I have indeed seen the attendance list of the meeting held on 16 August 2020. In my view, there was ample consultation with the tenants of Buxton Estate on how they would vacate the premises. The affidavit of the 3rd interested parties elaborates that the amount of Kshs. 300,000/= to be paid for every tenant was agreed upon in these meetings. I now wonder what issue the petitioners have. If the quarrel is in the amount of money being offered, that ought to have been a subject for discussion in the meetings, and in fact, appears to have been a topic that was canvassed and a resolution reached. Of course not all parties can agree on all resolutions passed, but what is important is that the question was analysed and a decision reached, after all views were taken into account.

106. On my part, I think the petitioners should be grateful, because I have not seen any clause in their tenancy agreement, that obligates the respondent to grant them alternative accommodation, in the event that the respondent needs its premises. It should not be forgotten that the relationship between the petitioners and the respondent is one of tenant and landlord despite the respondent being a public body. The petitioners and the respondent’s relationship is subject to the terms of contract that they have. I have looked at the tenancy agreements

displayed by the petitioners. They all contain a clause that the tenancy agreement is subject to termination by the giving of a notice of one month. It means that the petitioners, or any other tenant of the respondent, is not a permanent tenant. There is nothing under their contract that bars the respondent to reclaim its premises by giving a notice of one month. Neither is there any provision in the terms of contract that obligates the respondent to house or facilitate the tenant in the event that it retakes its premises or wishes to pull it down. In our case, the tenants were given a notice of three months, which is more than the one month notice stipulated in their contract. They are also being given some *ex gratia* payment (*ex gratia* because there is no legal obligation under the contract to make such payments) to enable them find alternative accommodation while the respondent undertakes the project. They have been given the first option to purchase, which will convert them from being tenants, to being owners. A deposit of Kshs. 60,000/= has already been made for them in case they wish to exercise this option to purchase. Where is the constitutional violation in the above? I do not see any.

107. The petitioners in their petition stated that they are protected tenants. Protected tenants would be those tenants falling within the jurisdiction of the Rent Restriction Act, Cap 296, Laws of Kenya, but that statute exempts dwelling houses which are the property of, and let by, the Government and local authorities. The petitioners were previously tenants of a local authority, and are now tenants of the County Government, so they cannot be considered as protected tenants. In any event, if the petitioners believe that they are protected tenants, then they can seek redress through the mechanism provided for in the Rent Restriction Act, and need not file a constitutional petition. Even if they were protected tenants and came to this court for redress, I would hold that in this instance the landlord requires to renovate or needs to use its land more efficiently, which is fully reasonable and justifiable.

108. The need to have the petitioners and other tenants vacate the premises so that they can be renovated, will of course lead to some inconvenience. But if you balance the inconvenience that the tenants will suffer, with the general public good, it is apparent that in this instance, the inconvenience to the tenants must give way to public good. It is in the interest of the public to have more housing and it is also in the public interest to have an avenue for a graduation from tenancy to ownership. The inconvenience to the petitioners has in fact been tempered by the respondent through the *ex gratia* payments made, and by the respondent giving the tenants a term of notice that is longer than is stipulated in their tenancy agreement.

109. The petitioners relied on the case of *Satrose Ayuma & 11 Others vs The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Others* but the facts in that case are radically different from the scenario before me, and the decision in that case cannot help them. In the *Satrose Ayuma* case, the petitioners were tenants of the 1st respondent. The 1st respondent wished to undertake development on its land and gave a 90 day notice to the residents. The petitioners contended that they had never personally been issued with the said notices, but even then, and before the expiry of the notice, the 1st respondent moved in and started demolishing the premises and its amenities such as toilets. They also averred that they had never been consulted. In its judgment, the court (Lenaola J, as he then was) found a violation of the rights of the petitioners, mainly because they had not been consulted, and directed that a meeting be convened by the Managing Trustee of the 1st respondent with the petitioners, where a programme of eviction of the petitioners would be designed. This is not the scenario here. For the case of Buxton Estate, there has already been consultation with the residents. Through the consultation, a compromise has been reached that the residents be given a grant that would enable them have alternative accommodation for the time that development will be ongoing. The tenants have been given the first right of purchase of the units to be developed. This certainly is not a similar scenario as that which was experienced in the *Satrose Ayuma* case. It is indeed quite telling that this petition has only been filed by 13 persons, yet the Estate has over 500 units. In essence, only a small group is not happy with the proposals made. I have pointed out before, that it may never be possible to have 100% agreement on all things. But clearly, in our case, the resettlement proposal is acceptable to a huge majority of the residents, and on my part I find them reasonable.

110. There was a claim that the respondent and 2nd interested party have violated international instruments. I have pored through the submissions of counsel for the petitioners and they have not pointed me to a specific provision of a specific international instrument that is claimed to have been violated. It was alleged that this is a mass eviction that can be equated to a crime against humanity. There is absolutely no substance in this argument. What we are dealing with is a situation where a local Government needs to create additional housing from the limited land resource that it has. There is no crime being committed here, whether in the domestic, or in the international, forum. The petitioners have not convinced me that the respondent or the 2nd interested party has violated any of the international instruments that they have mentioned.

111. Whichever way I consider this petition, I find absolutely no merit in it, and it is hereby dismissed.

112. The only issue left is costs. There had been previous litigation where the court had pronounced the rights of the parties and I have found that much of the issues in this petition are *res judicata*. On the single narrow point that I have considered novel, that is regarding the manner of removal of the tenants from the premises, I have found that there was adequate public participation and even consensus with tenants reached. Adequate notice period was given. The tenants were given an *ex gratia* grant to get alternative accommodation which was not stipulated in their tenancy agreement, meaning, that the respondent went beyond its obligations under the contract. This litigation had absolutely no basis. It is for this reason that I will order the petitioners to pay the costs of this litigation to the respondent and to the 2nd interested party. I make no orders as to costs in favour of, or against, the 3rd interested parties.

113. Judgment accordingly.

DATED AND DELIVERED THIS 3RD DAY OF MARCH 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT

MOMBASA