



**Sheria Na Haki Human Rights Institute v Kara & 8 others; Ethics and Anti
– Corruption Commission & another (Interested Parties) (Constitutional
Petition E034 of 2023) [2024] KEELC 3668 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3668 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION E034 OF 2023

LL NAIKUNI, J

MAY 2, 2024

IN THE MATTER OF: THE REPEALED (FORMER) CONSTITUTION

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF: SECTION 70(A) AND SECTION 77 (9) AND ARTICLE 62 (1)
(A) & E AND ARTICLE 62(2), 258 AND 159(2) (D) OF THE CONSTITUTION 2010**

BETWEEN

SHERIA NA HAKI HUMAN RIGHTS INSTITUTE PETITIONER

AND

BILKIS UMER SULEIMAN KARA 1ST RESPONDENT

ZUBEDA SAID ABDALLA 2ND RESPONDENT

THE REGISTRAR OF TITLES MOMBASA 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

THE HON.ATTORNEY GENERAL 5TH RESPONDENT

DIRECTOR LAND ADMINISTRATION 6TH RESPONDENT

**CABINET SECRETARY MINISTRY OF LANDS URBAN
DEVELOPMENT 7TH RESPONDENT**

INSPECTOR GENERAL OF THE POLICE 8TH RESPONDENT

O.C.S BAMBURI POLICE STATION 9TH RESPONDENT

AND



ETHICS AND ANTI – CORRUPTION COMMISSION INTERESTED PARTY
DIRECTORATE OF CRIMINAL INVESTIGATION INTERESTED PARTY

RULING

I. Introduction

1. Before this Honourable Court for determination are two (2) Notice of Motion applications dated 29th November, 2023 and 20th December, 2023 by both the 1st Respondent and Petitioner respectively.
2. Upon service of the Notice of Motions applications to the Respondents, the 1st Respondent opposed the Application dated 20th December, 2023 through raising an objection through a Notice of Preliminary objection dated 24th January, 2024.

II. The Notice of Motion application dated 29th November, 2023 by the 1st Respondent

3. The application dated 29th November, 2023 by the 1st Respondent was brought under the provision of Sections 1A,1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 40 Rule 3 and Order 51 of the Civil Procedure Rules, 2010 and any other enabling provisions of Law. The Applicants sought for the following orders:-
 - a. Spent
 - b. That the Petitioner/Respondent ,his servants/agents/proxies be summoned to appear before this Honorable Court to show cause why they should not be committed to Civil Jail for a period not exceeding six (6) months;
 - c. That in the alternative to prayer two (2) above, this Honorable Court imposes a fine against the Petitioner/ Respondent for disobeying the orders of the Court dated 3rd November, 2023.
 - d. That the Officer Commanding Station (OCS) Bamburi Police Station be directed to ensure that, the Applicant's possession is protected and offered security.
 - e. That the Respondent, that is Sheria Na Haki Human Rights Institute be investigated and charged appropriately.
 - f. That Etoke John Akaran be investigated and charged appropriately.
 - g. That the Respondent that is, Sheria Na Haki Human Rights Institute pay for damages caused for breach.
 - h. That the costs of this Application be provided for.
 - i. That such other or further Order that this Honorable Court may deem fit and just to grant
4. The application by the 1st Respondent/Applicant was premised on the grounds, facts and testimony on the face of the application and further supported by the annexed affidavit of Bilkis Umer Suleiman Kara the Applicant herein. The Applicant averred that:-
 - i. On 3rd November 2023 this Honorable Court gave Orders directing that “inter alia’ the Status quo to be maintained.



- ii. The 1st Respondent/Applicant was issued with a copy of the Application and the Order of the Court dated 3rd November 2023.
- iii. A Court Order was binding upon All parties.
- iv. On or around 24th November 2023 the Petitioner/Respondent and his cohorts attempted to forcefully, unlawfully and illegally take occupation of the suit property and in the process injured the 1st Respondent's/Applicant's Caretaker and destroyed and looted the premises.
- v. Officers from Bamburi Police Station managed to disperse the "attackers" but they again tried to force their way in at night but were thwarted.
- vi. The Petitioner/Respondent's actions were brazen, with impunity and a total disregard to the rule of law and/or the protection guaranteed by the Constitution.
- vii. The Court Orders MUST be obeyed by ALL parties to the suit to protect the dignity of the Court and uphold the rule of law.
- viii. Court Orders could not be used as a shield and sword otherwise it can lead to a perception of BIAS towards a litigant.

III. The Notice of Motion application dated 20th December, 2023 by the Petitioner

- 5. The application dated 20th December, 2023 filed by the Petitioner was brought under Order 2 Rule 5, 9 Rule 1 of the Civil Procedure Rule, 2010, Section 3A of the Civil Procedure Act Cap. 21 Laws of Kenya and all other enabling provisions of the law. The Petitioner sought for the following orders:-
 - a. Spent
 - b. That the Respondents allow a Land Surveyor access the suit property to ascertain whether the suit property known as Number 20800 (Original No MN/1/341/3 is the same as property known as MN/1/341/4 on the survey of Kenya Sheet Map.
 - c. That an order be issued directing the Mombasa County Police Commander to provide security during the exercise of the survey exercise.
 - d. That a survey Report be prepared for the properties known as Number 20800 (Original No MN/1/341/3 and MN/1/341/4.
 - e. That leave be granted for the petitioner to produce the above mentioned Survey Report as evidence in its list of documents.
 - f. That the cost of this application be provided for.
- 6. The application by the Petitioners/Applicants was based on the grounds, testimonial facts and the averments made out under the further Supporting affidavit of Eto John Akaran the Applicant herein. The Applicant averred that:-
 - a. The Petitioner received complaints from the members of the Utange Shanzu Community with regards to their mistreatment by the 1st and 2nd Respondents who instructed the 9th Respondent herein to actualize said harassment and mistreatment.
 - b. On further inquiry, the Petitioner ascertained that the members of the Utange Shanzu community had been living in the suit property since the years of 1960s.



- c. Sometimes in the year 2011, the 1st and 2nd Respondents laid claim of ownership to the suit property and that members of the community therefore vacate the property
- d. The fraudulent copies of titles to the Suit property were produced.
- e. On doing due diligence the community found out that the registered number on the copies of Titles never matched with the survey of Kenya Map.
- f. The 1st and 2nd Respondents through goons invaded the suit property and illegally/unlawfully sought to evict the members of the community.
- g. The members of the community sought help and instructed the Petitioner hereinto act for them in the suit.
- h. The Petitioner herein sought orders restraining the Respondents from conducting survey, subdividing, evicting, alienating, and dispossessing the community of the suit property.
- i. The orders of status quo were granted on the 31st day of October 2023
- j. As a result, the members of the community needed this court to grant leave for a survey to be conducted.
- k. To clear the doubt, and ascertain which exact property the 1st and 2nd Respondents lay claim to, such a survey was deemed necessary.
- l. The oxygen principle based on the provision of Article 159 (2) (d) of the Constitution provides that:- “justice shall be administered without undue regard to procedural technicalities”. This grants this Honorable court the discretion to grant orders sought to enable justice be done to all parties.
- m. If the orders sought herein was not granted the Petitioner would suffer irreparable damages.
- n. The Respondents would not suffer any prejudice if the Order sought was granted.
- o. This application was in the interest of justice and intends to help expedite this matter in the event that the suit property the 1st and 2nd Respondents lay claim to does not match those on the survey map and report.

IV. Response to the Notice of Motion application dated 20th December, 2023

7. The 1st Respondent opposed the Notice of Motion application by the Petitioner through a 7th paragraphed Notice of Preliminary objection dated 24th January, 2024 on the following grounds:-
 - a. The Petitioner/Applicant's Application was anchored on a Letter of Allotment, which could not override a duly registered Title under the law.
 - b. Prayer No. 2 on the Petitioner/Applicant's Application was an attempt to disregard and defeat the provisions stipulated under the provision of Section 24 of the Survey Act.
 - c. The Application violated the provisions of Section 17(1) of the Land Registration Act as there no intention to amend the cadastral map that warrants a further survey.
 - d. The Application further infringed the provision of Section 18 of the Land Registration Act.
 - e. The Application contravened the provisions embedded under Sections 24 and 25 of the Land Registration Act 2012.



- f. The Application was an attempt to undermine and defeat the applicability of the provision of Section 7 of the [Land Registration Act](#).
- g. The Application was bad in law, fatally defective and an abuse of the Court process.

V. Submissions

- 8. On 18th January, 2024 while the Parties were present in Court, they were directed to have the Notices of Motion applications dated 29th November, 2023 and 20th December, 2023 respectively be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 19th February, 2024 a ruling date was reserved on 15th April, 2024, 2024 by Court although due to unavoidable circumstances, it was actually delivered on 2nd May, 2024 accordingly.

A. The Written Submission by the 1st Respondent/ Applicant to the Notice of Motion dated 29th November, 2023

- 9. The 1st Respondent/Applicant through the Law firm of Messrs. Tariq Khan & Associates filed their written submissions dated 16th February, 2024. Mr. Tariq Khan Advocate commenced by stating that the submissions were in support of the Application dated 29th November, 2023 which was premised on the grounds on the face of the Application and the annexed Affidavit of Bilkis Umer Sueiman Kara. The core ground was that this Honorable Court issued Orders on 31st October 2023 as follows:-
 - a. That the Notice of Motion dated 24th October 2023 be and is hereby certified as urgent.
 - b. That the Petitioner/Applicant to immediately serve the Respondents with the pleadings.
 - c. That upon service the Respondents granted 14 days leave to file and serve their replies thereof and submissions upon being served by the Petitioner.
 - d. That thereafter, the Petitioners be granted 14 days leave to file and serve Further Affidavit if need be from the new issues raised thereof and written submissions thereof.
 - e. That there be inter partes hearing on 27th February 2024 before ELC No.3.
 - f. That in the meantime, there be Status Quo to be maintained meaning that the situation to remain as it was before the suit was filed and hence no activities i.e. subdivision, eviction, alienation, wastage and/or any other on the suit land thereof.
- 10. The Learned Counsel contended that the Petitioner/Respondent on two separate occasions attempted to forcefully, unlawfully and illegally take occupation of the Suit Property contrary to the Court's Order dated 31st October 2023. The Learned Counsel stated that the 1st Respondent/ Applicant sought to address the following two (2) issues. Firstly, whether the Petitioner/ Respondent should be cited for contempt is that according to [Black's Law Dictionary](#), Contempt refers to:-
 - a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.
- 11. According to the Counsel, there were four elements that must be provided in a case of civil contempt. There were;-
 - a. The terms of the Order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;



- b. The Defendant had knowledge of or proper notice of the terms of the Order;
 - c. The Defendant has acted in breach of the terms of the Order; and
 - d. The defendant's conduct was deliberate.
12. In the instant case, according to the Learned Counsel, this Honourable Court issued the Orders dated 31st October 2023 following the Urgency. At the time of making the Orders of status quo, the status of the ground was that the 1st Respondent/Applicant was in quiet and peaceful possession of the Suit Property. The Petitioner/Respondent never and did not dispute the terms of the Order and/or knowledge of the Order. The only thing the Petitioner/Respondent disputed was the fact that it disobeyed the Court Order and if it did, it was not deliberate. The Learned Counsel therefore wished to show that the breach was done and that it was deliberate. On or around 24th November 2023, the Petitioner/Respondent led by one Mr. John Ekore Akaran and his cohorts attempted to forcefully, unlawfully and illegally take occupation of the Suit Property and in the process injured the 1st Respondent/Applicant's caretaker and destroyed and looted the premises. The unfortunate and illegal actions of the Petitioner/Respondent forced the 1st Respondent/Applicant to lodge a complaint at Bamburi Police Station under OB No.50 and 51. The Petitioner/Respondent was well aware of the Orders of the Court but chose to blatantly disobey the said Orders by unlawfully and illegally making an attempt to take occupation of the Suit Property. The 1st Respondent/ Applicant's Application dated 29th November 2023 was filed to ensure that the rule of law was preserved and that the Petitioner/Respondent was held accountable for failure to comply with the Orders of the Court dated 3rd November 2023. It was imperative to note that the orders made by a properly constituted Court must be obeyed at all times in order to protect the dignity of the Court. To buttress his point, he cited the case of:- "*Hadkinson – versus -Hadkinson*(1952)2 ALL ER56" where it was stated as follows:-

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”

13. Further, the Court in the case of "*Jesugut Tamining Kiprotch – Versus - Antony Kipketer Rotich* [2020] KLR" stated that:-

“An order of the court must be obeyed and if a party is not comfortable with the order, then such a party can approach the court to vary or explain the difficulty with the implementation of the order. There is no option for disobedience as this goes to the authority of the court under attack. Court orders are issued to maintain the rule of law.”

14. Additionally, he referred Court to Ibrahim J(as he then was)in the case of "*Econet Wireless Kenya Ltd – Versus - Minister for Information & Communication of Kenya & another* [2005] KLR 828" discussed the importance of obeying Court Orders as follows:-

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it



extends even to cases where the person affected by the order believes it to be irregular or void.”

15. According to the Learned Counsel, the Petitioner/Respondent had no authority whatsoever to lead goons in an illegal pursuit of taking occupation of the Suit Property, which the 1st Respondent/Applicant was enjoying quiet and peaceful possession. In the circumstances, it is only right that the Petitioner/Respondent be cited and punished for the contempt. According to the Learned Counsel, this being a land matter, reliance was placed on the provision of Section 29 of the Environment and Land Court Act, No. 19 of 2011 which provides that:-

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

16. In addition to the above mentioned provisions of the law, they beseeched this Honorable Court to be guided by the provision of Section 5 of the Judicature Act which provides as follows:-

- 1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
- 2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

17. On the same issue, the Learned Counsel also cited the case of: “*Refrigeration and Kitchen Utensils Limited – Versus - Gulabchand Popatlal Shah & Another*, Civil Application No.39 of 1990”, where it was observed that:-

A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it....It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question.....he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

18. In light of the above, it was the Learned Counsel’s submission that this Honorable Court was properly vested with the discretion to punish the Petitioner/Respondent for the failure to comply with the Orders of the Court dated 31st October 2023. In saying so, he cited the case of “*Joseph Kabugi Karanja – Versus - Benson Mugo Mukunya & 3 others* [2021]eKLR” pronounced itself thus:-

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. To this end, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing.”

19. Secondly, on whether the Petitioner/Respondent had shown sufficient cause as to why it disregarded Court Orders. The Learned Counsel submitted that in its Replying Affidavit dated 17th December 2023, Mr. Ekore John Akaran alleged that he was not in Mombasa on the day of the incident. He also produced unclear bus tickets as proof of travel. The law of evidence under the provision of Sections 107 and 109 of the Evidence Act, Cap. 80 demand that whoever desires any Court to give judgment



as to any legal right or liability dependent on the existence of facts, which he asserted must prove that those facts existed. Further, it is trite that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

20. By Mr. John Ekore's own admission at Paragraph 13, of the Replying Affidavit date 17th December 2023, thirteen(13) persons were arrested following the illegal and unlawful attempt to take occupation of the Suit Property. According to the Learned Counsel, it was clear from the exhibit marked as EJA - 2 that the Petitioner/Respondent was well aware of the thirteen (13) persons that were arrested. Suffice to say that Mr. John Ekore Akaran was out of town, nothing precluded him from instructing his agents, servants and/or persons acting on his authority from the illegal and unlawful invasion, which occasioned injuries on the 1st Respondent/Applicant's caretaker and also destruction and looting on the premises.
21. The Learned Counsel notably stated that Mr. John Ekore Akaran never refuted the illegal invasion. He only refuted the fact that he was in town on the day of the incident. The Petitioner/Respondent's conclusive proof was the payment of bus tickets to prove an alleged travel out of town and ETR receipts. There was no conclusive proof that Mr. John was indeed out of town on the date of the incident. There is also no corroborating evidence of the travel. In the absence of conclusive evidence, the narrative that Mr. John Ekore was out of town must be treated as hearsay. In stating this, the Learned Counsel referred Court to the Court of Appeal in the case of "[*Anne Wambui Ndiritu – Versus - Joseph Kiprono Ropkoi & Another*](#) [2005] 1 EA 334" where the Court held that:-

“As a general proposition under Section 107 (1) of the [*Evidence Act*](#), Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
22. The mere fact that the names of Mr. John Ekore Akaran appeared on bus tickets for the dates 19th November and 6th December 2023 could not be taken as conclusive proof of absence (on the day of the incident) by this Honorable Court. If anything, the said ticket could only be an alibi to escape liability. Witnesses positively identified Mr. John Ekore Akaran and others leading the attempted invasion the caretaker positively identified him too. The Police who came onto the sight also confronted him.
23. The Learned Counsel submitted that the Petitioner/Respondent had failed, refuse and/or neglected to show sufficient cause as to why it blatantly disregarded the Court Orders. The Petitioner/Respondent had only demonstrated a trade of blame game without actually pointing out a particular cause for the disobedience of Orders of this Honorable Court. According to the Learned Counsel, it was clear that the 1st Respondent/Applicant has discharged the burden of proving that there was indeed an illegal attempt by the Petitioner/Respondent to take occupation of the Suit Property which was contrary to the Orders of this Honorable Court issued on 31st October 2023. In the circumstances, the Petitioner/Respondent ought to be cited and punished for contempt of Court.
24. In conclusion, the Learned Counsel submitted that this was a court of law whose orders must not be taken for granted, disregard and/or disobeyed. The Petitioner/Respondent moved Court on its own accord to which this Court issued an Order dated 31st October 2023 directing that status quo to remain as it was prior to the filing of the suit herein. Care had to be taken to ensure that the Petitioner/Respondent never - used the Order dated 31st October 2023 against the Respondents. So far, there was an apparent demonstration by the Petitioner/Respondent that notwithstanding Orders of the Court,



the Petitioner/Respondent was still willing to unlawfully, illegally and forcefully take occupation of the Suit Property.

25. Notably, the Petitioner/Respondent's actions caused the 1st Respondent/Applicant to suffer damages as a result of destruction of property and for her caretaker to be injured from the assault carried on by the Petitioner/Respondent's goons. It is only right that this Honorable Court cited the Petitioner/Respondent for contempt of Court and summons the Petitioner/Respondent, his servants/agents/proxies to appear before this Honorable Court and show cause why they should not be committed to civil jail for a period not exceeding six (6) months.

B. The Written Submissions by the Petitioner/ Respondent to the Notice of Motion application dated 29th November, 2023

26. The Petitioner/Respondent through the Sheria na Haki Human Rights Institute, filed their written submission dated 16th January, 2024. M/s. Chano Advocate submitted that the submissions were filed pursuant to the directions issued by this Honorable Court on 30th November 2023 and in opposition to the Application dated 29th November 2023.
27. On the background, the Learned Counsel informed Court that on 24th October, 2023, the Petitioner/Respondent herein sought orders restraining the Respondents from conducting survey, subdividing, evicting, alienating, and dispossessing the community of the suit property. Orders of status quo were granted on the 3rd November 2023. On the 29th November 2023, the 1st Respondent/Applicant filed a Notice of Motion Application seeking the following orders:-
- a. That the Petitioner/Respondent, his servants/agent/proxies be summoned to appear before this Honourable court to show cause why they should not be committed to civil jail for a period not exceeding six (6) months.
 - b. That in the alternative the Honourable court imposes a fine against the Petitioner/Respondent for disobeying court Orders.
 - c. That the Petitioner/Respondent that is Sheria na Haki Human Rights Institute be investigated and charged appropriately.
That the Petitioner/Respondent's Executive Officer be investigated and charged appropriately.
 - e. That the Petitioner/Respondent that is Sheria na Haki Human Rights Institute pay for damages caused for breach.
28. On the issue of whether the Petitioner/ Respondent herein was in contempt of orders granted on 3rd November, 2023, the Learned Counsel submitted that Orders of status quo were granted by this Honourable Court on 3rd November 2023. Status quo at the time meant the land remained as it was at the time of institution of suit. This consequentially meant that none of the parties in this suit should occupy the suit property neither should they build and claim ownership to the same. The 1st Respondent/Applicant alleged that the Petitioner/Respondent's Executive Officer led goons or cahoots to illegally or forcefully gain entry to the suit property.
29. The Petitioner/Respondent's Executive Officer was not in Mombasa County on the said date of 24th November and therefore could not have visited the suit property whether lawfully or not. He had other engagements in Nairobi and therefore left Mombasa County on 19th November 2023 via Tahmeed Bus Services and returned on the 6th December 2023 via Dreamline Express Bus Services. The annexed receipts for said Bus services were electronically generated per date of travel and therefore could not be manipulated. They represented the true nature of events in the most honest way. The Petitioner/



Respondent's Executive Officer was only made aware of the events if any by his advocate when the application was served upon the Petitioner.

30. On whether the Respondent/ Applicant had proved contempt of court orders by the Petitioner/ Respondent's Executive Officer, the Learned Counsel submitted that in a contempt of court Application such as the present, the burden of proof lied upon the Applicant. The standard of proof in such an Application was well settled as being higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt because contempt of court proceedings is akin to criminal proceedings. An individual may end up losing his liberty. See the case of "[Makita – Versus - Babarini Farm Limited](#) (1985)229". In discharging the burden of proof the 1st Respondent/Applicant must prove the following;
- a. There was an Order of Court;
 - b. The Order in question was served personally on the contemnor or the contemnor had knowledge of the Order; and
 - c. That despite such service or knowledge the party sought to be committed has disobeyed the Order.

See the authority of "[Quick Handling Aviation Limited – Versus - Adan Nor Adan](#) (2015) eKLR".

31. According to the Learned Counsel, the 1st Respondent/Applicant herein had failed to adduce any evidence to prove the alleged contravention of the said Court Order. He had merely made general averments of the alleged contempt without giving particulars capable of being rebutted by the Petitioner/Respondent. The Petitioner/Respondent never refuted service of the said court order since it was the Petitioner who was granted said Order. The 1st Respondent in contravention of said Orders has contracted the services of guards and police men to man the property, claiming to be the owners of the suit property. The said guards have been constantly harassing the community and there was evidence of the same. This was going against the Orders of status quo granted on 3rd November 2023. If there's a party who ought to be held in contempt of Orders then it should be the Respondent/Applicant. The Learned Counsel to ascertain the above position submitted that the Petitioner was of the option that a site visit conducted by the court in line with Order 40 Rule 10 of the [Civil Procedure Rules 2010](#) was necessary. The 1st Respondent/Applicant merely stated that the Petitioner/Respondent led a group of goons and servants wantonly and invaded the suit property without giving further evidence of the same. The 1st Respondent/Applicant therefore had failed to discharge the burden of proof required to succeed in the instant Application.

32. In conclusion, the Learned Counsel asserted that the Petitioner/Respondent was a law abiding institution led by a law abiding Executive Officer who had never at any given time acted in any manner that warranted his being held in contempt and consequently being committed to civil jail. In light of the foregoing authorities, the Learned Counsel argued this Honourable Court to dismiss the application herein with costs to the 1st Respondent/ Applicant.

C. The Written submissions by the Petitioner/ Applicant in Support of the Notice of Motion application dated 20th December, 2023

33. The Petitioner/Applicant through the Sheria na Haki Human Rights Institute, filed their written submission dated 5th February, 2024. M/s. Chano Advocate commenced her submission by stating that before the Honourable Court was the Petitioner/Applicant's application dated 20th December, 2023 seeking for the prayers as already set out above.



34. The Learned Counsel submitted that the Application was supported by a sworn affidavit of Etoke John Akaran, who deponed that the Petitioner received complaints from the members of the Utange Shanzu Community with regards to their mistreatment by the 1st and 2nd Respondents who instructed the 9th Respondent herein to actualize said harassment and mistreatment. On further inquiry, the petitioner ascertained that the members of the Utange Shanzu community have been living in the suit property since the years of the 1960s. Sometime in the year 2011, the 1st and 2nd Respondents laid claims of ownership to the suit property and that members of the community therefore vacate the property.
35. The fraudulent copies of titles to the Suit property were produced. On doing due diligence the community found out that the registered number on the copies of Titles never matched with the survey of Kenya Map. The 1st and 2nd Respondents through goons invaded the suit property and illegally/unlawfully sought to evict the members of the community. The members of the Community sought help and instructed the Petitioner herein to act for them in the suit. The Petitioner herein sought orders restraining the Respondents from conducting survey, subdividing, evicting, alienating, and dispossessing the community of the suit property. The Orders of status quo were granted on the 31st day of October 2023. As a result, the members of the community need this court to grant leave for a survey to be conducted. To clear the doubt, and ascertain which exact property the 1st and 2nd Respondents lay claim to, such a survey is deemed necessary.
36. The Learned Counsel submitted the application was made in the interest of justice for both the Petitioner/Applicant and the Respondents. One could not purport to own something which does not belong to him. The Respondents claimed ownership to various parcels of land which need to be clearly shown on the survey map, ascertained and proved to be the suit properties in question so as to ascertain ownership. The provision of Article 159 of the *Constitution* of Kenya, 2010, vested judicial authority to be exercised by courts, it also provides for justice to be done to all without undue regard to technicalities and in a manner to protect and promote the principles of the *Constitution* such as the right to land ownership.
37. The Learned Counsel contended that whereas the land pleaded as Number 20800 (Original No MN/1/341/3 existed, the Applicants sought just to confirm whether the same was MN/1/341/4 on the survey of Kenya Sheet Map to remove doubt as to the suit property and its current ownership. The provision of Section 89 of the *Evidence Act* Cap. 80 provides, (1) The court shall presume that maps or plans purporting to be made or published by the authority of the Government, or any department of the Government, of any country in the Commonwealth were so made or published and are accurate. (2) Maps or plans specially made for the purposes of any cause or other proceeding, civil or criminal, must be proved to be accurate. The Applicant requested for the Respondent to agree to a survey being done and a survey report be produced to clear the doubts and ease the court in the determination of this matter. The provision of Section 107 (2) of the *Evidence Act* Cap. 80 provides that a person was bound to prove the existence of any fact it is said that the burden of proof lies on that person. To buttress on this point, the Counsel cited the case of: “*Christopher Ndaru – Versus - Esther Mbandi Kagina & another* (2016) eKLR” where it held:-

“The duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.

Under the common law, for expert opinion to be admissible it must be able to provide the court with information which is likely to be outside the courts' knowledge and experience,



but it must also be evidence which gives the court the help it needs in forming its conclusions”.

38. The Learned Counsel submitted that to prove that the property known as Number 20800 (Original No MN/1/341/3 is the same as property known as MN/1/341/4 on the survey of Kenya Sheet Map or not, the Learned Counsel humbly requested this Honourable Court to indulge their prayer to have a survey done. According to the Learned Counsel, this court has jurisdiction and the power to compel the Respondent to allow a surveyor access the suit property and conduct said survey to expedite this matter and achieve justice to both the Petitioner and the Respondent. The provision of Section 3A of the *Civil Procedure Act*, Cap. 21 provides for the inherent power of the court to make such orders as may be necessary for the ends of justice. Expert opinion and in this case the survey and its report was necessary to clear doubts in this matter hence the need for it to be conducted. The survey was not for a boundary dispute but one that sought to do some clarification and the same should be considered.
39. In conclusion, the Learned Counsel averred that from the above analysis, it was clear that the application was merited. She argued that Justice for both the Petitioner and the Respondent in this matter was the outmost goal. In view of the plethora of authorities she humbly submitted that it was within the Court’s discretion to order that:-
- a. That the Respondents allowed a land Surveyor access the suit property to ascertain whether the suit property, known as Number 20800 (Original No MN/1/341/3 was the same as property known as MN/1/341/4 on the survey of Kenya Sheet Map.
 - b. That an order be issued directing the Mombasa County Police Commander to provide security during the exercise of the survey exercise.
 - c. That a survey Report be prepared for the properties known as Number 20800(Original No MN/1/341/3 and MN/1/341/4.
 - d. That leave be granted for the petitioner to produce the above mentioned Survey Report as evidence in its list of documents.
 - e. That the cost of this application be provided for.

D. The Written submissions by the 1st Respondent against the Notice of Motion application dated 20th December, 2023

40. The 1st Respondent through the Law firm of Messrs. Tariq Khan & Associates Advocates filed their written submissions dated 8th March, 2024. Mr. Tariq Khan Advocate submitted that what was before Court was the Petitioner’s Application dated 20th December 2023 that was filed under Certificate of Urgency. The Application sought for Orders inter alia an Order that the Respondents allowed a land Surveyor access to the Suit Property to ascertain whether the property known as Plot Number 20200/L/MN(hereinafter referred to as the “Suit Property”) is the same as the property known as MN/1/341/4. The Petitioner’s Application was opposed by the 1st Respondent who filed a Notice of Preliminary Objection dated 24th January 2024 wherein the following points of law were raised:
- i. The Application was anchored on a Letter of Allotment, which cannot override a duly registered Title under the law.
 - ii. The Application was an attempt to disregard and defeat the provisions of Section 24 of the *Survey Act*.
 - iii. The Application violated the provisions of Section 17(1) of the *Land Registration Act*.



- iv. The Application further infringes Section 18 of the [Land Registration Act](#).
 - v. The Application contravened Sections 24 and 25 of the [Land Registration Act](#).
 - vi. The Application was an attempt to undermine and defeat the applicability of Section 7 of the [Land Registration Act](#).
41. The Learned Counsel in highlighting these submissions, submitted that on the Preliminary Objection and then submitted on the Petitioner's Application. The Learned Counsel sought to first submitted to address the following two (2) issues for determination:-
42. Firstly, on whether the Preliminary Objection dated 24th January 2024 was merited. The Learned Counsel submitted that the meaning of what constituted a Preliminary Objection and the parameters of consideration of the same were clearly set out in the case of "*Mukisa Biscuit Manufacturing Co. Ltd - Versus - West End Distributors Ltd.* (1969) EA 696", where the Court held as follows:-
- ".....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".
43. In the instant case, the Learned Counsel contention touched purely on points of law the same being anchored on the following provisions of the law;
- i. The provision of Section 24 of the [Survey Act](#)
 - ii. The provision of Sections 7,17(1),18, 24 and 25 of the [Land Registration Act](#), No. 3 of 2012.
44. The provision of Section 24 of the [Survey Act](#) provides that:-
- Every trigonometrical station, fundamental benchmark and boundary beacon erected or placed for the purpose of defining the boundaries of any holding or land shall be shown on the plan(if any) attached to, or referred to in, any document or instrument purporting to confer, declare, transfer, limit, extinguish or otherwise deal with or affect any right, title or interest, whether vested or contingent to, in or over such holding or land, being a document or instrument which is required to be registered, or is ineffectual until registered, under any written law for the time being in force relating to the registration of transactions in or of title to land.
45. According to the Learned Counsel, it is trite that every fundamental boundary beacon placed for the purposes of defining the boundaries of any holding in land shall be shown on the plan. The Petitioner had not placed any material before this Honorable Court that pointed out to the proprietorship of the property known as MN/1/341/4. The Petitioner deemed it fit to leave the same to the imagination of this Honorable Court. Notably, the document produced as exhibit EJA - 2 and titled as Certificate of Title clearly defines the Suit Property's registered Number as C.R 1716/23 subdivision number 20800(Org. No 341/3) of Section I Mainland North and delineated on Land Survey Plan Number 367516.



46. It was clear that the Petitioner was aware that the Suit Property and the property known as MN/1/341/4 are two separate parcels of land. There were no stringent provisions in law that bar the Petitioner herein from visiting the lands office to obtain a Map Sheet that will clearly case the Petitioner's doubts (if any). It was the Learned Counsel's contention that the Petitioner's application was an audacious attempt to disregard and defeat the rule of law. The provision of Section 7 of the [Land Registration Act](#) provides for the maintenance in each registration unit a land registry in which there shall be kept parcel files containing the instruments and documents that support subsisting entries in the land register.
47. Further, the provision of Section 7(2) of the [Act](#) provides that the Registrar shall, upon payment of the prescribed fee make information in the land registry accessible to any person. The Land Registrar has a statutory duty to open, maintain and keep land records professionally accurately, in good order and to make them available and accessible to the general public upon request. The rationale of the right to access information was explained by Majanja, J in the case of:- "[Nelson O. Kadiso – Versus - The Advocates Complaints Commission & Another](#)" NBI HC Petition No. 549 of 2013" as follows:-
- “The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the [Constitution](#). It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law. Social justice set out in the preamble to the [Constitution](#) and Article 10 cannot be achieved unless the citizen has access to information.”
48. Nothing precluded the Petitioner from approaching the Registrar of lands, paying the prescribed fees and acquiring the information, it needed to ascertain whether the Suit Property and the property known as MN/1/341/4 are similar or different. In the case of "[Andrew Marigwa – Versus - Josephat Ondieki Kebati](#) [2017] eKLR" the Court pronounced itself thus:-
- “The Land Registrar is the custodian of the records relating to land, have the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the [Land Registration Act, 2012](#)”.
49. Again, nothing could have been easier than making an Application before Court seeking for Orders that the 3rd Respondent herein produced the Green Cards touching on the Suit Property and the property known as MN/1/341/4. The 1st Respondent was apprehensive that the Petitioner's Application was another attempt to gain access and/or occupation to the Suit Property thereby diminishing the 1st Respondent's rights. A cursory look at the provision of Section 17 (1) of the [Land Registration Act](#) shows that a further survey on land shall be used to amend the cadastral map only if it was approved by the office or authority responsible for the survey of land. The Petitioner had no intention to amend the cadastral map. All the Petitioner wanted was access to the Suit Property to allegedly have the Surveyor establish whether the Suit Property and the property known as MN/1/341/4 were the same. It is trite that upon issuance of a Letter of Allotment, a Part Development Plan (PDP) of the area was drawn and the same is approved by the local authority of the area. It was surprising that the Petitioner now sought for an Order for access into the Suit Property.
50. According to the Learned Counsel, it was imperative to bring to this Court's attention the fact that ascertaining whether one parcel of land was similar to another parcel of land never fell under the ambit of the powers of the Director of Survey and/or Surveyors, the powers of the Director and Surveyors are provided for under the provision of Section 23 (1) of the Surveyors Act. Determining whether one



parcel of land was similar to another was not one of the powers. In any event, matters touching on boundary dispute are for the Registrar to determine and not the Honorable Court as has been provided for under the provision of Section 18 (2) of the [Land Registration Act](#).

51. The Petitioner could not on one hand move Court to restrain the Respondents from conducting a survey determined and now make an Application for the grant of an Order for survey of the Suit Property in its Application dated 20th December 2023, this was counter-intuitive. The provision of Section 18 of the [Land Registration Act](#) for boundaries in general. Section 18 (2) of the [Land Registration Act](#) provides that:-

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

52. From the above provisions of the law, it was apparent that this Honorable Court is not vested with the jurisdiction to determine matters touching on boundaries. The same fell under the scope of the Registrar, as he was the designated subject officer. The [Land Registration Act](#) has provided for a course for the determination of boundary disputes. The Petitioner had failed, refused and/or neglected to explore the said avenue as was provided for under the provision of Section 18 (2) and had instead opted to present the dispute before this Court. It was only right to conclude that the Petitioner had moved to this Court prematurely.

53. The provision of Section 24 of the [Land Registration Act](#) provides that:-

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

54. According to the Learned Counsel, to this end, the Petitioner had failed, refused and/or neglected to produce material before this Honorable Court that challenges the 1st Respondent’s Certificate of Title. All the Petitioner had produced before this Court was an alleged Letter of Allotment that could not in law override a duly registered Title. The position in law regarding a holder of Title Deed was provided for under the provision of Section 26 of the [Land Registration Act](#). It was without doubt that the 1st Respondent is the absolute and indefeasible owner of the Suit Property. As such, this Honorable Court was duty bound to hold that the Title Deed produced by the 1st Respondent is prima facie evidence that he is indeed the Proprietor as opposed to the Letter of Allotment produced by the Petitioner.

55. There were no proprietary rights whatsoever, belonging to the Petitioner, that would be infringed by the Petitioner that would be infringed should the 1st Respondent refuse to grant access to a Surveyor. In any event, the Petitioner held a Letter of Allotment and not Certificate of Title. To support his point, he cited the case of: “[Marcus Mutua Muluvi & Another – Versus - Philip Tonui & another](#) [2012] eKLR” held that:

“I am satisfied that the applicants have not made out a prima facie case with probability of success.....On the material placed before me, the applicants have failed to demonstrate to my satisfaction the foregoing. The applicants have no title to the suit premises. That being the case, I do not see the proprietary interest of their suit premises that have been infringed by the respondent. Their claim to the suit premises is anchored on letters of allotment.”

56. According to the Learned Counsel, the Petitioner could not seek for Orders of access into a land that it never had any proprietary interests whatsoever. The provision of Section 25(1) of the [Land](#)



Registration Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court. Shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.

57. The 1st Respondent herein had all the rights to the Suit Property including all the privileges and appurtenances free from all other interests and claims. The Court in the case of “Kiprotich Arap Chepkwory – Versus - Simion Langat & 3 Others”(2017) eKLR” in which the court stated the following:

“I have seen from the documentary evidence tendered, especially the title deed and the official search, that the plaintiff is indeed the registered proprietor, he is entitled to enjoy all rights of such proprietorship including the right of exclusive possession. These rights are set out in section 25 of the Land Registration Act,...The defendants have not tendered any evidence which will go to prove that the plaintiff ought not to enjoy his rights as proprietor.”

58. Therefore, the Petitioner's claim of access by a Surveyor to the Suit Property has no basis in law.

59. Secondly, on whether the Petitioner should be granted the Orders sought in the Application dated 20th December 2023. The Learned Counsel submitted that the Petitioner's Application was geared towards depriving the 1st Respondent's proprietary right over the Suit Property. Having failed to succeed in its other Applications against the Respondent, the Petitioner had now come up with a creative way to access the Suit Property bringing this Application before Court. The Petitioner had attached in its application a copy of the order that was issued on 31st October, 2023 by this Honorable Court which clearly stated that status quo be maintained meaning that the situation to remain as it was before the suit was filed and hence no activities i.e. subdivision, eviction, alienation, wastage and/or any other on the suit land thereof.

60. The Court was being asked to determine who had a (greater) right between a Title owner versus an Allottee and a Deed Plan registered versus a Map Sheet. The law was clear. The application had no basis in law. The Petitioner was simply forum shopping. The application dated 24th October 2023, from which the above Order was gotten, was yet to be heard nor determined by this Honorable Court. The Petitioner's Application of 20th December 2023 was a total contradiction to the Petitioner's application of 24th October 2023. At paragraph 8 of the Petitioner's Supporting Affidavit dated 24th October 2023 and sworn by Mr. Etoe John Akaran, the Petitioner herein claimed to be in possession of the original Kenya Map Sheet pertaining to the Suit Property which was produced as EJA - 5 and EJA - 3 in the present application.

61. According to the Learned Counsel, now the Petitioner had filed another application dated 20th December 2023 seeking for access by a Surveyor into the Suit Property to confirm whether the Suit Property and the property known as MN/1/341/4 are similar or different without even allowing the Court to make a determination on the application dated 24th October 2023. The rules of equity was clear. He who sought equity must do equity. Why should the Petitioner be granted Orders of survey of the Suit Property?

62. The Learned Counsel submitted that the Petitioner must be estopped from bombarding this Honorable Court with numerous and similar Applications and forum shopping for Orders that promote its illegal and unlawful attempt to take occupation of the Suit Property. The 1st Respondent held a good Title and the same should not be defeated. The 1st Respondent's proprietary rights must be protected in line with Article 40 of the Constitution of Kenya 2010. The Petitioner has produced an alleged map sheet, which according to it, was the original map sheet. Placing reliance on Section 87



of the Evidence Act only means that the Map Sheet produced by the Petitioner must be thoroughly investigated.

63. On one hand, the Petitioner purported to hold the original Map Sheet of the property and on the other hand the Petitioner requested that Respondent (being the 1st Respondent) to agree to a survey being done and a survey Report be produced to clear the doubts and ease the Court in the determination of this matter. The Petitioner had brought a suit before this Court and still wanted to be a Judge of the same. This was contrary to the rules of natural justice, that is, *nemo iudex in causa sua*.
64. In the case of “Ernst & Young LLP - Versus – Capital Markets Authority & Another [2017] eKLR” Mativo J. held:

“The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, “an essential inbuilt component” of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

Natural justice has been described as “fair play in action the principles and procedures which in any particular situation or set of circumstances are right and just and fair.” Its rules have been traditionally divided into two parts: *Audi alteram partem*-the duty to give persons affected by a decision a reasonable opportunity to present their case. *Nemo iudex in causa sua debet esse* -the duty to reach a decision untainted by bias. “Those two rules are the essential characteristics of what is often called natural Justice. They are the twin pillars supporting it.”

65. Further, the continuous allegations of the existence of a community that was being deprived of its rights are not only bewildering but also mystifying. It is trite under the provision of Section 9 of the Community Groups Registration Act that a community must be registered after meeting all the requirements as is enshrined under the provision of Section 9 (2) of the Act. The Petitioner had failed, refused and/or neglected to produce before this Honorable Court any proof of registration of the alleged Utange Shanzu Community contrary to the rules of evidence as is enshrined under the provision of Section 107 of the Evidence Act, Cap. 80.
66. According to the Learned Counsel, it was only right to conclude that there was no Utange Shanzu Community that existed. A group of people including the Petitioner herein had come together to illegally and unlawfully defeat the 1st Respondent's rights over the Suit Property. The Petitioner's application had no basis in law and the same should not be allowed.
67. The Learned Counsel concluded by stating that from the Petitioner's applications before Court to which the Order dated 31 October 2023 was issued barring any activity on the Suit Property. Conveniently, the Petitioner had come before this Court now seeking that the order dated 31st October, 2023 be by – passed and it be granted access to the Suit property. Nothing could have been easier than waiting for the hearing of the Application dated 24th October, 2023 wherein the Petitioner would have had a platform to raise the issue of a surveyor entering into suit property. In the event this Honorable Court allowed the Orders sought in the application, a precedent would be created to be used to pave way to forum shopping which was a colossal abuse of the Court process.



VI. Analysis and Determination

68. I have carefully read and considered the pleadings herein the two applications by the Petitioner and the 1st Respondent and the Notice of Preliminary Objection by the 1st Respondent herein the rival submissions and the plethora of authorities cited by the parties, the relevant provision of the Constitution of Kenya, 2010 and statutes.
69. For the Court to reach an informed, reasonable, equitable and fair decision, it has condensed the subject matter into the following four (4) salient issues for its determination as follows:-
- a. Whether the Notice of Preliminary objection dated 24th January, 2024 by the 1st Respondent is envisaged by law and whether it is merited.
 - b. Whether the Notice of Motion application dated 29th November, 2023 by the 1st Respondent/ Applicant is merited?
 - c. Whether the Notice of Motion application dated 20th December, 2023 by the Petitioner/ Applicant is merited?
 - d. Who bears the costs of the Notice of Motion applications dated 29th November, 2023 and 20th December, 2023.

Issue No. a). Whether the Notice of Preliminary objection dated 24th January, 2024 by the 1st Respondent is envisaged by law and whether it is merited

70. Under this Sub – heading, the Honourable Court wishes to tackle the matter of the Preliminary Objection herein raised by the 1st Respondent. The threshold of a preliminary objection was set in the case of “*Mukisa Biscuit Manufacturing Co. Ltd – Versus - West End Distributors Ltd* [1969] E.A 696” relied on by the Respondent herein. In the case the court held that;

“a Preliminary Objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may disposed of the suit.

Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”

71. The court further held that:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

72. Form the foregoing decision, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court’s discretion.

73. The Preliminary objection dated 24th January, 2024 raised by the 1st Respondent herein relates to a plea that the application dated 20th December, 2023 offends provisions of Section 7, 17, 24 and 25 of the



Land Registration Act. The same is raised on points of law that emerge from the pleadings filed by the parties. It satisfies the requirements for a preliminary objection to be sustainable.

74. On whether or not the Preliminary objection has merit, the 1st Respondent has raised issues of contravention of Section 7, 17, 24 and 25 of the Land Registration Act. Section 7 of the current page outlines the maintenance of land registries within each registration unit. The provision of Section 17 of the Land Registration Act provides that:-

“Approval for further surveys.

17.

- (1) Further surveys may be made for any purpose connected with this Act, but such surveys shall be used to amend the cadastral map only if it is approved by the office or authority responsible for the survey of land.
- (2) This section shall not preclude the Registrar from keeping in the registry records of cadastral information and maps approved by the office or authority responsible for survey.
- (3) The office or authority responsible for the survey of land shall submit to the Commission a copy of the cadastral maps and the Commission shall be a depository of the maps

75. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

76. The key points from the provision of Sections 24 and 25 of the Land Registration Act, 2012, as per the web page content are:

a. Interest Conferred by Registration (Section 24):

Registration of a person as the proprietor of land vests in that person the absolute ownership of the land, along with all rights and privileges belonging to it.

Registration of a person as the proprietor of a lease vests in that person the leasehold interest described in the lease, subject to all agreements, liabilities, or incidents of the lease.

b. Rights of a Proprietor (Section 25):

The rights of a proprietor, acquired on first registration or subsequently, are not liable to be defeated except as provided in the Act.

Proprietors hold their rights, along with all privileges and appurtenances, free from all other interests and claims, but subject to any encumbrances, leases, charges, conditions, and restrictions shown in the register.



77. It is manifestly clear that the entity which has the statutory mandate to avail an accurate plan of defined boundaries is the Land Registrar. This is also the entity which has the requisite expertise to undertake the aforementioned task. In the Court of Appeal Case of “Estate Sonrisa Limited & another – Versus - Samuel Kamau Macharia & 2 others [2020] eKLR”, the court stated thus:-

“It is the Land Registration Act that makes provisions relating to the determination of boundaries. Those provisions are found in sections 16 to 19. Specifically, for this dispute, the Registrar is empowered, after giving notice to all the affected parties, in this case, the 1st appellant and 1st respondent, indeed as well as any owner whose land adjoins the boundaries in question, and with the assistance of the surveyor, to ascertain and fix the disputed boundaries.

.....

Under that Act, the Registrar carries out his functions without any restrictions and may rely on any other relevant document and existing records in order to resolve any dispute between landowners. Because a title deed is only prima facie evidence of the matters shown therein, the Registrar’s investigations, of necessity must encompass all entries in the register, rely on any other relevant document and existing records, conduct proceedings in accordance with section 14(1) and cause a survey to be carried out and determine the dispute.....

It is only after determining the dispute can parties move to court to challenge it (emphasize added).

78. According to the Learned Counsel, it is trite that every fundamental boundary beacon placed for the purposes of defining the boundaries of any holding in land shall be shown on the plan. The Petitioner has not placed any material before this Honorable Court that points out to the proprietorship of the property known as MN/1/341/4. The Petitioner deemed it fit to leave the same to the imagination of this Honorable Court. Notably, the document produced as exhibit EJA 2 and titled as Certificate of Title clearly defines the Suit Property’s registered Number as C.R 1716/23 subdivision number 20800(Org. No 341/3) of Section I Mainland North and delineated on Land Survey Plan Number 367516.

79. According to the 1st Respondent it is clear that the Petitioner is aware that the Suit Property and the property known as MN/1/341/4 are two separate parcels of land. There are no stringent provisions in law that bar the Petitioner herein from visiting the lands office to obtain a Map Sheet that will clearly case the Petitioner’s doubts(if any). It was the learned Counsel for the 1st Respondent’s submission that the Petitioner’s Application is an audacious attempt to disregard and defeat the rule of law. Section 7 of the Land Registration Act provides for the maintenance in each registration unit a land registry in which there shall be kept parcel files containing the instruments and documents that support subsisting entries in the land register.

80. The Preliminary objection invites court to find that the application has no cause of action to be determined by Court, and for this to be done court has to make reference to facts that are disputed by both parties. The court cannot from the face of the preliminary objection, conclude that the Application dated 20th December, 2023 summarily without examining it. There is need to consider factual evidence and court will exercise its judicial discretion. Once court steps out of the Preliminary objection, it ceases to be a point of law and cannot be sustained.



81. The upshot of it all, therefore, I find that the Preliminary objection is unmeritorious and hence dismiss it.

Issue No b). Whether the Notice of Motion application dated 29th November, 2023 by the 1st Respondent is merited?

82. The Honourable Court has deciphered that the main Substratum in this proceedings herein is one on Contempt of Court from an alleged breach and gross violation of the Court orders. It has been stated on umpteenth times that Court orders are sacrosanct. They are not a formality nor cosmetic. They have to be obeyed however erroneous they maybe. The only remedy available is for an aggrieved party to revert back to Court seeking for either review or variation or setting aside or discharge of the said orders depending on the prevailing circumstance and surrounding facts and inferences. The consequences of disobedience of Court order is extremely serious as it borders on criminality capable of one forfeiting their fundamental rights and freedoms enshrined in the Bill of Rights under the Constitution of Kenya, 2010.

83. The provision of Order 40 Rule 3 of the Civil Procedure Rules, 2010 on the consequence of breach of injunctive orders provides as follows:-

“(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit.

84. I wish to refer to the Black's Law Dictionary 11th Edition, which defines contempt as:-

“The act or state of despising; the quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it punishable by fine or imprisonment”.

85. At some initial point, the legal framework that governed contempt of court was the Contempt of Court Act until it's nullification in the case of:- “Kenya Human Rights Commission – Versus - Attorney General & another [2018] eKLR Constitutional Petition No. 87 of 2017”.

86. However, the court in the case of:- “Samuel M. N. Mweru & Others – Versus - National Land Commission & 2 others [2020] eKLR” while discussing the legal framework on contempt of court stated as follows:-

“The applicable law as regards contempt of court existing before the enactment of the Contempt of Court Act was restated by the Court of Appeal in Christine Wangari Gachege – Versus - Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. In that case the Court found



that the English law on committal for contempt of court under Rule 81.4 of the *English Civil Procedure Rules*, which deals with breach of Judgment, order or undertakings, was applied by virtue of Section 5 (1) of the *Judicature Act* which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

This section was repealed by Section 38 of the *Contempt of Court Act* of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal Section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under Section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the *English Civil Procedure Rules* of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the *English Civil Procedure Rules*.”

87. As restated in the above case law, the law then applicable in contempt of court proceedings is Section 5(1) of the *Judicature Act* which mandates that the court relies on the applicable law in England at the time the alleged contempt is committed. In the case of “*Samuel M. N. Mweru (Supra)*” the Court dealing with an application for contempt of court based on disobeyed of a court order stated:

“An application under Rule 81.4 “(breach of judgement, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon”.

88. I reiterate that a claim on contempt of court is a grave issue that the court treats with a lot of seriousness as it goes to the core of undermining the authority of the court. It is a fundamental principle of law that court orders are meant to be obeyed to the letter as they are not issued in vain. Failure to obey court orders would then result in contempt of court.

89. The importance of obedience of court orders was restated in the case of “*Econet Wireless Kenya Limited – Versus- Minister for Information & Communication of Kenya & another* [2005] eKLR” where the court cited with approval the case of “*Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990*”, (unreported). The Court of Appeal held, inter alia,

“..... It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors”

90. Fundamentally, courts need to ascertain whether the applicant herein has met the basic elements set out to prove a case for contempt of court. In the case of “*Katsuri Limited – Versus - Kapurchand Deepar Shah* [2016] eKLR” as relied upon by the Respondents, the court stated that:

“The applicant must prove to the required standard (in civil contempt cases which is higher than in criminal cases) that:-



- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.”

91. I will therefore be analyzing each element as set out above and in close application to the instant case. In so doing I will be looking at the court order issued by the court. The provision of Section 29 of the [Environment and Land Court](#) is clear to the effect that:-

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both

92. It is an established principle of law as was held in the case of “[Kristen Carla Burchell – Versus - Barry Grant Burchell](#), Eastern Cape Division Case No. 364 of 2005” in order to succeed in civil contempt proceedings, an Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondents, (iii). Failure by the Respondent to comply with the terms of the order.

93. From the sworn affidavits, annexure's, submissions by the respective parties' Counsels on record, the applicable law and the decided cases, the following issues stand out for determination:-

- i. Whether there was a valid Court order issued by this Court on the 31st October, 2023 by this Honourable Court
- ii. Whether the Petitioner herein were served with or was aware of the orders made on 31st October, 2023.
- iii. Whether the order as sought and extracted was clear and unambiguous
- iv. Whether the Petitioner is guilty of contempt of Court order herein issued.

94. In the instant case, from the very onset and without mincing words, the Honourable court outrightly states that it is not at all persuaded that there is any Contempt of Court committed by the Petitioner as alleged by the 1st Respondent for the following reasons:- Firstly, I hold that it is clear that the order issued by the court was clear and unambiguous. It was addressed to the both Parties, hence binding upon them. The core ground is that this Honorable Court issued Orders on 31st October 2023 as follows:-

- a. That the Notice of Motion dated 24th October 2023 be and is hereby certified as urgent.
- b. That the Petitioner/Applicant to immediately serve the Respondents with the pleadings.
- c. That upon service the Respondents granted 14 days leave to file and serve their replies thereof and submissions upon being served by the Petitioner.
- d. That thereafter, the Petitioners be granted 14 days leave to file and serve Further Affidavit if need be from the new issues raised thereof and written submissions thereof.
- e. That there be inter partes hearing on 27th February 2024 before ELC No.3.



- f. That in the meantime, there be status quo to be maintained meaning that the situation to remain as it was before the suit was filed and hence no activities i.e. subdivision, eviction, alienation, wastage and/or any other on the suit land thereof.
95. According to the 1st Respondent, the Petitioner/Respondent on two separate occasions attempted to forcefully, unlawfully and illegally take occupation of the Suit Property contrary to the Court's Order dated 31st October 2023. Therefore it is this Court's opinion that there was a valid Court order issued by this Court on the 31st October, 2023 by this Honourable Court.
96. Secondly, on the alleged contemnor ought to have knowledge of or proper notice of the terms of the order. According to the 1st Respondent, the Petitioner was well aware of the Orders of the Court but chose to blatantly disobey the said Orders by unlawfully and illegally making an attempt to take occupation of the Suit Property. The 1st Respondent/ Applicant's Application dated 29th November 2023 was filed to ensure that the rule of law is preserved and that the Petitioner/Respondent is held accountable for failure to comply with the Orders of the Court dated 3rd November 2023.
97. Thirdly, the allegations blatantly meted out by the Applicant to the effect that the Respondent had willfully disobeyed these orders and on or around 24th November 2023, the Petitioner/Respondent led by one Mr. John Ekore Akaran and his cahoots attempted to forcefully, unlawfully and illegally take occupation of the Suit Property and in the process injured the 1st Respondent/Applicant's caretaker and destroyed and looted the premises. The unfortunate and illegal actions of the Petitioner/ Respondent forced the 1st Respondent/Applicant to lodge a complaint at Bamburi Police Station under OB No.50 and 51.
98. Further, that accusation that the Respondent willfully acted in contempt by not obeying this Court orders as this Honorable Court had made clear orders in terms of handling of the suit property remain as mere unproved assertions. Additionally, the Honourable Court fully concurs with the aversions made by the Petitioner that the 1st Respondent/Applicant herein has failed to adduce any evidence to prove the alleged contravention of the said Court Order.
99. Fourthly, the Court fully concurs with the aversions rightfully made out on the proper legal position by the Petitioner/ Respondent to wit that:-
- a. The service of the orders to the Petitioner/ Respondent was not disputed.
 - b. The 1st Respondent in contravention of said Orders has contracted the services of guards and police men to man the property, claiming to be the owners of the suit property.
 - c. The said guards have been constantly harassing the community and there is evidence of the same going contrary to the orders of status quo granted on 3rd November 2023.
 - d. The application was therefore not clear and it does not show how the Petitioner/Respondent have interfered with the orders of this Honourable Court.
 - e. The 1st Respondent has failed to demonstrate how the Petitioner was in contempt of Order 40 Rule 3 of the Civil Procedure Rules 2010 as indicated in the application.
100. To this end, therefore, the Honourable Court is not satisfied that the Applicant has proved its case for contempt of Court orders by this Honourable Court given on 31st October, 2023 against the Petitioner/ Respondent.



101. The Court of Appeal in “*Sbimmers Plaza Limited – Versus - National Bank of Kenya Limited* [2015] eKLR” emphasized that:-

“It is important however, that the Court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”

102. As stated above, contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. In the end, it is the finding of this Honourable Court that the Applicant has not proved to the required standard that the Petitioner/ Respondent as cited were in brazen disobedience of the Court orders issued by this Honourable Court on 31st October, 2023. Therefore prayer b, c, and d of the application fails.

103. As for prayer e of the application on instituting investigations and charges against Sheria Na Haki Human Rights Institute, pursuant to Article 162(3) of the *Constitution*, Parliament then enacted the *Environment and Land Court Act* Section 13(1) of which outlines the ELC’s jurisdiction as follows:

“(2) In exercise of its jurisdiction under Article 162(2) (b) of the *Constitution*, the Court [the ELC] 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*.”

104. It is trite that the powers and discretion given to the police and the prosecution ought to be exercised lawfully and in good faith and purely for the vindication of the commission of a criminal offence and the criminal justice system. Therefore, where the same are being exercised for the achievement of some collateral purpose other than its legally recognized aim, the Court would be entitled to and must intervene.



105. In was in this regard that Majanja, J in Petition No. 461 of 2012 – “*Francis Kirima M’ikunyua & Others – Versus - Director of Public Prosecutions*”, when dealing with situations where there exist criminal and civil proceedings arising from the same facts pronounced himself as follows:

“It is very clear that the criminal process and the resultant court proceedings are being used to settle what is otherwise civil dispute which has been the subject of several court cases and indeed decisions. It is clear to me that the contending parties wish to use the criminal process to score points against each side in order to assert the rights of ownership. The use of the criminal process in this manner is not uncommon within this jurisdiction to find that intractable land disputes mutate into criminal matters. It is not difficult to see why. In criminal cases the State’s coercive power is brought to bear upon the individual and where we have an inefficient system to settle civil claims, a person who can tie his opponent in the criminal justice system and ultimately secure a conviction will no doubt have an advantage over his opponent.”

106. Under the *Contempt of Court Act*, 2016, the Environment and Land Court (ELC) does not have the authority to directly seek the commencement of criminal proceedings. However, the Environment and Land Court has jurisdiction over environmental and land matters, including disputes related to land ownership, use, and conservation. Its primary role is to adjudicate civil cases concerning land and environmental issues.

107. Under statutory Law and the Criminal Procedure Code, criminal proceedings are initiated by the state (usually the Director of Public Prosecutions) against an accused person. These proceedings involve offenses against the state or society, and the accused faces penalties such as fines, imprisonment, or other sanctions. If a criminal offense occurs within its jurisdiction (e.g., illegal land transactions, environmental violations), the Environment and Land Court does not directly initiate criminal proceedings. Instead, the matter is reported to the relevant criminal court (such as a magistrate court or a higher court), which has the authority to handle criminal cases.

108. The upshot of that is that this Honourable Court does not have the jurisdiction to call for investigation and charging of anybody therefore prayer e and f fail.

109. As for the prayer for payment of damages for breach, this is a final prayer that cannot be granted at an interlocutory stage as evidence must be adduced to determine whether or not damage had occurred to the Applicant as a result of the Respondent’s breach and how much the Applicant is entitled to as payment of the breach. Therefore under this prayer, the Applicant fails.

110. In the long run, this Honourable Court finds that the Notice of Motion application dated 29th November, 2023 lacks merit and therefore is dismissed with costs.

Issue No. c). Whether the Notice of motion application dated 20th December, 2023 by the Petitioner/ Applicant is merited?

111. Under this sub title, the Court will examine the procedure of requesting or applying for survey, the director of Survey is empowered under Section 15-17 of the *Land Registration Act* to alter and rectify boundary lines or position of a boundary based on a cadastral map based on subdivision plan, combination plan or any other approved plan necessitating the alteration of the boundary.

112. The Petitioner sought the following orders in the Notice of Motion application dated 20th December, 2023.:-

a. Spent



- b. That the respondents allow a land Surveyor access the suit property to ascertain whether the suit property known as Number 20800(Original No MN/1/341/3 is the same as property known as MN/1/341/4 on the survey of Kenya Sheet Map.
 - c. That an order be issued directing the Mombasa County Police Commander to provide security during the exercise of the survey exercise.
 - d. That a survey Report be prepared for the properties known as Number 20800 (Original No MN/1/341/3 and MN/1/341/4.
 - e. That leave be granted for the petitioner to produce the above mentioned Survey Report as evidence in its list of documents.
 - f. That the cost of this application be provided for.
113. According to the Petitioner, it received complaints from the members of the Utange Shanzu Community with regards to their mistreatment by the 1st and 2nd Respondents who instructed the 9th Respondent herein to actualize said harassment and mistreatment. On further inquiry, the petitioner ascertained that the members of the Utange Shanzu community have been living in the suit property since the 1960s. Sometimes in 2011, the 1st and 2nd Respondent laid claims of ownership to the suit property and that members of the community therefore vacate the property. The fraudulent copies of titles to the Suit property were produced. On doing due diligence the community found out that the registered number on the copies of Titles did not match with the survey of Kenya Map. The 1st and 2nd Respondent through goons invaded the suit property and illegally/unlawfully sought to evict the members of the community. The members of the community sought help and instructed the Petitioner hereinto act for them in the suit.
114. The Petitioner herein sought orders restraining the Respondents from conducting survey, subdividing, evicting, alienating, and dispossessing the community of the suit property. The orders of status quo were granted on the 31st day of October 2023. As a result, the members of the community needs this court to grant leave for a survey to be conducted. To clear the doubt, and ascertain which exact property the 1st and 2nd Respondents lay claim to, such a survey is deemed necessary. The oxygen principle based on Article 159 (2) (d) of the Constitution provides that “justice shall be administered without undue regard to procedural technicalities”. This grants this Honorable court the discretion to grant orders sought to enable justice be done to all parties.
115. Having dismissed the Notice of Preliminary objection opposing the orders for survey of the suit land, I see no other reason as to why I should not grant the orders sought by the Petitioner as with regards to prayers (b) to (e) of the Notice of Motion application dated 20th December, 2023.
116. For these reasons, therefore, I discern and strongly find that the Notice of Motion application dated 20th December, 2023 has merit and thus allowed with no orders as to costs. The Petitioner shall bear the costs of its survey and its surveyor.



Issue No. d): Who bears the costs of the Notice of Motion application dated 29th November, 2023 and Notice OF Motion application dated 20th December, 2023

117. It is now well established that costs are an issue at the discretion of the Court. Costs is an award that is granted to a party at the conclusion of a legal action in any litigation process. The Black Law Dictionary defines cost to mean:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

118. Rule 26 (1) & (2) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practices and Procedure Rules, 2013](#) and Section 27 of the [Civil Procedure Act](#), Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the [Civil Procedure Act](#) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

119. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book [The Code of Civil Procedure](#), 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

120. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case of:- “[Morgan Air Cargo Limited – Versus - Everest Enterprises Limited](#) [2014] eKLR” the court noted that:-

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the [Civil Procedure Act](#) is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

121. In this case, the Honourable Court reserves the discretion to award costs for the Notice of Motion application dated 29th November, 2023 to the Petitioner and does not award any costs for the Notice of Motion application dated 20TH December, 2023.



VII. Conclusion and Disposition.

122. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders:-

- a. That the Notice of Motion application dated 29th November, 2023 by the 1st Respondent be and is hereby found to lack merit and is dismissed in its entirety with costs.
- b. That the Notice of Motion application dated 20th December, 2023 by the Petitioner be and is hereby found to have merit and is allowed in its entirety with no orders as to costs.
- c. That the Honourable court be and is hereby pleased to allow a land Surveyor access the suit property to ascertain whether the suit property known as Number 20800(Original No MN/1/341/3 is the same as property known as MN/1/341/4 on the survey of Kenya Sheet Map .
- d. That an order do hereby issue directing the Mombasa County Police Commander to provide security during the exercise of the survey exercise.
- e. That the Honourable Court be and hereby issues an order directing the preparation of a survey Report for the properties known as Number 20800 (Original No MN/1/341/3 and MN/1/341/4.
- f. That leave do and is hereby granted for the petitioner to produce the above mentioned Survey Report as evidence in its list of documents.
- g. That an order do hereby issue that the Petitioner shall bear the costs of the survey and the surveyor.
- h. That for expediency sake, the Petition to be heard on 26TH September, 2024 by adducing of Viva Voce evidence. There shall be a mention on 15th July, 2024 for conducting of Pre – Trail conference under the provision of Order 11 of the Civil procedure Rules, 2010 and taking a Judgement date thereof.
- i. That in the meantime the orders of status Quo onto the suit land as already issued Must be maintained on the suit land in order to sustain peace and tranquility at all times.
- j. That the costs of the Notice of Motion application dated 29th November, 2023 to be awarded to the Petitioner. There shall be no orders as to the costs of the Notice of Motion application dated 20th December, 2023.
- k. That there are no orders as to costs.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 2ND DAY OF MAY, 2024.

.....

HON. MR. JUSTICE L. L. NAIKUNI

ENVIROMNENT AND LAND COURT AT

MOMBASA

Ruling in the presence of:



- a. M/s. Firdaus Mbula, the Court Assistant;
- b. M/s. Chano Advocate for the Petitioner.
- c. Mr. Tariq Khan Advocate for the 1st Respondent.
- d. No appearance for the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Respondents and 1st & 2nd Interested Parties.

