



REPUBLIC OF KENYA



**Lengapiani & another v Masoud & 4 others (Environment and Land Appeal
37 of 2023) [2024] KEELC 13704 (KLR) (2 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13704 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 37 OF 2023
LL NAIKUNI, J
DECEMBER 2, 2024**

BETWEEN

PETER LEMANTON LENGAPIANI 1ST APPELLANT

CYRUS NDIRITU MAINA 2ND APPELLANT

AND

ALI SWALEH MASOUD 1ST RESPONDENT

STEPHEN NYACHOTI OUSO 2ND RESPONDENT

SULEIMAN HAMISI ALI 3RD RESPONDENT

DEVOTA WANDERA 4TH RESPONDENT

THE OFFICE OF THE ATTORNEY GENERAL 5TH RESPONDENT

*(Being an appeal from the Ruling of the Chief Magistrates' Court of Kenya at Mombasa
by Hon, D.W Mburu delivered on 20th April, 2023 in M.E.L.C Case No. E513 of 2022)*

JUDGMENT

I. Preliminaries

1. The Judgment herein pertains to an appeal lodged before this Honorable Court by Peter Lemanton Lengapiani and Cyrus Ndiritu Maina – the Appellants herein. The appeal was filed through a Memorandum of Appeal dated 19th May, 2023 and a Record of Appeal dated 3rd August, 2023 subsequently filed against Ali Swaleh Masoud, Stephen Nyachoti Ouso, Suleiman Hamisi Ali, Devota Wandera and the Office of the Attorney General, the Respondents herein. In a nutshell, the appeal revolves around the interpretation by the lower court of its own ruling herein as seen here below.



2. The Appeal emanated from the Ruling of the Chief Magistrate's Court of Kenya at Mombasa by Hon. D.W. Mburu delivered on 20th April 2023 in MCELC Case No. E153 of 2022. Based on the Affidavit of Service on record the Record of Appeal was properly served upon the Respondents.
3. On 7th May, 2024 having confirmed that the Record of Appeal dated 3rd August, 2023 has been filed and served the Honourable Court directed that the matter be slated for mention to ascertain compliance and filing of submissions on 20th June, 2024 which the parties discharged effectively.

II. The Appellants' case

4. From the filed Memorandum of Appeal, the Appellants averred as follows: -
 - a. The Learned Magistrate erred in law and fact by materially disregarding that the application dated 21st November 2022 by the 1st and 2nd Defendants questioned the court's jurisdiction to determine claims by the Plaintiff which are based on alleged grounds of historical injustices since the review of grants for such claims was being done by the National Land Commission and the period for such review has since expired.
 - b. The learned Magistrate erred in law and fact by dismissing the application dated 21st November 2022 by the 1st and 2nd Defendants without at all ruling on the issue of the court's jurisdiction as explained in Ground 1 above.
 - c. The learned Magistrate erred in law and fact by issuing injunctive orders in favour of the Plaintiffs who have not provided any title documents relating to PLOT 280/148 BUBUBU EXTENSION 1 which the Plaintiffs claim to own.
5. The Appellants proposed to ask the Court for the following orders: -
 - a. The Appeal herein be allowed and, the Ruling of the Chief Magistrate's Court of Kenya at Mombasa by Hon. D.W. Mburu delivered on 20th April 2023 in MCELC Case No. E153 of 2022 be set aside and substituted by an order that the entire suit against the Defendants be dismissed with costs.
 - b. The Appellants' costs of this Appeal be provided for.
6. From the filed Pleadings, the case was filed on 26th October, 2022 by the 1st, 2nd and 3rd Respondents as against the Appellants and the 4th and 5th Respondents in MCELC Case No. E153 of 2022. Together with the Plaintiff, the Plaintiffs filed a Notice of Motion application under Certificate of Urgency dated 26th October 2022 which application forms subject of this Appeal. In the Application, the 1st, 2nd and 3rd Respondents sought injunctive orders in the interim against the Appellants and the 4th and 5th Respondents from dealing, interfering and accessing the PLOT 280/148 BUBUBU EXTENSION 1.
7. On 27th October 2022, the trial court issued an order of temporary injunction in favour of the 1st, 2nd and 3rd Respondents

III. Submissions

8. On 20th June, 2024 in the presence of all parties and after the Honourable Court had confirmed compliance of all the parties in the Appeal filed through a memorandum of Appeal dated 19th May, 2023 and a Record of Appeal dated 3rd August, 2023 and resolved to have the Appeal disposed off by way of written submissions. Pursuant to that the parties complied and the Honourable Court reserved a judgment date on notice.



A. The Written Submissions by the Appellants

9. The Appellants through the Law firm of Messrs CM Advocates LLP Advocates filed their written submissions dated 12th June, 2024. M/s. Mbwana Advocate commenced her submissions by stating that what was before the Honourable Court was the Appellants' appeal arising from a decision by Hon. D. W. Mburu (SPM) Chief Magistrate's Court, Mombasa filed through Memorandum of Appeal dated 19th May 2023.
10. On the background it was the aversons of the Learned Counsel submitted that the 1st, 2nd and 3rd Respondents herein filed MCELC Case No. E153 of 2022 as the Plaintiffs against the Appellants and the 4th and 5th Respondents herein as the Defendants. Together with the Plaintiff, the Plaintiffs filed a Notice of Motion an application under Certificate of Urgency dated 26th October 2022 which application forms subject of this Appeal. (Refer to page 26-71 of the Record of Appeal). On 27th October 2022, the trial court issued an order of temporary injunction in favour of the Plaintiffs restraining the Defendants, their agents, cronies, accomplices and lieutenants from harassing, interfering, arresting, charging or dealing in any manner with the Plaintiffs' operations, dealings and or working on PLOT 280/148 BUBUBU EXTENSION 1 pending inter partes hearing of the application. (Refer to page 72 of the Record of Appeal).
11. According to the Learned Counsel, the totality of the Plaintiffs' averments were that, the land PLOT 280/148 BUBUBU EXTENSION 1 forms part of their ancestral land and legally belonged to them. In objection to the application by the Plaintiffs, the Appellants herein filed a Replying Affidavit sworn by Peter Lemanton Lengapiani on 18th November 2022 arguing inter alia that the Appellants were strangers to the land PLOT 280/148 BUBUBU EXTENSION 1 being claimed by the Plaintiffs and that the Appellants were the legal registered owners of land Title No. MOMBASA/M.S/BLOCK II/300. (Refer to page 84-89 of the Record of Appeal).
12. In further objection, the Appellants herein filed an application dated 21st November 2022 seeking orders to set aside the temporary injunction issued as well as to strike out the entire suit on Two (2) main grounds: -
 - a. The suit does not disclose any cause of action or defence in law against the Appellants since they are a stranger to the PLOT 280/148 BUBUBU EXTENSION 1 being claimed by the 1st, 2nd and 3rd Respondents herein; and
 - b. The Chief Magistrate's Court lacks jurisdiction to determine the claims of the Plaintiffs which are based on alleged grounds of historical injustices since the review for such claims was being done by the National Land Commission and the period for such review has since expired. (Refer to page 90-97 of the Record of Appeal).
13. The Learned Counsel submitted that the aforesaid Appellants' application was brought inter alia under the provision of Order 2 Rule 15(1) (a), (b) and (d) which permits the court at any stage of the proceedings to strike out any pleading on the ground that it discloses no reasonable cause of action or defence in law or it was scandalous, frivolous or vexatious or it was otherwise an abuse of the court process and may order the suit to be dismissed. No party including the Plaintiffs filed any response in opposition of the said Appellants' application. On 24th November 2022, the Hon. Magistrate directed parties to file and exchange written submissions on both the Plaintiffs' application dated 26th October 2022 and the Appellants' application dated 21st November 2022. (For the submissions, refer to page 98-169 of the Record of Appeal).



14. The court delivered its Ruling on 20th April 2023 and ordered that there be no construction or any other form of development in respect of the suit property and that there shall be no sale and or transfer of the suit property pending the hearing and determination of the main suit. The Hon. Magistrate dismissed the Appellants' application dated 21st November 2022. The Appellants being dissatisfied with the whole of the said decision has appealed to this Honourable Court. (Refer to page 175-179 of the Record of Appeal).
15. The Learned Counsel relied on the following issues for determination from the above background and pleadings before court:-
 - a. Whether the Learned Magistrate erred in finding that the Plaintiffs' had satisfied the threshold for issuance of injunctive reliefs as set out in the case of *Giella vs. Cassman Brown*. In addressing this, the following two issues are pertinent;
 - i. Whether the Learned Magistrate was right in issuing injunctive orders in favour of the Plaintiffs who have not provided any title documents relating to PLOT 280/148 BUBUBU EXTENSION 1 which the Plaintiffs claim to own
 - ii. Whether the Learned Magistrate erred by concluding that the land PLOT 280/148 BUBUBU EXTENSION 1 being claimed by the Plaintiffs and the Appellants' land Title No. MOMBASA/M. S/BLOCK II/300 are one and the same property
 - b. Whether the Learned Magistrate erred in law and fact by finding that the Appellants had not satisfied the threshold under Order 2 Rule 15(1) of the Civil Procedure Rules. In addressing this, the following 3 issues are pertinent;
 - i. Whether the Plaintiffs' suit discloses any reasonable cause of action or defence in law against the Appellants
 - ii. Whether the Learned Magistrate was right to dismiss the Appellants' application dated 21st November 2022 without at all ruling on the issue of the court's jurisdiction
 - iii. Whether the Magistrate's Court has jurisdiction to determine the claims by the Plaintiffs which are based on alleged grounds of historical injustices
16. Under the issue of whether the Learned Magistrate erred in finding that the Plaintiffs' had satisfied the threshold for issuance of injunctive reliefs as set out in the case of "*Giella – Versus - Cassman Brown*". In addressing this, the following two issues are pertinent and under the sub – issue of whether the Learned Magistrate was right in issuing injunctive orders in favour of the Plaintiffs who had not provided any title documents relating to PLOT 280/148 BUBUBU EXTENSION 1 which the Plaintiffs claim to own [GROUND 3]; the Learned Counsel submitted that they were alive to the duty of the Appellate Court in hearing of first appeals to itself which was considered and enumerated in the case of "*County Government of Kakamega – Versus - Ufanisi Freighters (K) Limited & Another [2018] eKLR*", wherein Honourable Justice Njoki. J, while quoting the case of "*United India Insurance Co. Limited, Kenindia Insurance Co. Limited & Oriental Fire & General Insurance Co. Limited – Versus - East African Underwriters (Kenya) Limited [1982-88] 1 KLR 639*", stated as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established:



first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken into account; fourthly, that he failed to take account of consideration of which he should have taken into account; or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

17. The Learned Counsel averred that the Honourable Magistrate was faced with a Notice of Motion application brought under the provision of Sections 3A, 1A and 1B of the *Civil Procedure Act*, Cap. 21 and Order 9, 10 Rule 11 and 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. Further it was the Learned Counsel’s submission that Order 9 made provisions as regards to recognized agents and advocates. The Plaintiffs therefore obtained injunctive orders despite having moved the court under the wrong law. A party who approached the court for a remedy was under a duty to state the applicable law. Courts act based on the laws of the land.
18. They also invited the Honourable Court to inspect the annexures alleged to support the Plaintiff’s application from page 37 to 71 of the Record of Appeal and the Court will note that none of the documents provided actually linked the Plaintiffs to the land PLOT 280/148 BUBUBU EXTENSION 1. None of these documents confer ownership of the land PLOT 280/148 BUBUBU EXTENSION 1 upon the Plaintiffs. They equally invited the Court to look at the prayers sought by the Plaintiffs in their Notice of Motion and your Lordship will note that the orders that were being sought were interim in nature applicable until the determination of the application and not the suit. (Refer to page 28 of the Record of Appeal). In this regard, the entire application was spent at the point of issuance of the ruling and no orders were capable of being granted subsequent to inter partes hearing of the application. They in this regard relied on the case of; “Oile – Versus - Murai (Commercial Case E927 of 2021) [2023] KEHC 24766 (KLR)(Commercial and Tax) (13 October 2023) (Ruling)” wherein the court held while relying on the case of; “Catherine Njeri Macharia – Versus - Macharia Kagio & Another [2013] Eklr” found as follows on the subject issue:-

“I however note with utmost concern that the prayer for this Court to set aside the default judgment entered on 23rd February, 2021 sought as prayer No. 3 in the instant application, is prayed ‘pending the hearing and determination of the application herein’. In essence, this means that the said prayer is spent and cannot be granted by this Court at this juncture as it will lapse as soon as this Court delivers this ruling.”
19. The court went further to hold that: -

“It is evident that the application herein suffers from inappropriate drafting to the detriment of the defendant. This Court finds that the prayer to set aside the default judgment entered on 23rd February, 2021 having been spent, this Court cannot belabor on the same.”
20. It was also submitted by the Learned Counsel that it also of great importance to note that the prayers that were finally granted by the Learned Magistrate are totally different from what the Plaintiffs had applied and prayed for. It is trite law that parties are bound by their pleadings and the court cannot grant orders and/or prayers not sought. In this regard, we rely on the Court of Appeal case of; “Caltex Oil (Kenya) Limited – Versus - Rono Limited [2016] eKLR” wherein the foregoing was upheld.
21. Based on the above, they urged the Court to find that no injunctive orders could issue under the above circumstances as the Plaintiffs had clearly not even satisfied the first limb of the threshold having not proved that they had a prima facie case as further demonstrated on issue (ii) below.
22. On whether the Learned Magistrate erred by concluding that the land PLOT 280/148 BUBUBU EXTENSION 1 being claimed by the Plaintiffs and the Appellants’ land Title No. MOMBASA/M.S/



BLOCK III/300 are one and the same property, the Learned Counsel submitted that the Appellants argued before the Magistrate's Court that they were strangers to the land PLOT 280/148 BUBUBU EXTENSION 1 being claimed by the Plaintiffs. The reason why the Plaintiffs were arrested and charged in Mombasa MCCR Case No. E481 of 2022 was that the 1st and 2nd Plaintiffs amongst others invaded the Appellants' land Title No. MOMBASA/M. S/BLOCK III/300. (Refer to the charge sheet at page 88 of the Record of Appeal). The 1st Plaintiff in his witness statement states that after the property in question was surveyed, all other neighboring plots were given new numbers except for the land PLOT 280/148 BUBUBU EXTENSION 1 which retained its original number. The 2nd Plaintiff also reiterates the same thing in his witness statement. (Refer to page 13-16 of the Record of Appeal).

23. According to the Learned Counsel, it then made one wonder what was the basis for the Learned Magistrate to conclude that the land PLOT 280/148 BUBUBU EXTENSION 1 being claimed by the Plaintiffs and the Appellants' land Title No. MOMBASA/M. S/BLOCK III/300 were one and the same property when all these parties submitted that there was clearly no nexus between the two properties. The Learned Magistrate clearly erred in issuance of injunctive orders as the Plaintiffs had not demonstrated any viable claim as against the Appellant's property, the two properties being distinct and separate. More specifically, the Plaintiffs did not demonstrate any clear and mistakable right sought to be protected by the injunctive orders to warrant a finding that the Plaintiffs had satisfied the first limb of the threshold. In this regard, they relied on the Court of Appeal case of "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others [2014] eKLR" on the definition of a prima facie case. In absence of satisfying the first limb, then the application could not succeed and as such by allowing the same, the learned magistrate erred in law and in fact.
24. On whether the Learned Magistrate erred in law and fact by finding that the Appellant had not satisfied the threshold under Order 2 Rule 15 (1) of the Civil Procedure Rules. In addressing this, the following 3 issues are pertinent and whether the Plaintiffs' suit disclosed any reasonable cause of action or defence in law against the Appellants, the Learned Counsel submitted that the Plaintiffs' suit disclosed no reasonable cause of action or defence in law against them since they are a stranger to the PLOT 280/148 BUBUBU EXTENSION 1 being claimed by the 1st, 2nd and 3rd Respondents herein.
25. The provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010 in which the Appellants' application dated 21st November 2022 was brought upon provides as follows;

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c)
 - (d) it is otherwise an abuse of the process of the court,

and may order the suit be stayed or dismissed (emphasis ours) or judgment be entered accordingly, as the case may be.”
26. They urged the Court to consider the submissions at paragraphs 18, 19, 20 and 21 above to make a finding that the Plaintiffs' suit disclosed no reasonable cause of action or defence in law against Appellant.
27. On whether the Learned Magistrate was right to dismiss the Appellant's Application dated 21st November, 2022 without at all ruling on the issue of the Court's jurisdiction [Ground 1 and 2), the



Learned Counsel relied on the case of “Phoenix of E.A. Assurance Company Limited – Versus - S. M. Thiga t/a Newspaper Service [2019] eKLR”, in which the Court of Appeal held that: -

“...Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the court cannot confer jurisdiction to itself...”

28. The Learned Counsel submitted that before anything else, a court of law is expected to rule whether or not it has the jurisdiction to hear and determine a matter once a party has submitted that such a court lacks the jurisdiction to hear the case. Contrary to this cardinal rule, the Learned Magistrate did not bother at all in his Ruling delivered on 20th April 2023 to discuss and confirm whether or not the court has jurisdiction to entertain the Plaintiffs' suit. (Refer to page 175 - 178 of the Record of Appeal).
29. According to the Learned Counsel, it had been held in Supreme Court of Kenya decision in the case of:- “Samuel Kamau Macharia & another – Versus - Kenya Commercial Bank Limited & others (2012) eKLR” where the Court stated as follows in respect of a Court's jurisdiction:-
 68. A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd Respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*...”
30. Based on the forgoing, they urged the Honourable Court to find that the Learned Magistrate indeed was wrong to dismiss the Appellants' application questioning on the jurisdiction of the Court. The said application was not opposed by any of the Respondents and still the Hon. Magistrate failed to determine in his Ruling delivered on 20th April 2023 whether or not the Court has jurisdiction to hear and determine the matter.
31. On whether the Magistrate's Court has jurisdiction to determine the claims by the Plaintiffs which are based on alleged grounds of historical injustices [GROUND 1 & 2], the Learned Counsel averred that it was their humble submission that the Chief Magistrate's Court lacks jurisdiction to determine the claims of the Plaintiffs which are based on alleged grounds of historical land injustices since the review for such claims was being done by the National Land Commission and the period for such review has since expired.
32. The Learned Counsel further stated that the 1st, 2nd and 3rd Respondents herein are claiming that PLOT 280/148BUBUBU EXTENSION 1 was theirs by virtue of it being ancestral land. Section 14(1) of the *National Land Commission Act* provided as follows:

“Subject to Article 68(c) (v) of *the Constitution*, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.”



33. In addition, the provision of Section 15 of the said Act addresses historical land injustices that may be brought to the National Land Commission. Sub - section 3(e) thereof provides that;
- (3) A historical land claim may only be admitted, registered and processed by the Commission if it meets the following criteria.....(e)it is brought within five years from the date of commencement of this Act.”
34. Based on the foregoing provisions, the forum for addressing the claim by the 1st, 2nd and 3rd Respondents herein which is based on alleged grounds of historical land injustices is the National Land Commission thereby stripping the Magistrate’s Court of jurisdiction. Additionally, such a claim before the National Land Commission would not stand as it is clearly time barred having been brought after five years from the commencement of the Act.
35. They urged the Honourable Court to consider the submissions under paragraphs 26 and 28 above discussing on the lack of jurisdiction of a court to make a finding that the Magistrate’s Court lacked jurisdiction to hear and determine the Plaintiffs’ claim and the Learned Magistrate could not confer jurisdiction to himself. In this regard and pursuant to the foregoing submissions on issues ii, iv and v, the Learned Magistrate clearly erred by failing to find that the Appellants had satisfied the threshold under Order 2 Rule 15 of the Civil Procedure Rules the suit having not disclosed any reasonable cause of action against the Appellants. Additionally, and perhaps more CRITICAL, the Court did not even have the jurisdiction to entertain the subject issue before it.
36. The Learned Counsel concluded that the Honourable Magistrate truly erred in issuing injunctive orders in favour of the Plaintiffs who have not satisfied the threshold for grant of the same. In particular, the Plaintiff did not provide any title documents relating to PLOT 280/148 BUBUBU EXTENSION 1 which the Plaintiffs claim to own to warrant a finding that they had demonstrated a prima facie case with a probability of success. In this regard, the Learned Magistrate therefore misdirected himself as to law and facts.
37. The Learned Magistrate had no basis whatsoever to conclude that the land PLOT 280/148 BUBUBU EXTENSION 1 being claimed by the Plaintiffs and the Appellants’ land Title No. MOMBASA/ M.S/BLOCK III/300 were one and the same property. Noting that the Plaintiffs’ suit disclosed no reasonable cause of action or defence in law against the Appellants, the Plaintiffs’ suit ought to have been dismissed in its entirety.
38. The Honourable Magistrate further erred in failing to find that it had no jurisdiction to hear and determine the matter as placed before him. The claim for historical land injustice was not recognized as an overriding interest under Section 28 of the [Land Registration Act](#), No. 3 of 2012. Further, they pleaded that the 1st, 2nd and 3rd Respondents herein are affected by the doctrine of laches since they never raised any claim when title to the land was first issued to the previous owner and thereafter failed to raise any claim during the period provided by the [National Land Commission Act](#).
39. Lastly, the Appellants were innocent purchasers for value and their title could not be defeated by alleged claims of historical land injustices brought to court over 20 years since the first title was issued as this will be tantamount to appropriation of land without compensation, and therefore a violation of Article 40 of [the Constitution](#) of Kenya, 2010.
40. In conclusion, the Learned Counsel urged the Honourable Court to allow this Appeal in terms of the prayers set out in the Memorandum of Appeal dated 19th May 2023 and since costs follow the event, they humbly sought the Court to allow costs for both the Appeal and the Subordinate’s Court matter in favour of the Appellants.



B. The Written Submissions by the 4th Respondent

41. The 4th Respondent through the Law firm of Messrs. Khaminwa and Khaminwa Advocates filed his written submissions dated 2nd July, 2024. M/s. Mudanyi Advocate the Learned Counsel submitted on the issue of whether the court has jurisdiction to hear and determine matter relating to historical injustice that this Honourable Court has no power to determine a dispute relating to historical injustice. It is part of jurisprudence as decided in the case of the “Owner Of Motor Vessel S - Versus - Caltex Oil Kenya (1989) K.L.R 1”, It was held that jurisdiction is everything and without it the court has no other power to take one more step.
42. Further the Learned Counsel submitted that since the 1st, 2nd, 3rd Respondents raise the issue of historical injustice in their plaint, it thus follows that the right forum for deciding historical injustice is the National Land Commission. The Court should have cautioned itself that after establishing it had no jurisdiction and make a decision to discontinue proceedings. As a matter of good practice all Courts should down its tools once an issue of jurisdiction has been raised. In the case of “Ledido Ole Tauta -Versus- Attorney General (2015) eKLR”, It was explained that;
- “..... the right forum to investigate historical investigate issues of historical injustice should be the National Land Commission and not the ordinary Court. The Court failed to note that the 1st, 2nd and 3rd Respondents had not proved to have a valid title
43. The Learned Counsel submitted that they believed the court was well guided that once an issue of jurisdiction was raised the court ought to have addressed itself on it instead of giving a blind eye. In the case of “Del Monte Kenya Limited – Versus - National Land Commission & another; Kandara Residence Association & 3 others (Interested parties) (2022) eKLR”, the Court explained that Article 40 on proprietary ownership is not absolute right and therefore the statues direction provided under section 15 of the National Land Commission takes precedence. In an obita under paragraph 37 of the Judgment the Learned Judge explains the following,
- “.....that jurisdiction is primordial in every suit . A suit that is filed without jurisdiction is dead on arrival and cannot be remedied. If a suit is filed without jurisdiction the only remedy is to withdraw it and file the Complaint in the forum that is well seized with the facts.”
44. According to the Learned Counsel if the court expounded on the reason the Court should caution itself on jurisdiction to prevent overlapping on matters beyond its control. They wanted to quote the Judge explanation on the reason historical injustices should be determined in the National Land Commission vis a vis the ordinary courts as Justice Gacheru explained as follows in paragraph 76;
- “.....Further article 25 *the Constitution* of Kenya (supra) provides for absolute rights which cannot be limited. It is clear that the right to property is not therein listed and hence it is not absolute. Further, the National Land Commission is mandated to investigate historical injustices and therefore, the court will shy away from limiting and /or usurping that mandate.....”
45. On whether the court erred in law in failing to uphold Order 2 Rule 15 of the Civil Procedure Rules 2010, the learned Counsel submitted that the suit filed by 1st, 2nd and 3rd Respondents Plaint was fatally defective and bad in law. The 1st, 2nd and 3rd Respondents failed to prove if they are legit owners of the land in question for them to have crystallized interest on the land. The law provides that a registered



proprietor of a land is the one whom a title is registered in his name. The mere possession of a person on a land does not make a person the owner of the land. The suit which was failed by 1st, 2nd and 3rd Respondents did not disclose a reasonable cause of action that would need the intervention of the Court. In the case of “Mwale - Versus Nation Media Group”, Justice Chirchir struck out a suit which did not disclose any reasonable cause of action and failed to meet the threshold of institution of a defamatory suit. Similarly, in this suit the Plaintiff has failed to prove he has an interest on the subject matter of the suit to seek the protection of the law. The court in dismissing the suit explained as follows.

“.....In the plaint, the plaintiff avers that he learnt that the 1st to 6th defendants intends to distribute offensive, misleading and malicious information against him and the companies associated with him.(Emphasis added).

An intend in other words is a plan, aim, propose, aspire, desire, wish contemplate etc (Oxford Dictionary). In effect, in the plaintiff’s own words the act is yet to materialize. Further it is to say that the words complained of, within the finding in Harrison case (supra) which would otherwise constitute his cause of action don’t exist and therefore no cause of action exists.....

For pleading to qualify as a pleading, it must disclose a course of action. That must be a minimum requirement. A pleading without a cause of action is dead on arrival. This what befalls this suit. The plaint as drafted has failed to disclose the tort of defamation.”

46. The 1st, 2nd and 3rd Respondents accordig to the Learned Counsel had not demonstrated that there had vested interest in the property. Secondly the Court could not be cited to have acted beyond its power if it struck out a pleading that does not disclose a cause of action.

47. On whether the Court erred in law in issuing injunctive orders in issuance of injunctive orders to the Respondents who provided no title documents relating to Plot 280/148 Bububu Extension 1, the Learned Counsel submitted that the law was clear that injunctive orders should be issued until it was found that the party seeking the relied established a prima facie case. The 1st, 2nd and 3rd Respondents claim the land in question is ancestral land but have nothing to prove that it was owned by their ancestors. The three limbs for injunctive orders were not meet, the Respondents did not prove they could suffer an irreparable harm if the orders were issued considering they established their interest on the said land. The last limb which is the balance of convenience was in their favour, and there was nothing to prove the same. It is common saying that court orders should not be issued in futility, the Court in issuing injunctive orders failed to note that it had no right to limit ownership rights of the Appellants and the 4th Respondent who had been registered as owners. The Learned Counsel relied on the case of “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR” where the learned judge offered further elaboration on what is meant by balance of convenience” and stated;

“The Court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk for injunctive.”

48. In conclusion, the Learned Counsl submitted that it was a greater risk for the Court to protect a person without title at the expense of the registered owners and the same was done in bad faith and against the spirit of Order 40 of the Civil procedure rules. They prayed for the Court to allow the appeal as it was merited.



C. The Written Submissions by the 1st, 2nd and 3rd Respondents

49. The 1st, 2nd and 3rd Respondents through the firm of Nzuki & Nzuki Advocates LLP dated 12th June, 2024. M/s. Jamila Advocate submitted that before the Honourable Court was the Appellant's appeal lodged via a memorandum of Appeal dated 19th May, 2023. The appellant being dissatisfied with the ruling of Hon. D.W Mburu delivered on the 20th April, 2023 moved this Honourable court via the appeal on the following grounds:
- a. threatens the magistrate erred in law and fact by materially disregarding that the application dated 21st November 2022 by the 1st and 2nd Defendants questioned the court's jurisdiction to determine claims by the plaintiff which are based on alleged grounds of historical injustices since the review of grants for such claims was being done by the National Lands Commission and the period for such review has since expired.
 - b. threatens the Learned magistrate erred in law and fact by dismissing the application dated 21st November, 2022 by the 1st and 2nd Defendants without at all ruling on the issue of the court's jurisdiction as explained in Ground 1 above.
 - c. threatens the learned magistrate erred in law and fact by issuing injunctive orders in favour of the plaintiff who have not provided any title documents relating to plot 280/148 BUBUBU EXTENSION 1 which the plaintiffs claim to own.
50. The Learned Counsel on the issues for determination relied on the following:-
- a. Whether the learned magistrate erred by dismissing the application dated 21st November, 2022?
 - b. Whether the learned magistrate erred by issuing injunctive orders?
51. On whether the Learned Magistrate erred by dismissing the application dated 21st November, 2022 the Learned Counsel submitted that the learned magistrate in his ruling dismissed the application, thereby making it clear that the said court had assumed jurisdiction over the suit. Now the same issue of whether the court had/has jurisdiction or not, the Learned Counsel further submitted that nothing stops any Environment and Land Court Division from hearing and determining any matter in so long as it pertained to land and environment issues and that court has the requisite pecuniary jurisdiction.
52. When the 1st, 2nd and 3rd Respondents approached the said trial court, their glaring intention was to question an interference by the Appellants on their use of land. They had presented a case of parties trespassing on their land, and the same be cured by the court. The Respondents equally prayed for the court to make a determination that the said piece of land belongs to them by virtue of them having stayed on the land for the longest period, being on it currently and the land being their ancestral piece of land. Along the same they attached their efforts in trying to get a proper title over the said piece of land over the years, and correspondences confirming that indeed that piece of land is well known to be theirs.
53. According to the Learned Counsel, the deduction of its being a historical injustice issue was equally one concocted by the Appellants. The plaintiffs in the lower court approached that court without ever coming to face with any title documents from the Defendants therein. They equally attached a Map Sheet (R.I.M) wherein the title number matched that which they were sure is theirs. It is after they filed the said suit that they have come to realize that not only have the appellants been trying to chase them away from their land, but have proceeded to obtain title documents over the said pieces.



54. As at this point, from the Magistrate’s perspective, the triable issues at hand are and remain to be; who was the legal and true owner of the said piece of land? The Environment and Land Courts source their jurisdiction from article 162 (2) (b) of *the Constitution*, which shall be exercised in accordance with the provision of Section 13(2) of the *Environment and Land Court Act*, which provides for the powers of the court 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
55. The framing of Section 13 (2) of the *Environment and Land Court Act* included the just in case clause which was “any other dispute relating to environment and land”. This clause meant the court could stretch its arms wider into any issue pertaining to land. There were no restrictions placed on the said courts from the Act, and the appellants ought not to attempt to try and place such restrictions on courts.
56. The Learned Counsel referred the Court to my brother Justice Munyao Sila’s position in “Constitutional Petition No. 2 of 2018; Henry Wambega & 733 others – Versus - The Attorney General & 9 others; eKLR”;
- “It will be seen from the above, that the NLC has wide jurisdiction on historical injustices. I would say that when it comes to the choice of filing a claim before the NLC or before the Court, one needs to make an assessment of what task is required. If the facts are contested, the number of persons elaborate and not easy to verify them, and where a thorough investigative process is going to be needed, then probably the court would not be the best forum and it would be best that the NLC handles the matter. If a person files such suit in court, the court, on being moved, or on its own volition, can refer the matter to the NLC for determination, rather than dismissing it outright. However, where facts are clear, the issues uncontested, and what is needed is for the court to determine the rights violated and the nature of redress, or the legal rights of the parties. Then a court is at liberty to entertain the suit and determine it on its merits. In the case at hand, the Petitioners have opted to come to court and I have admitted the Petition. I will this proceed to determine it on merit”
57. The Learned Counsel with reliance on the “Constitutional Petition No.2 of 2018; Henry Wambega & 733 [Supra]”, submitted that:-
- a. The issue of whether a court should determine the case or simply refer it to the National Lands Commission was purely discretionary. In the trial suit, the learned Magistrate saw it fit to listen to the suit and determine it on its own merit.
 - b. The Appellant had the opportunity to suggest to the court to refer the matter to the National Lands Commission but instead pleaded that the NLC as well lacked jurisdiction as the timeline for hearing such disputes had since lapsed, thereby unclenching the NLC with jurisdiction to hear such matters as well.



58. By unclothing the NLC as well with the jurisdiction to decide on the issue at hand, and also pleading that courts of law equally lack jurisdiction, the appellants are simply trying to inform the courts and the general public that we could get to a point where a citizen has no place of resolving their disputes. In simple terms telling them ‘kimekuramba’ without according them any listening ear. Further the Learned Counsel submitted that the framers of *the Constitution* and the Environment did not envision a place where a citizen should be stuck with their dispute, just as the appellant is inexcusably pleading. They are informing this court that the period for filing the said dispute expired and the court also lacks jurisdiction. Then who has jurisdiction according to this litigant?
59. According to the Learned Counsel on this same issue it was their wish to move closer home on the decision by the Court of Appeal in the case of “Civil Appeal No 8 of 2019; Safepak Limited – Versus - Henry Wambega & 11 Others (Appeal on ELC Petition Number 2 of 2018” herein quoted above), the court held that:-
- “ That passage, we believe, accurately represents the state of the law on the matter and provides a complete answer to the appellant’s contention on jurisdiction and we need not say more. There is however the additional complaint in the present case that the petitioners’ first port of call before approaching the ELC, should have been the National Land Commission on which the specific function of carrying out investigations into historical land injustices is vested. The advisory opinion of the Supreme Court in opinion in the Matter of the National Land Commission (above), the High Court decision in Leidi Ole Tuta & others vs. Attorney General & 2 others (above), and decision of this Court in Speaker of the National Assembly vs. James Njenga Karume (above) were cited in support. Those authorities stand for the proposition, with which we agree, that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be followed provided that the remedy thereunder is effectual.
60. The Learned Counsel further relied on “Safepak Limited [supra]”, and submitted that the court in question considered the triable questions before it and saw that it actually had the jurisdiction to hear it on merit, that said jurisdiction should not be interrupted. Whatever the interpretation, in so far as statute law and case law was concerned, nothing at the time could stop the said Court from admitting the suit, and prefer to hear and determine it on merit.
61. At the Magistrate court, the main issue in contention was as to who is the true and actual owner of the said piece of land and the line of thinking would be whether that magistrate court has jurisdiction to hear and determine the issue of ownership of the land. The 1st, 2nd and 3rd Respondents clearly indicated that they are currently domiciled on the said suit property and they have been there all their lives. They have just recently noted new entrants trying to claim the said land. No title to that same land was ever produced until when the suit before the lower court was filed.
62. The Learned Counsel called upon this Honourable Court not to deny the 1st, 2nd and 3rd Respondents their day in court, in that they get to know from a point of facts and law as to who is the actual owner of the said property. For that to be determined, the said suit has to go to its final fruition. Lastly on this issue, with the adoption of *the Constitution* of Kenya, 2010 coming up, the transition process included the magistrate’s courts being included in the ELC wing, thereby allowing them to hear Land matters in so long as they have the requisite pecuniary jurisdiction.
63. Any magistrate court that has been gazetted by the Chief Justice to listen to land matters was properly clothed as an ELC lower court division as it bears jurisdiction as prescribed under the *Environment*



and Land Court Act. From the above, the magistrate was right to dismiss the application, and prefer to hear the matter on merit to its conclusion.

64. On the issue of whether the Learned Magistrate erred by issuing injunctive orders, the Learned Counsel submitted that the question on granting injunctive orders was not a picky ponky but rather one founded in law, practice and good behavior. One begs the question as to whether the learned magistrate granted the said injunctive orders having been properly backed by the law, and precedents. The law on granting of interlocutory injunction is set out under the provision of Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides:-

“Where in any suit it is proved by affidavit or otherwise-

- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP.21 [Subsidiary] C17-165;
 - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting damaging alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”
65. Further the Learned Counsel drew the attention of the court to the case of:- “R. J. R. Macdonald – Versus - Canada (Attorney General)”, which was cited with approval by the court in the case of:- “Paul Gitonga Wanjau – Versus - Gathuthi Tea Factory Company Limited & 2 others [2016] eKLR” which captured the principles in “Giella – Versus - Cassman Brown” as follows: -

“D Is there a serious issue to be tried?

- ii. Will the applicant suffer irreparable harm if the injunction is not granted?
 - iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called” balance of convenience
66. The Learned Counsel submitted that there were serious issues being tried before the Learned Magistrate which were:-
- a. Who is the genuine and true owner of the subject property?
 - b. Whether there was any trespass upon the subject property by the Appellants.
67. According to the Learned Counsel in such an application as was before the Learned Magistrate, the cardinal question that should be asked was whether the Applicant has satisfied the conditions for consideration in granting an injunction is now well settled in the case of “Giella – Versus - Cassman Brown & Company Limited (1973) E A 358”, where the court expressed itself on the condition’s that a party must satisfy for the court to grant an interlocutory injunction:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of



damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

68. The injunctive orders were directed at all parties before the court, in that both the applicants and respondents in the application were stopped from interfering with the suit property at the time. The learned magistrate simply avoided causing irreparable harm to any party. It was not as though he denied the Appellants herein the right to interfere with the suit property but allowed the 1st, 2nd and 3rd Respondents to do so. All parties were immediately warned and stopped from any form of interference.
69. The Learned Magistrate saw it fit on the balance of convenience to preserve the subject matter in question. It is only just and fair that the said subject matter be preserved throughout the pendency of the suit. Similarly, the test for granting of an interlocutory injunction was considered in the case of “American Cyanamid Co. – Versus - Ethicom Limited (1975) A AER 504” where three elements were noted to be of great importance namely:
1. There must be a serious/fair issue to be tried,
 - ii. Damages are not an adequate remedy,
 - iii. The balance of convenience lies in favour of granting or refusing the application.
70. From the above-mentioned principles, they humbly submitted that the Plaintiff had placed before this Honourable Court a prima facie case with a serious issue that is worth trial. The Learned Counsel submitted that the 1st, 2nd and 3rd Respondents’ claim of the piece of property having been in occupation over that piece and without any interruptive use for their lifetime and that of their previous generations. The 1st, 2nd and 3rd Respondents had never parted with possession of the suit property neither were they ever aware of any form of title or sale of the property prior to the happenings as indicated in the Plaintiff.
71. It was not in dispute that the 1st, 2nd and 3rd Respondents had always been in possession of the suit property and the Appellants have tried all manner tactics to forcefully evict the Plaintiff. The Respondents intended to illegally evict the Respondents from the suit property, hence necessitating the said orders from being put in place. Without the said orders as it has been set currently, the Appellants will have the overriding right over the Respondents, and proceed to evict and sale the property.
72. Furthermore, the Appellants before the trial court claimed that the suit property was not the same as that one belonging to them. That element would ordinarily open up a triable issue as the court had to listen to both parties through the suit and settle on which property is being referred to, who is the rightful owner, and if there was any malice and fraud ever occasioned be cured by an order of the court. There was a likelihood that the suit property will be transferred to third parties at the pendency of this suit just as it was done during the pendency of civil suit 136 of 2013 where the 2nd Respondent transferred the property to the 1st Respondent
73. It was their humble submission that the Respondent will suffer no prejudice if the order of inhibition is granted.
74. In conclusion, the Learned Counsel submitted that the appeal before the Honourable Court was framed to strip off jurisdiction from the Magistrate Court on the issue at hand. They approached the said court with the intention to be heard and decision be reached at on merit. The main issue in contention at the time was whether the Defendants (now the appellants) had trespassed upon the property, and who was the actual owner of the said property. The 1st, 2nd and 3rd Respondents’ all claim ownership by the fact that it was their historical land, were currently in possession of the property



and have never sold the said property. They have equally attached all the documentation showing their chase towards solving the land tussles across the region (that is inclusive of several other properties).

75. The Appellants had since reframed it to simply be historical injustice issue, and have continuously argued that the instant court lacks jurisdiction. They equally argue that the National Lands Commission where the said jurisdiction ought to be equally no longer hears such matters. In essence submitting to court that no one actually has jurisdiction and such matter are unresolvable. The Learned Counsel submitted that the question before court was on the ownership of the said property and the potential trespass and not simply a blanket historical land injustice question.
76. The Respondents prior to the suit had everything to lose if the orders were not granted. In conclusion, the Plaintiff/ applicant had demonstrated the three limb of granting injunction as per the case of “Giella – Versus - Cassman Brown Co. Ltd 1973 E.A. 358”. The Respondents had also demonstrated that Defendants/Respondent have trespassed to the suit property with an intention to permanently dispose it and interfere with their occupation and to the court's wisdom that was a triable issue to be heard at hearing. The best solution to the court was to bar all parties before the said court from any potential interference.
77. It was therefore imperative and in the interest of justice that appeal be dismissed and the trial suit be allowed to commence, and be determined on merit. They humbly submitted to the Honourable Court that it be pleased to dismiss the current appeal with orders as to costs.

IV. Analysis and Determination

78. The Honourable Court has had a chance to critically assess all the pleadings filed in this Appeal being the Record of Appeal and its contents, the Memorandum of Appeal by the Appellants, the written submissions, the plethora of cited authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
79. For the Honorable Court to be in a proper position to arrive at an informed, plausible, just, fair and reasonable decision from the filed Appeal by the Appellant herein, the Honorable Court has condensed the subject matter into the following two issues (2) salient issues for its determination. These are: -
 - a. Whether the file appeal by the Appellants being aggrieved by the Ruling of the Chief Magistrate's Court at Mombasa [Hon. D. W Mburu, PM) made on 20th April, 2023 in M.E.L.C Case No. E513 of 2022.
 - b. Who will bear the costs of the Appeal?
ISSUE No. a). Whether the file appeal by the Appellants being aggrieved by the Ruling of the Chief Magistrate's Court at Mombasa [Hon. D. W Mburu, PM) made on 20th April, 2023 in M.E.L.C Case No. E513 of 2022
80. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgement the Honourable Court in a preamble form the court makes two assertions. First on the re-evaluation of the evidence from trial court and secondly the brief facts of this case. This is a first appeal. In the



case of “Kenya Ports Authority – Versus - Kuston (Kenya Limited, (2009) 2 EA 212” this Court stated as follows regarding the duty of first appellate court: -

“This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”

81. Similarly, in the case of “Peter –Versus - Sunday Post Limited 1958 E.A. 424” Sir Kenneth O’Connor P. rendered the applicable principles as follows: -

“It is a strong thing for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion....”

82. The various powers of the Court on appeal, the provision of Section 78 of the [Civil Procedure Act](#), Cap. 21 provides as follows:

78. Powers of appellate court

- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - (a) To determine a case finally;
 - (b) To remand a case;
 - (c) To frame issues and refer them for trial;
 - (d) To take additional evidence or to require the evidence to be taken;
 - (e) To order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

83. I will discuss the issues as per the grounds of appeal tendered by the Appellant. On the issue of whether the learned Magistrate erred in law and fact by materially disregarding that the application dated 21st November 2022 by the 1st and 2nd Defendants questioned the court’s jurisdiction to determine claims by the Plaintiff which are based on alleged grounds of historical injustices since the review of grants for such claims was being done by the National Land Commission and the period for such review has since expired.

84. The provision of Section 13(1) of the Environment & [Land Act](#) gives this Court original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2) (b) of [the Constitution](#) and with provisions of this Act or any other written law relating to environment and land I am not bound with the findings of the case of “Stanley Ngethe Kinyanjui (Supra)” that parties should not constitutionalise simple processes which should be done through ordinary claims as there are different positions taken on this particularly the provisions of Article 159 (2) of [the Constitution](#) that requires the Courts to look at the substance rather than form. However the petitioners claim is premised on a matter clearly provided for under the provision of Article 67 of [the Constitution](#). The mode of resolving



the dispute is provided to be done through the processes given under the provision of Section 15 of the *National Land Commission Act*.

85. It is established that jurisdiction is everything and without it the court must down its tools. To that extent, we would agree with counsel for the appellant and counsel for the 8th respondent that if indeed the ELC was, by reason of Article 67 of *the Constitution* and Section 15 of the *National Land Commission Act* section, divested of jurisdiction, then the ELC should have declined jurisdiction. In the famous words of Nyarangi, J.A. in the often-cited case of “The Owners of Motor Vessel Lilian “S” – Versus - Caltex Oil (Kenya) Ltd [1989] KLR 1” at page 14:

“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

86. The Supreme Court of Kenya followed in the same path in “Samuel Kamau Macharia & Another – Versus - Kenya Commercial Bank Limited & 2 Others, Application No. 2 of 2011”, where it pronounced that:

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

87. This Honourable Court bears those principles in mind in considering the question whether it is within the mandate or jurisdiction of the ELC to deal with historical land injustice claims. The issue arose in the case in “Chief Land Registrar & 4 others – Versus - Nathan Tirop Koech & 4 others”, to which we were referred, where, like here it was contended that in light of Article 67(2) of *the Constitution* the proper forum to investigate claims of historical land injustices lay with the National Land Commission, to the exclusion of the court. The Court rejected that contention. In doing so, the Court stated, and it is necessary to quote at length:

“On the question whether a court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seised of the matter. Our conviction stems from our reading of Article 67(2) (e) of *the Constitution*. The Article provides that the NLC can investigate “present or historical” land injustices. We lay emphasis on the word “present.” If the NLC had initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the Environment and Land Courts redundant. We do not think this was intended to be so. Our view is fortified by Section 15 (3) (b) of the *National Land Commission Act* which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.

Further, there is nothing in the 2010 Constitution or in the *National Land Commission Act* ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice.”

88. I agree that the National Land Commission also has jurisdiction to hear claims of historical injustices under Article 67 (2) (e) which provides that one of the functions of the NLC is “to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and



recommend appropriate redress.” This function is embodied in Section 15 of the NLC Act, which provides at Section 15 (1) that:

“Pursuant to Article 67 (3) of *the Constitution*, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.”

89. Of course, the court has discretion to defer jurisdiction to the NLC if it is of opinion that the matter is best handled by the NLC rather than by the Court. I did address this point when I handled the case of “Henry Wambega & 733 others – Versus - Attorney General & 9 others [2020] eKLR” where I stated as
33. I think the issue of jurisdiction is settled. This court has jurisdiction to hear claims even those based on historical injustices. What we need to have in mind here is that just because a court is vested with jurisdiction, does not mean that in all cases the court will proceed to exercise that jurisdiction, especially where there is another body that also has capacity to hear that dispute. In other words, depending on the facts and circumstances surrounding the case, the court can defer jurisdiction to another body, or decline to take up the matter altogether, and this would not be because it has no jurisdiction, but because given the surrounding circumstances, it would be best for the court not to exercise its jurisdiction.
90. I still hold the same view even as I handle this petition. I in fact think that a party needs to carefully assess his case, and make a determination whether it is best suited to be heard by the NLC or by the Court. The risk of coming to court is that the claimant is tied to rigours of procedure which may not be applicable before the NLC. Also in court, parties are tied by their pleadings and the evidence that they have filed and/or presented. They also face an adversarial system of litigation, and the court has limited leeway to enter into the arena of litigation, say, for purposes of investigating an issue. In court, it is for the party to tailor his case, present appropriate pleadings and evidence to support it, and then square out in battle with the person/s that he has sued, who will certainly throw all brickbats at the case of the claimant, as it is indeed their right to do so. Those are the risks of coming to court.
91. In further objection, the Appellants herein filed an application dated 21st November 2022 seeking orders to set aside the temporary injunction issued as well as to strike out the entire suit on Two (2) main grounds: -
- a. The suit does not disclose any cause of action or defence in law against the Appellants since they are a stranger to the PLOT 280/148 BUBUBU EXTENSION 1 being claimed by the 1st, 2nd and 3rd Respondents herein; and
- b. The Chief Magistrate's Court lacks jurisdiction to determine the claims of the Plaintiffs which are based on alleged grounds of historical injustices since the review for such claims was being done by the National Land Commission and the period for such review has since expired. (Refer to pages 90 - 97 of the Record of Appeal).
92. The Appellants submitted that the aforesaid Appellants' application was brought inter alia under Order 2 Rule 15(1) (a), (b) and (d) which permits the court at any stage of the proceedings to strike out any pleading on the ground that it discloses no reasonable cause of action or defence in law or it was scandalous, frivolous or vexatious or it was otherwise an abuse of the court process and may order the suit to be dismissed. No party including the Plaintiffs filed any response in opposition of the said Appellants' application. On 24th November 2022, the Hon. Magistrate directed parties to file and exchange written submissions on both the Plaintiffs' application dated 26th October 2022 and the Appellants' application dated 21st November 2022.



93. The court delivered its Ruling on 20th April 2023 and ordered that there be no construction or any other form of development in respect of the suit property and that there shall be no sale and or transfer of the suit property pending the hearing and determination of the main suit. The Hon. Magistrate dismissed the Appellants' application dated 21st November 2022. The Appellants being dissatisfied with the whole of the said decision has appealed to this Honourable Court.
94. Guided by the provision of Section 15(3)(d) of the NLC Act, prima facie, the contested facts disclosed in the Plaint and annexures thereto as well as the facts revealed by the pleadings indicate that the allocation of the suit property was done at BUBUBU but the same raised pertinent issues that made the Government entities Parliament, National land Commission and others to intervene as land allocation has been done un procedurally without involvement of the area leadership and that people who were not locals/indigenous were allocated land at the detriment of the real bona fide beneficiaries. According to the Plaintiff the suit land PLOT 280/148 BUBUBU EXTENSION 1 formed part of their ancestral land by virtue of the fact that their grand parents and their parents lived there and they were born there. In this regard, this Court holds that Section 15(3) (d) of the National Land Commission Act as amended removes the claims in the Plaintiff from the mandate of the NLC.
95. On the question whether a court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is the Court's considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seized of the matter. The Court's conviction stems from our reading of Article 67(2) (e) of the Constitution. The Article provides that the NLC can investigate "present or historical" land injustices. I lay emphasis on the word "present." If the NLC had an initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the Environment and Land Courts redundant. I do not think this was intended to be so. My view is fortified by the provision of Section 15 (3) (b) of the National Land Commission Act which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.
96. Further, there is nothing in the 2010 Constitution or in the National Land Commission Act ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice. Further the Plaintiffs raised an issue of trespass in their claim which can be examined and determined by the Courts. There is nothing in the Plaint that refers to historical injustices; it is the Plaintiffs who identifies their cause of action. A party cannot compel the other on how to frame a claim or cause of action. For the foregoing reasons, I find that that the ground of appeal urging the trial court to relinquish its jurisdiction cause of the NLC has no merit.
97. On the other ground of whether the Learned Magistrate erred in law and fact by dismissing the application dated 21st November 2022 by the 1st and 2nd Defendants without at all ruling on the issue of the court's jurisdiction as explained in Ground 1 above I have already discussed the issue of jurisdiction in length above therefore I find this ground to lack merit.
98. On the ground of whether Learned Magistrate erred in law and fact by issuing injunctive orders in favour of the Plaintiffs who had not provided any title documents relating to PLOT 280/148 BUBUBU EXTENSION 1 which the Plaintiffs claim to own. The principles of injunctions as enunciated in the case of "Giella – Versus - Cassman Brown (1973) EA 358" and as was reiterated in



the case of “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [CA No.77 of 2012](#) (2014) eKLR” where the Court of Appeal held that;

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

99. The Court of Appeal “Mrao Ltd – Versus - First American Bank Of Kenya Ltd (2003) eKLR” gave a determination on a prima facie case. The court stated that:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

100. According to the 4th Respondent the law was clear that injunctive orders should be issued until it was found that the party seeking the relief established a prima facie case. The 1st, 2nd and 3rd Respondents claim the land in question is ancestral land but have nothing to prove that it was owned by their ancestors. The three limbs for injunctive orders were not met, the Respondents did not prove they could suffer an irreparable harm if the orders were issued considering they established their interest on the said land. The last limb which is the balance of convenience was in their favour, and there was nothing to prove the same. It is common saying that court orders should not be issued in futility, the Court in issuing injunctive orders failed to note that it had no right to limit ownership rights of the Appellants and the 4th Respondent who had been registered as owners.

101. According to the 1st, 2nd and 3rd Respondents, the injunctive orders were directed at all parties before the court, in that both the applicants and respondents in the application were stopped from interfering with the suit property at the time. The learned magistrate simply avoided causing irreparable harm to any party. It was not as though he denied the Appellants herein the right to interfere with the suit property but allowed the 1st, 2nd and 3rd Respondents to do so. All parties were immediately warned and stopped from any form of interference.

102. On whether the applicant shall suffer irreparable injury which cannot be compensated by damages, the Learned Counsel submitted that it was trite that merely establishing a prima facie case is inadequate; the applicant must demonstrate that irreparable injury will befall them if the injunction is not granted and that no alternative remedy exists to shield them from the potential consequences of the apprehended injury. The judicial decision of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR” provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”



103. On the issue of if the court is in doubt then it can decide the application on a balance of convenience, the Learned Counsel submitted that as regards the issue of balance of convenience, we associate ourselves with the decision in case:- “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai [supra]”, where it was held as follows(supra):

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

104. I do agree with the Learned Magistrate that under paragraph 12 that in the circumstances provided for in the trial court the status quo in respect of the suit property (the status being that no construction or any other form of development should be going on) shall be maintained and there shall be no sale and/or transfer of the suit property pending the hearing and determination of the suit. I therefore find that the third ground on the issue of the injunctive orders unmerited as well.

105. The Court also wishes to examine the issue of the dismissal of the suit under Order 2 Rule 15 as per the application by the Appellant. According to the submissions by the Appellants’ Order 2 Rule 15(1) (a), (b) and (d) which permits the court at any stage of the proceedings to strike out any pleading on the ground that it discloses no reasonable cause of action or defence in law or it was scandalous, frivolous or vexatious or it was otherwise an abuse of the court process and may order the suit to be dismissed. No party including the Plaintiffs filed any response in opposition of the said Appellants’ application. According to the Appellants the suit did not disclose any reasonable action against them. Order 2 Rule 15(1) of the Civil Procedure Rules provides as follows:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- a. It discloses no reasonable cause of action or defence in law; or
- b. It is scandalous, frivolous, or vexatious; or
- c. It may prejudice, embarrass or delay the fair trial of the action; or
- d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be.”

106. In a nutshell, I find that in matters to do with the disposition of land the Court should not be so quick to dismiss a parties claim. Therefore, I fully agree with the Trial Court that the matter should be heard on merit to its full conclusion. In this regard, the Appeal by the Appellant is found to be unmerited.

ISSUE No. b). Who will bear the costs of the Appeal

107. The issue of Costs is at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any process, legal action or proceeding in any litigation. The Proviso of the provision



of Section 27 (1) of the Civil Procedure Act, Cap. 21 provides that Costs follow the event whereby by events it means the result of the said process, legal action or proceedings.

108. In the instant case, I find that the Appellants having failed to establish his claim on the appeal the 1st, 2nd, 3rd, 4th and 5th Respondents have the costs of the appeal.

V. Conclusion and Disposition

109. The upshot of the foregoing, and having conducted an in-depth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellants lacks merit and is hereby dismissed. Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof: -

- a. That the appeal filed through a Memorandum of Appeal dated 19th May, 2023 and a Record of Appeal dated 3rd August, 2023 herein be and is hereby found to lack merit and is dismissed in its entirety with costs.
- b. That the Honourable Court reserves the right to uphold the Ruling of the Chief Magistrate's Court of Kenya at Mombasa by Hon. D.W. Mburu delivered on 20th April 2023 in MCELC Case No. E153 of 2022.
- c. That the 1st, 2nd, 3rd, 4th and 5th Respondents shall have the costs of the appeal to be borne by the 1st & 2nd Appellants herein.

It is so ordered accordingly

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS.....2ND DAY OFDECEMBER.....2024.

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HON. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of:

- a. M/s. Fridaus Mbula, the Court Assistant.
- b. M/s. Mbwana Advocate for the Appellants.
- c. M/s. Shumla Advocate for the 4th Respondent.
- d. No appearance for the 1st, 2nd & 3rd Respondents.

