



Mwatsuma & 4 others (Suing in their Capacity as the Bona Fide Occupants and Owners of Land No 368/11 /MN, 370/11/MN and 367/11/MN Utange Mombasa) v Karama & 12 others (Constitutional Petition E004 of 2024) [2024] KEELC 13702 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13702 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION E004 OF 2024**

LL NAIKUNI, J

DECEMBER 4, 2024

**IN THE MATTER OF: AN ALLEGED CONTRAVENTION OF ARTICLE 2 (1)
(5), 19 (1), (2), (3), 35 (1)(2), 40 (1), (3) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 16 AND 24
OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS (ACHPR)**

AND

**IN THE MATTER OF: LAND PARCEL NO. 368/11/MN UTANGE MOMBASA
MEASURING 2.74 ACRES, 370/11/MN MEASURING 2.18 ACRES**

AND

IN THE MATTER OF: THE REGISTERED LAND ACT 300 LAWS OF KENYA

BETWEEN

ONESMUS MWATSUMA 1ST PETITIONER

JAPHET MWATSUMA 2ND PETITIONER

KAHINDI MWATSUMA 3RD PETITIONER

KADZO MWATSUMA 4TH PETITIONER

JOSEPH KALAMA MWATSUMA 5TH PETITIONER

**SUING IN THEIR CAPACITY AS THE BONA FIDE OCCUPANTS AND
OWNERS OF LAND NO 368/11 /MN, 370/11/MN AND 367/11/MN UTANGE
MOMBASA**

AND

ARIF KHAMISI KARAMA 1ST RESPONDENT



ABUBAKAR KHAMISI SWALEH	2 ND RESPONDENT
FARJALWA SHADAU AHMED	3 RD RESPONDENT
ESTATE OF AHMED BIN MATANO	4 TH RESPONDENT
BULKON BUILDERS LTD	5 TH RESPONDENT
ZOLA GARDENS LTD	6 TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA	7 TH RESPONDENT
CHIEF LAND REGISTRAR MOMBASA	8 TH RESPONDENT
NATIONAL LAND COMMISSION	9 TH RESPONDENT
COUNTY SURVEYOR MOMBASA	10 TH RESPONDENT
OMAR MOHAMED AHMED MATANO	11 TH RESPONDENT
SHAIBU MOHAMED AHMED	12 TH RESPONDENT
ADAWIYA MOHAMED AHMED	13 TH RESPONDENT

RULING

I. Introduction

1. This Court is tasked onto making determination of two (2) Notice of Motion applications dated 26th January, 2024 and 11th April, 2024 both by Onesmus Mwatsuma, the 1st Petitioner respectively. The application was brought under the provision of Order 51 Rule 1 and 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* Cap. 21 of the Laws of Kenya and any other enabling provisions of the law.
2. Upon service of the Notice of Motions application and while opposing it, the 5th and 6th Respondents filed their Replying Affidavit. The Honourable Court shall be dealing with it at a later on stage of this ruling hereof.

II. The Petitioners/Applicants case on the application dated 26th January, 2024.

3. The Petitioners/Applicants sought for the following orders:-
 - a. Spent.
 - b. That the Honourable Court be pleased to issue a temporary injunction order restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 11th, 12th and 13th Respondents by themselves, their servants and or agents from any dealings to land registration no 368/II/MN, 367/11/MN and 370/11/MN and should not trespass, enter, evict, demolish the constructed houses built thereon or carryout any transfers to the suit lands and or sell, alienate or subdivide pending hearing and determination of this petition and or the application.
 - c. That the OCS Kiambeni Police Station to make sure that order 2 above is complied with;
 - d. That the DCI Mombasa to commence their investigations into how land Registration no. 368/11/MN,370/11/MN AND 367/11/MN was transferred, subdivided, surveyed, titles



were issued to the 1st, 2nd, 3rd, 5th, 6th Respondents and if any one found capable to be arrested and be prosecuted.

- e. That the DCI Mombasa to file their report findings into the investigations to this Honourable court for action and further orders.
 - f. That costs of this application be provided for.
4. The application by the 1st Petitioner/Applicant was premised on the grounds, testimonial facts and the averments made out under the 13th Paragraphed annexed supporting affidavit of ONESMUS MWATSUMA the Applicant herein. The Applicant averred that:-
- i. They were all born on the land described as LR. No. 368/II/MN, 370/II/MN and 367/II/MN and they had attended different schools and they were all married and with children and grandchildren.
 - ii. They had lived on the land for decades during the lifetime of their parents and the late AHMED BIN MATANO peacefully.
 - iii. They had several titles issued against all the land mentioned herein above to the 1st, 2nd, 3rd, 5th and 6th Respondents which at the face of it they looked fictitious i.e. not genuine. They annexed the titles marked as “O.M.1” for 370/11/MN, “O.M.2” for 368/II/MN, “O.M.3” for 367/II/MN and their searches marked as “O.M.4”, “O.M.5” and “O.M.6” respectively and their sale agreement marked as “O.M.7” dated 29th March, 2011, “O.M.8” dated 19th February, 2011 and all these lands were being sold by the 3rd respondent as a person.
 - iv. A colony of Kenya and the E.A protectorate NO.13557 plan for 3 portions of land No 370/II/MN, 368/II/MN and 367/II/MN dated at Nairobi on 9th July, 2021 in the names of SAIDI BIN FARJALLA of Mombasa, ITBARI BIN MULA DAUDJEE of Mombasa and JUMA BIN FARJALLA of Mombasa and they therefore annexed their titles marked as “O.M.9” for 368/II/MN dated 12th September, 1921 and “O.M.10” for 370/II/MN for SAIDI BIN FARJALLA dated 17th July, 1921 and “O.M.11” for ITBARI BIN MULA DAUDJEE dated 20th September, 1921 for the court’s perusal and action.
 - v. They had also been inclined to annexed some of the correspondences made by the Counsels and litigants in reference to the lands in question marked as “O.M.12” FARJALWAS AHMED dated 22nd February 2007, from Y.A. ALI ADVOCATES, “O.M.14” dated 5th October, 2011 from Messrs. KENGA & Co Advocates marked as “O.M.15” dated 16th July, 2015 from Messrs. NABIHAN SWALEH ADVOCATE, “O.M.16” dated 7th August, 2015 from Messrs. KENGA & Co Advocates.
 - vi. They had a constitutional right to own the land they did occupy as enshrined under the provision of Article 40 (1) of [the Constitution](#) of the Republic of Kenya 2010.
 - vii. The land Registration No 368/II/MN, 370/II/MN and 367/II/MN had been fraudulently sold to individuals while they are on the land and they were not trespassers, they were given the land by the owner to stay and live permanently and to corroborate this further they were given a cemetery measuring 100 x 100 to be burying their loved ones and they already have 4 graves, he annexed the photo of the graves marked as “O.M.17” and the houses marked as “O.M.18”, “O.M.19” and “O.M.20”.



- viii. He annexed AHMED BIN MATANO'S rate payments to the lands in question marked as "O.M 21", "O.M 22" and "O.M 23" respectively and his Certificate of death marked as "O.M 24".
- ix. The 1st, 2nd and 3rd Respondents stormed into the land which they occupied and demolished their houses and illegally erected a perimeter fence and they disappeared to date.
- x. It was their constitutional right to file this case in this Court as enshrined under Article of *the Constitution* of the Republic of Kenya 2010.

III. The Replying Affidavit by the 5th Respondent.

5. While opposing this application the 5th Respondents filed a 21 Paragraphed Replying Affidavit sworn by NILESHKUMAR BHIMII HARII of Krish Plaza, Links Road, Nyali and of Post Office Box Jumber 84197 – 80100. He averred as follows:
- a. He was the 5th Respondent's Director and duly authorized by it and its board of directors to make this this Affidavit on its behalf.
 - b. He made this Affidavit in response to the Petitioners' Notice of Motion Application dated 26th January 2024 and the Supporting Affidavit of ONESMUS MWASUMA filed in this court for consideration and determination.
 - c. He was informed by his Advocate, Mr. Sanjeev Khagram of Messrs A. B. Patel & Patel Advocates, which information he verily believe to be true that the said application was an abuse of the due process of this Honourable Court and should be dismissed with costs to the Respondents. The Petitioners' claim herein was utterly baseless and without any basis or foundation whatsoever.
 - d. It was an abuse of court process and tantamount to forum shopping seeking for favourable court.
 - e. The 5th Respondent was the sole registered and beneficial owner of the suit land as observed from the Certificate of Postal Search as on 12th April, 2019 and annexed in the Petitioner's bundles marked as "O.M.6" of their annextures.
 - f. He was advised by his Advocate on record that the Petitioners had no locus standi to institute these proceedings against the 5th Respondent or any other Respondent as they were trespassers to the suit land.
 - g. It was clear from the official search that this was a case of fraud being perpetrated as against the 5th Respondent who was the registered proprietor of the subject property in question and had been in possession.
 - h. It was evidently clear from the Petition that the Petitioners were forum shopping in different divisions of the High Court seeking to have a favourable Judgment granted to them for their unlawful trespass onto the Suit Property.
 - i. From the above averments, it was clear that in the year 2019 the 2nd Petitioner instituted a suit, "ELC Suit No. 113 of 2019 Japheth Mramba Mwatsuma [suing on his behalf and on behalf of 20 others] – Versus - Bulkon Builders seeking for declaratory orders that the Plaintiffs had acquired title to Land No.367/II/MN by way of adverse possession. He annexed hereto and



marked as Exhibit 'NBH-1', true Photostat copies of the Originating Summons and Affidavits filed in the above suit ELC No.113 of 2019.

- j. On 31st January 2024, the said suit ELC No. 113 of 2019 was dismissed and he annexed hereto and collectively in a bundle marked Exhibit as 'NBH - 2', true photostat copies of the said Order and all in subsequent Orders issued by the Court.
- k. He was aware that when parties appeared before Hon. Justice Mr. Sila Munyao on 13th November 2019, he ordered that the Plaintiffs therein (who included the 2nd Petitioner) and their agents and/or families or any other persons claiming through them be restrained from dealing with the properties or carrying out any development on the Suit Property known as 367/II/MN registered as C. R. No.1015 at the Land Titles Registry, Mombasa. He annexed hereto and marked as Exhibit "NBH - 3", a true photostat copy of the said Order issued on the 26th November 2019.
- l. Despite this Honourable Court issuing the order marked as "NBH - 3", above, the 2nd Petitioner herein and the rest of the Petitioners continued to unlawfully erect developments and structures on the 5th Respondent's property without any regulatory and statutory approvals in a bid to wrongfully and unlawfully entrench themselves further and influence the outcome of these proceedings.
- m. It was trite that to uphold the rule of law, acts done in breach of a Court Order was null and void and could not grant any rights to any persons.
- n. Since then and even after failing to prosecute their case, the Petitioners now, whilst blatantly disregarding the Orders of this Honourable court, continued to trespass on the Suit Property in a bid to entrench themselves on the 5th Respondent's property and without any respect for the dignity of this Honourable Court or its Orders had now proceeded to file this Petition seeking orders against the Respondents.
- o. Clearly the Petitioners had no regard for the rule of law and/or authority or dignity of this Honourable Court when they themselves have blatantly refused to obey and comply with the orders of this Honourable Court and expect that by bringing this Petition, they would get orders of injunction against the 5th Respondent in relation to its own property.
- p. He was further advised by their Advocates on record that the Petitioners had approached this Honourable Court with unclean hands in the circumstances and that they were not entitled to the orders sought in the Application and the Petition. Notably, the entire Petition is nonetheless Res Judicata ELC No. 113 of 2019 therefore this Court had no jurisdiction to determine this Application.
- q. He was further advised that the 2nd Petitioner could not deride away from the principles of Res judicata simply by adding new parties to this Petition and filing the suit under a different division of the High Court.
- r. The abuse being perpetrated was further evident from the fact that the Petitioners herein continued to litigate in different courts. In this regard, he annexed hereto in a bundle and collectively mark as Exhibit 'NBH - 4', true Photostat copies of the application the Petitioners continued in a vexatious manner to file in the other matters.
- s. There could not be in the circumstances a prima facie case capable of success as against the 5th Respondent.



- t. He was advised by their Advocate that powers to grant the orders as sought were not available to this Court. The power to decide to investigate, prosecute or not solely belonged to the Director of Criminal Investigations and office of the Director of Public Prosecution.
- u. He urged the Court to dismiss the Petitioners' application dated 26th January 2024 to be dismissed with costs to the 5th Respondent.

IV. The Notice of Motion application dated 11th April, 2024

- 6. The application was brought under Order 10 Rules 6, 7, 8 and 10 and Order 11 Rule 3 (1)g of the Civil Procedure Rules 2010 and Sections 3A,1A,1B and 63 (e) of the *Civil Procedure Act* Cap. 21 of the Laws of Kenya.
- 7. The Applicant sought for the following orders:-
 - a. Spent
 - b. That the Respondents be cited for contempt of court orders given on the 12th day of March 2024 which required them to write and file their replies to the Petition and the application.
 - c. That the Honourable court be pleased to order the application and the Petition to be heard as undefended suit.
 - d. That the Honourable court be pleased to consolidate ELC case no. 113 of 2019 with this Petition and both to run concurrently.
 - e. That costs of the application be provided for.
- 8. The application by the Petitioner/Applicant was based on the grounds, testimonial facts and the averments made out under the 8th paragraphed further Supporting affidavit of ONESMUS MWATSUMA, the 1st Petitioner/Applicant herein. The Applicant averred that:-
 - a. All the Respondents had defaulted to file their responses or defences against this application and or petition within the prescribed period.
 - b. The Respondent though served with the Petition and the application through advertisement in the Nation and Taifa Leo Newspapers on the 12th day of March 2024 and through the court process server on 31st January, 2024, 2nd February, 2024 and 6th February, 2024 respectively had defaulted to file their replies to the application.
 - c. It would be prudent enough for the court to grant the orders sought in the application and Petition.
 - d. The Court would uphold the rule of the law by allowing this application instant.
 - e. Case No. ELC No. 113 of 2019 had the same parties and land described in this Petition as plot No. 367/11/MN was also in this Petition.
 - f. It would be for the interest of justice that the commencement of investigations by the DCI Mombasa be allowed as a priority



V. The Petitioners Supplementary Affidavit in response to the 6th Respondent's replying affidavit.

9. With the leave of Court, the 2nd Petitioner responded to the 6th Respondent's Replying Affidavit through a 5 paragraphed supplementary affidavit dated 16th July, 2024 where the deponent averred that:-
- a. The authority filed for TARIQ SAID SHAHBAL had no names of the directors and there was no resolution by the 6th Respondent since it was a limited liability company as the law depicts and therefore in the absence of this legal requirement renders the replying affidavit incompetent together with the authority to be null and void and therefore should be expunged from the court records.
 - b. The Replying Affidavit of the 6th Respondent was drawn and filed by an Advocate of this court on 4th July, 2024 whom he believed understood or knew the law better than him and this further demonstrated that he was incompetent to handle such weighty issues.
 - c. The contents of the 6th Respondent's Replying Affidavit under Paragraphs 1, 3, 4, 5, 6, 12 and 13 were denied in totality and therefore the following shall be his statements in response:-
 - i). That the Replying Affidavit filed was sworn by a stranger who had no authority from the 6th Respondent under the name TARIQ SAID SWALEH.
 - ii). That the man who purported to be the manager without a Kenyan identity card number or the 6th Respondent designation card and whose name was appearing in the purported authority not a letter off authority was a sham in law and he urged this court to disregard this man and strike out the Replying Affidavit instant.
 - d. That they were physically in occupation of the three parcels of land for decades and the prayers sought in our application was not hot air or a passing cloud.
 - e. The evidence they had was that they were in physical occupation for decades and they needed their rights to be protected from further violations as enshrined in *the Constitution* of Kenya 2010 under the provision of Articles 22 and 400 while the certificates being used and possessed by the Respondents had to be investigated.
 - f. That their prayers No. 3,4 and 5 of their application dated 26th January, 2024 had been conceded by the 6th Respondent while the other Respondents had also conceded all.
 - g. This court gave directions severally for the Respondents from No. 1-13 to file their indeed tried to reply to the application which gave the status quo orders
 - h. He sought for the striking out of the Replying affidavit by the 6th Respondent.

VI. Submissions

10. On 20th June, 2024 while the Parties were present in Court, they were directed to have the Notices of Motion applications dated 26th January, 2024 and 11th April, 2024 respectively be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged a ruling date was reserved on 18th November, 2024 by Court accordingly.



A. The Written Submission by the Petitioner for the Notice of Motion Application dated 26th January, 2024

11. The Petitioner filed their written submissions dated 26th June, 2024. The Petitioner commenced by stating that the orders sought as stated above.
12. The Petitioners contended that despite the honourable court having issued orders for the parties to file their responses or replies, they had not done so to date and this amounts to contempt to court. The Petitioners effected service of the application to the Respondents and was an affidavit of service on record. The trial court for the interest of Justice gave the orders of status quo to the parcels of land. Since there was no response filed against this application, the Petitioners prayed the same be allowed as sought.

B. The Written Submissions by the Petitioner to the Notice of Motion application dated 11th April, 2024

13. The Petitioner filed their written submission dated 3rd May, 2024. The Petitioner submitted that they were seeking the above stated reliefs. They submitted that the Petitioners effected service upon the Respondents and there is an affidavit of service on record. Also the Application had not been defended, and the Petitioners would rely on the averments stated in their supporting affidavit. The Petitioners pray for the same be allowed as sought.

C. The Written submissions by the 6th Respondent for the Notices of Motion application dated 26th January, 2024 and 11th April, 2024

14. The 6th Respondent through the Law firm of Messrs. Salim & Company Advocates, filed their written submission dated 4th July, 2024. Mr. Salim Advocate submitted that the Notice of Motion dated 26th January, 2024 the Applicants sought for a 'temporary injunction to restrain the 1st, 2nd, 3rd 4th, 5th, 6th, 11th, 12th and 13th Respondents from any dealings to Land Registration Numbers 368/II/MN, 367/I1/MN and 370/II/MN, trespass, enter, evict, demolish the constructed houses built thereon or carry out any transfers to the suit lands and or sell, alienate or subdivide pending hearing and determination of this Petition and or the Application.' The Notice of Motion was supported by the Supported Affidavit of Onesmus Mwatsuma sworn on 26th January, 2024. The Notice of Motion also seeks for the DCI Mombasa to conduct investigations on entries on the suit lands above-mentioned and if anyone is found culpable be arrested and prosecuted and report of the findings of the investigations be filed by the DCI Mombasa to this Honourable Court.
15. In the Notice of Motion application dated 11th April, 2024 the Applicants sought that all the Respondents be cited for contempt for not complying with the Orders given on 12th March, 2024 by not responding to the application and the Petition was filed by the Applicant; that orders be issued that the application and the Petition be deemed undefended; and that the instant suit be consolidated with ELC Case No. 113 of 2019, although the prayer for consolidation had since been withdrawn via the Petitioners' written submissions dated 26th June, 2024.
16. On whether the Notice of Motion application dated 26th January, 2024 was merited; the Learned Counsel submitted that in "Giella – Versus - Cassman Brown (1973) EA 358", enunciated and settled the law on the issuance of injunctive reliefs to be that the applicant has to satisfy the triple requirements; -(a) establish a prima facie case, (b) demonstrate irreparable injury if a temporary injunction is not granted; and show that the balance of convenience is in its favour.



17. According to the Learned Counsel a prima facie case was described in the case of “MRAO Ltd – Versus - First American Bank of Kenya Ltd & 2 Others (2003) KLR 125” to mean:

“... In civil cases it is a case which on the material presented to the court or 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 on rebuttal from the latter.” (“Emphasis theirs”).

18. According to the Learned Counsel from the documents placed before this Honourable court, the Petitioners had failed to produce any documents in support of their case on them being rightful owners of the suit property. The Petitioners application is devoid of even a certificate of ownership under Section 26 (1) of the [Land Registration Act](#), deed of gift from the original proprietor if any or any document to show that the Petitioners were granted any rights of the suit properties that would provide a basis for a prima facie case.

19. The Court was being called upon to assume ownership and consequently proprietary rights over the suit property in favour of the Petitioners without them producing documentary evidence to support their claim over the suit property. At the very least, the Petitioners ought to provide a Deed of Gift or a registered Transfer instrument in their favour. In the absence of either document, they cannot claim that they were given the land by the ‘owner’. Photographs of a burial site as annexed and marked “O.M -17” in the Petitioners’ Supporting Affidavit dated 26th January, 2024 does not confer ownership as was held in the case of “Victoria Distributors – Versus - Joseph Abwao Nyawir [2015] eKLR” which refers to the case of “Dinah Caren Ondiek Akinyi – Versus - Leukadia Ajwang Ondero & Another”, which held that a burial on a disputed land (suit land) does not confer title or ownership to that land.

20. On the occurrence of irreparable harm that cannot be compensated by way of damages-are the Petitioners likely to suffer irreparable harm that cannot be adequately compensated by way of damages? No. The concept of irreparable harm has been defined as settled law. Pursuant to “Seraphins International [Limited & another – Versus - NCBA Bank Kenya PLC & 2 others \(Commercial Case E293 of 2023\)](#) [2024] KEHC 4131 (KLR) (Commercial and Tax) (30 April 2024) (Ruling)”, the Court quoted the case of “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others [2014] eKLR”, which stated the following of irreparable injury or damage: -

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot ‘adequately’ be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.” (emphasis ours).

21. According to the Learned Counsel, the Petitioners had not placed before the Court any proof that they may suffer irreparable harm, and any reference to it is speculative and unfounded. As it stands, the 6th Respondent is in possession of the suit property and not the Petitioners, hence no form of irreparable harm shall befall the Petitioners in the event an injunction is not issued. It was their humble submission



- that the Petitioners have failed to meet the requirements under “Giella – Versus - Cassman Brown (Supra)” and are thus not entitled to their prayer seeking for an injunction against the 6th Respondent.
22. On the balance of convenience; it was their humble submission that the balance of convenience tilts in favour of the 6th Respondent. It was their submission that the balance of convenience tilts in favour of the 6th Respondent. In dispensing with this aspect, the court was invited to determine the party that will suffer greater harm from granting or refusing the injunction pending a decision on the merits.
23. Indeed, this was the finding of the court in “Paul Gitonga Waniau – Versus - Gathuthis Tea Factory Company Ltd”, the Court held that:-
- “Where any doubt exists as to the Applicant’ right, or if the right is not disputed, but its violation is denied, the court in determining whether an interlocutory injunction should be granted, takes in to consideration the balance of convenience nature of the injury which the Respondent on the other hand, would suffer if the injunction was on the other hand might sustain if the injunction was refused and he should ultimately turn out to be right.....Thus the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction.”
24. The 6th Respondent holding a certificate of ownership over the suit property, in their view, stood to suffer more harm than the Petitioners who have not presented any proof of ownership and therefore, they do not stand to be prejudiced in any way. The interlocutory injunctions being equitable remedies should not in our view be issued in favour of a party who was guilty of interfering with others rights knowing full well that said rights were and have always been enjoyed by others.
25. The Petitioners have always known that the 6th Respondent has been in occupation and use of the suit property as the registered Proprietor and nothing would have been easier than the Petitioners producing at the least, documentary evidence giving them proprietary rights over the property.
26. On whether the 6th Respondent should be held in contempt of orders issued on 12th March, 2024 the Learned Counsel submitted that the Petitioners’ application was presented in bad faith. The Petitioners herein filed their application dated 11th April, 2024 seeking the 6th Respondent be cited for contempt yet they effected service on 13th May, 2024. Several weeks after they had already filed their application before this Honourable Court. Furthermore, by way of the Petitioners’ affidavit of service dated 23rd April, 2024 sworn by one ONESMUS MWATSUMA, at paragraph 3, he confirmed and swears that he had indeed failed to effect service upon the 6th Respondent. Thus, their application seeking the 6th Respondent be cited for contempt lacks merit.
27. It was their submission that the Petitioners were not deserving of this Courts protection and ought to be immediately halted from continuing their unlawful activities over the suit property. In view of the overriding objective of the court to do justice, it is our humble submission that the Petitioners applications are marred in bad faith and lack merit and should not be allowed. For the above reasons, the 6th Respondent prays that both Applications be dismissed with costs.

D. The written submission of the Petitioners’ supplementary submissions to the 6th Respondent’s submissions dated 4th July, 2024

28. The Petitioners individually responded to the 6th Respondents through supplementary submissions dated 16th July, 2024; where the Petitioner submitted that the Petitioners had demonstrated that they are the bona fide occupiers of the (3) three parcels of land by virtue of settlement by building



permanent houses for decades and have no any other home as they were born there since the immemorial of their parents and none of the Respondents had homes or buildings in the 3 parcels of the land and even some of them did not know where the land was situated despite their lawyers giving them titles which were questionable and need to be investigated fully.

29. This was a Constitutional Petition based on facts and none of the Respondents has come to defend the titles they were holding in this court and at the moment they should not be used in any place as they are not genuine and were obtained through a flawed process and this is why investigations is the only viable way which unlock will the stalemate. In the Petition page 5, the Petitioner had invoked the jurisdiction of the Court and on page 6 the provisions being relied upon, which were express provisions of the law and there was no any compromise in any way whatsoever by any party. The Petitioners did not applaud the efforts of this court in dispensing justice by saving many souls not one.
30. According to the Petitioner, the submissions of the 6th Respondent were full of authorities and nothing tangible was seen in them where they were only complaining instead of addressing prayers 3,4 and 5 of the Petitioners' application dated 26th January, 2024, this court was competent to make its own ruling upon merits. In the constitutional petition the prayers were very weighty and no one had come out to defend the same which act had made the Petition to be undefended. The filed submissions and the Replying affidavit of the 6th respondent are incompetent and for their failure to address on the burning crucial issues raised. The Petitioners prayed that both applications the court should find them to be merited and be allowed as prayed and no one would suffer any prejudice if the same was granted.

VII. Analysis and Determination

31. 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.
32. For the Court to reach an informed, reasonable, equitable and fair decision, it has condensed the subject matter into the following three (3) salient issues for its determination as follows:-
 - a. Whether the Notice of Motion dated 12th January, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
 - b. Whether the Notice of Motion application dated 11th April, 2024 by the Petitioner/Applicant is merited?
 - c. Who bears the costs of the Notice of Motion applications dated 12th January, 2024 and 11th April, 2024.

ISSUE No. a). Whether the Notice of Motion dated 12th January, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

33. Under this sub – title, the main issue here is whether the Plaintiffs are entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -
Order 40, Rule 1

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



- 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 orders.
34. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Limited (1973) EA 358”, where it was stated:-
- “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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
35. The three conditions set out in “Giella (supra)”, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- “Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR”,
- “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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.
36. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case of:- MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125,
- “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 would 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”
37. As the Court previously observed in this ruling, the Applicant in the affidavit supporting the Application averred that they were all born on the land described as 368/II/MN, 370/II/MN and 367/II/MN and they had attended different schools and they were all married and with children and grandchildren. They had lived on the land for decades during the lifetime of their parents and the



late AHMED BIN MATANO peacefully. A colony of Kenya and the E.A protectorate NO.13557 plan for 3 portions of land No 370/II/MN, 368/II/MN and 367/II/MN dated at Nairobi on 9th July, 2021 in the names of SAIDI BIN FARJALLA of Mombasa, ITBARI BIN MULA DAUDJEE of Mombasa and JUMA BIN FARJALLA of Mombasa. They had also been inclined to annexed some of the correspondences made by counsels and litigants in reference.

38. However, the 5th Respondents averred that, they were the sole registered and beneficial owner of the suit land as observed from the Certificate of Postal Search as on 12th April, 2019 and annexed in the Petitioner's bundles marked as "O.M.6" of their annexures. They held that the Petitioners had no locus standi to institute these proceedings against the 5th Respondent or any other Respondent as they were trespassers to the suit land. According to them, it was clear from the official search that this was a case of fraud being perpetrated as against the 5th Respondent who was the registered proprietor of the subject property in question and had been in possession. Further, that it was it was evidently clear from the Petition that the Petitioners were forum shopping in different divisions of the High Court seeking to have a favourable Judgment granted to them for their unlawful trespass onto the Suit Property. That in the year 2019 the 2nd Petitioner instituted a suit, "ELC Suit No. 113 of 2019 Japheth Mramba Mwatsuma [suing on his behalf and on behalf of 20 others] – Versus - Bulkon Builders seeking for declaratory orders that the Plaintiffs had acquired title to Land No.367/II/MN by way of adverse possession. To support their point they annexed hereto and marked as Exhibit 'NBH-1', true Photostat copies of the Originating Summons and Affidavits filed in the above suit ELC No.113 of 2019. To them, on 31st January 2024, the said suit ELC No. 113 of 2019 was dismissed and he annexed hereto and collectively in a bundle marked Exhibit as 'NBH - 2', true photostat copies of the said Order and all in subsequent Orders issued by the Court. They were aware that when parties appeared before Hon. Justice Mr. Sila Munyao on 13th November 2019, he ordered that the Plaintiffs therein (who included the 2nd Petitioner) and their agents and/or families or any other persons claiming through them be restrained from dealing with the properties or carrying out any development on the Suit Property known as 367/II/MN registered as C. R. No.1015 at the Land Titles Registry, Mombasa. He annexed hereto and marked as Exhibit "NBH - 3", a true photostat copy of the said Order issued on the 26th November 2019.
39. Despite this Honourable Court issuing the order marked as "NBH - 3", above, the 2nd Petitioner herein and the rest of the Petitioners continued to unlawfully erect developments and structures on the 5th Respondent's property without any regulatory and statutory approvals in a bid to wrongfully and unlawfully entrench themselves further and influence the outcome of these proceedings.
40. According to the 6th Respondent from the documents placed before this Honourable court, the Petitioners had failed to produce any documents in support of their case on them being rightful owners of the suit property. The Petitioners application is devoid of even a certificate of ownership under Section 26 (1) of the [Land Registration Act](#), deed of gift from the original proprietor if any or any document to show that the Petitioners were granted any rights of the suit properties that would provide a basis for a prima facie case.
41. In the case of "Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1", the court held that;
- “In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases.”



42. Similarly, in the case of “Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd” the court held that;

“In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria.”

43. In the present case, the issue of the ownership of the suit land is highly contested. While the Petitioners/Applicants hold on the fact that they were born and brought up on the land and where they lived to date with their families, but based on the annexure marked as “O.M.6” of the Petitioners/Applicants’ bundles being Certificate of Postal Search as on 12th April, 2019, it is clear that unless otherwise stated the 5th Respondents were the sole registered and beneficial owner of the suit land. Indeed, the Petitioners/Applicants have strongly challenged the said title alleging that it was obtained irregularly and through fraudulent means. Indeed, they have called for it to be investigated by the appropriate statutory authorities. Be that as it may, while awaiting the investigation to take place, the principles on “The Burden of Proof” enshrined under the provision of Sections 1017, 108 and 109 of the Law of Evidence, Cap. 80 that he who alleges proves comes to play. Therefore, regarding this first condition I hold that the Petitioners/Applicants have failed to demonstrate a “prima facie” case with a probability of success at the trial as enunciated in the case of “Giella -Versus - Cassman Brown & Co. Ltd (Supra)”.

44. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Petitioners/Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in “Nguruman Limited (supra)”, held that,

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

45. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Petitioners/Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicants’ property is at risk and being that they live in the suit property they will suffer risk if they are evicted by the Respondents if the Court does not intervene. The Applicants have to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. 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.”

46. Quite clearly, the Respondents would not be able to be compensated through damages as it has shown the court that its rights to the suit property as legal proprietors. Indeed, having failed on the first condition, therefore, the Court is not satisfied the second condition has been met as laid down in “Giella’s case”.

47. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)” which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour 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 will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

48. In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR”, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

49. The balance of convenience tilts in favour of the Respondents. The decision 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 of injustice.”

50. Bearing this in mind, I am convinced that there is no ground whatsoever in granting orders of temporary injunction at all.



51. In the case of:- “Robert Mugo wa Karanja – Versus - Ecobank (Kenya) Limited & Another [2019) eKLR” where the court in deciding on an injunction application stated;

“circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts...”

52. I am not convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Applicants. In view of the foregoing, I strongly find that the Applicants have not met the criteria for grant of orders of temporary injunction.

53. As already indicated above, the Petitioners also prayed for the grant of orders for the commencement of investigations into how the land registration no. 368/II/MN, 370/II/MN and 367/II/MN was transferred, subdivided, surveyed, titles were issued to the 1st, 2nd, 3rd, 5th, 6th Respondents and if anyone found capable to be arrested and be prosecuted by the DCI Mombasa. The Petitioners know the relevant authority to approach and the procedure of instituting a public interest suit or calling for investigations. This Court can only enforce the recommendations of the investigative bodies but not cannot order an independent body to conduct the investigations. Therefore prayer d and e are not merited and the same are hereby dismissed.

ISSUE No b). Whether the Notice of Motion application dated 11th April, 2024 by the Petitioner/ Applicant is merited?

54. Under this subtitle the Court is called upon to examine the following issues:-

- a. Whether the Petitioners have made out a case for the grant of contempt of court orders against the Respondents for the orders made on the 12th day of March, 2024.
- b. Whether the Petition and application can be heard as an undefended suit
- c. Whether the Honourable court could consolidate ELC case no 113 of 2019 with this Petition and both to run concurrently

55. The Honourable Court has deciphered that the main Substratum in this proceeding 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.



56. 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”.
57. 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*”.
58. 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.”
59. 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”.
60. 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.



61. 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 ”
62. 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.”
63. 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
64. 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.
65. 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 12th March, 2024 by this Honourable Court
 - ii. Whether the Respondents herein were served with or was aware of the orders made on 12th March, 2024.
 - iii. Whether the order as sought and extracted was clear and unambiguous
 - iv. Whether the Respondents are guilty of contempt of Court order herein issued.
66. 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 Respondents



as alleged by the Petitioners 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 12th March, 2024 as follows:-

That the petition and the Application be advertised in the Nation and Taifa Leo Newspaper.

67. Therefore it is this Court's opinion that there was a valid Court order issued by this Court on the 12th March, 2024 by this Honourable Court.
68. Secondly, on the alleged contemnor ought to have knowledge of or proper notice of the terms of the order. The Applicants' Application dated 11th April, 2024 was filed to ensure that the rule of law is preserved and that the Respondents are held accountable for failure to comply with the Orders of the Court dated 12th March, 2024.
69. Thirdly, the allegations blatantly meted out by the Petitioners/Applicants to the effect that the Respondents had willfully disobeyed these orders. Further, that accusation that the Respondents 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 Respondents that the Petitioners/Applicants herein have failed to adduce any evidence to prove the alleged contravention of the said Court Order.
70. To this end, therefore, the Honourable Court is not satisfied that the Petitioners/Applicants have proved its case for contempt of Court orders by this Honourable Court given on 31st October, 2023 against the Petitioners/Respondents.
71. The Court of Appeal in the case of:- "Shimmers 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.”
72. 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 Applicants have not proved to the required standard that the Respondents as cited were in brazen disobedience of the Court orders issued by this Honourable Court on 12th March, 2024. Therefore prayer b of the application fails.
73. As for prayer c, the Applicants are seeking to have the Petition had formal proof and undefended. Order 7 Rule 1 of the Civil Procedure Rules provides that where a Respondent has been served with Summons to appear, he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit. The Rule does not state what would happen where a defence is filed outside the stipulated period of 14 days.
74. The provision of Order 10 of the Civil Procedure Rules provides for consequences of non-appearance and or default of defence. In my view, the consequences of what would happen to a party who does not file his Defence within 14 days in unliquidated claims like the current one should have been provided for under this Order. Order 10 Rules 2 of the Civil Procedure Rules provides that where any defendant fails to appear and the Plaintiff wishes to proceed against such defendant, he shall file an affidavit of



service. On the other hand Rule 4 provides that where a Plaintiff makes a liquidated demand only and the Respondents fail to appear, the court shall, on request enter judgment against the Respondents for the sum claimed.

75. The court ought to look at the issues raised in a holistic manner before making a decision as to whether it can strike out a pleading which has been filed contrary to the provisions of the Rules. I say so because the Rules themselves allow the court, in appropriate cases, and upon such terms as the justice of the case may require to enlarge time where a limited time has been fixed for doing any act or taking any proceedings under the Rules. The approach of the court should therefore not to strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objective set out in the Civil Procedure Rules and Article 159 of *the Constitution*. This is the position that the Court of Appeal (with Kiage J.A. Dissenting) took in the case of “Nicholas Kinto Arap Korir Salat – Versus – Independent Electoral and Boundaries Commissions & others (2013) eKLR” as follows:-

“Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”

76. Striking out is an extreme measure which should only be resorted to where it is clear that a party is abusing the Court process. Article 159(2)(d) of *the Constitution*, Section 1A and 1B of the *Civil Procedure Act* emphasizes on substantive justice as opposed to undue regard to procedural technicalities.
77. In this regard, I find that allowing this prayer in the application, the Respondents will be barred from participating or being heard in this matter, which in my view will be a draconian step to take. I will therefore in the interest of justice admit the responses that the Respondents shall file or already filed although out of time. However, I will impose sanctions to deter other parties from flouting the prescribed rules. A party who files his documents late should not be allowed to go scot free. For the Petitioners to have filed this application it is evident that they were desirous of bringing this matter to a logical end. Although they have failed on ground c.
78. On the issue of consolidation of this Petition and ELC case no 113 of 2019 according to the Petitioners, Case No. ELC No. 113 of 2019 has the same parties and land described in this Petition as Plot No. 367/II/MN was also in this Petition. Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-
- a. some common question of law or fact arises in both or all of them; or
 - b. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
 - c. for some other reason it is desirable to make an order for consolidating them



79. In the Supreme Court case of “Law Society of Kenya – Versus - Centre For Human Rights & Democracy & 12 Ors [2014] eKLR” the judges enunciated the general principles to be applied when considering consolidation as follows:

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”

80. Consolidation of suits is done for the purpose of achieving the overriding objectives of the Civil Procedure Act, that is, for the expeditious disposal of Civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.

81. The jurisdiction to consolidate suits is donated by the provision of Order 11 Rule 3 of the Civil Procedure Rules. In the case of “Prem Lala Nahata & Anor – Versus - Chandi Prasad Sikaria [2007] 2 Supreme Court Cases 551”, the India Supreme Court held:-

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases.... The main purposes of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit.”

82. From the foregoing, it is clear that the Court has a wide discretion in ordering consolidation. Consolidation will be ordered if there is a common question of law or fact in the suits, the reliefs or rights sought arise from the same or a series of transactions, or for any other reason such as for convenience, avoiding multiplicity of suits, expedition and in order to meet the overriding objective set out in the Civil Procedure Act, Cap 21 Laws of Kenya. See “John Gakure & 148 Others – Versus - Dawa Pharmaceuticals Company Ltd CA 299 of 2007”.

83. The grounds upon which the present application was made were inter-alia, that the suits raise a common question of law and fact, that the transactions are inter-related and it would be convenient to try all the suits together. According to the Applicant the Case ELC No. 113 of 2019 has the same parties and land described in this Petition as plot NO 367/II/MN was also in this Petition. In the Court’s view, it would be convenient and expedient to try all the suits together as it would obviate the multiplicity of suits. It will lead to the determination of all the issues arising in all the 2 suits at the same trial. It will be less costly and will save the Court precious judicial time.

84. In the case of: “Benson G. Mutahi – Versus - Raphael Gichove Munene Kabutu & 4 Others [2014] eKLR”, the court held: -

“It is also clear from a reading of the Court of Appeal’s decision in NGUMBAO VS MWATATE & 2 OTHERS [1988] KLR 549 that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded. Therefore submissions of Mr. Muyodi that this case cannot



be consolidated with Kerugoya ELC Case No. 809 of 2013 (OS) because it is part heard, does not find support in any case law and in any case, no case was cited for the proposition.”

85. I would reiterate the foregoing here and add that, there would be no prejudice to be suffered by any of the parties herein if the consolidation sought is granted. In view of that I have stated above, it is my view that that rather than tire 2 courts which raise similar and common questions of law and fact, the provision of Article 159, which dictates that justice should be dispensed without undue delay as well as the overriding objective of the *Civil Procedure Act*, calls for the consolidation of these suits. I find that prayer (d) of the application is merited.

ISSUE No. c). Who bears the costs of the Notice of Motion applications dated 12th January, 2024 and 11th April, 2024?

86. 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 means:-

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

87. 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.”

88. 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.

89. 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.”

90. In this case, the Honourable Court finds that the Petitioners, Applicants have failed to establish their case and hence finds that the Respondents are entitled to the costs of the application dated 26th January, 2024 as the one dated 11th April, 2024 is partly allowed.

VIII. Conclusion and Disposition.

91. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court based on the Preponderance of Probabilities and the balance of convenience, arrives at the following decision and make below orders:-
- a. That the Notice of Motion application dated 26th January, 2024 by the Petitioners/Applicants be and is hereby found to lack merit, thus it is dismissed with costs.
 - b. That the Notice of Motion application dated 11th April, 2024 by the Petitioners be and is hereby partially found to have merit and is allowed partially with no orders as to costs.
 - c. That an order do hereby issue consolidating ELC case no 113 of 2019 with this Petition and both to run concurrently and with this file being the lead file.
 - d. That to clear any doubt, the Court has not found the Petitioners to have proved their claim for contempt against the Respondents viable and therefore the same has been found to be unfounded and the same is dismissed.
 - e. That for expediency sake, the Petition to be heard on 24th February, 2025. There shall be a mention on 10th February, 2025 for conducting of Pre – Trial conference on taking direction for the disposal of the Petition under the provision of Order 11 of the Civil Procedure Rules, 2010 and taking a Judgement date thereof.
 - f. 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.
 - g. That costs of the application dated 26th January, 2024 to be awarded to the Respondents herein and to be borne by the Petitioners/Respondents herein.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF DECEMBER 2024.

HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling in the presence of:

- a). M/s. Firdaus Mbula, the Court Assistant.
- b). Mr. Onesmus Mwatsuma in person for the Petitioners.
- c). M/s. Essejee Advocate holding brief for Mr. Khagram for the 5th Respondent.
- d). Mr. Salim Advocate for the 6th Respondent.



a. No appearance for the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th, 10th, 11th, 12th and 13th Respondents.

