



**Chawia Council of Elders & another v Director of Lands Adjudication and Settlement & another
(Constitutional Petition 01 of 2022) [2023] KEELC 16815 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16815 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 01 OF 2022**

LL NAIKUNI, J

MARCH 9, 2023

IN THE MATTER OF: THE CONSTITUTION OF KENYA

ARTICLES: 40(3)(4), 42, 43(1) (C) (D),

60, 63, 67

AND

IN THE MATTER OF: THE LAND ACT (NO. 6 OF 2012)

SECTION 134 AND 135

AND

IN THE MATTER OF: LAND LAWS AMENDMENT ACT (NO. 28

OF 2006) – SECTION 98

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION

ACT (NO. 5 OF 2012)

AND

IN THE MATTER OF: THE INHABITANTS OF MWATATE SUB

COUNTY, CHAWIA WARD

BETWEEN

CHAWIA COUNCIL OF ELDERS 1ST PETITIONER

WUMARI SECHU COUNCIL OF ELDERS 2ND PETITIONER

AND

**DIRECTOR OF LANDS ADJUDICATION AND SETTLEMENT 1ST
RESPONDENT**



RULING

I. Introduction

1. The Petitioners herein moved this Honorable Court by filing both *the Constitution* Petition dated 21st January, 2022 against the 1st and 2nd Respondents herein. At the same time, they also filed a Notice of Motion application dated 21st January, 2022 all brought under the Certificate of Urgency but without specifying under which provision of Law they brought the application. Upon being served, on 1st March, 2022 the 1st and 2nd Respondents filed their Replies accordingly.
2. It is instructive to note that through the main Constitution Petition, the Petitioners sought orders of declaration: -
 - a. A declaration that the current Identification Committee appointed by the Management Officer on 7th of December 2021 is unconstitutional and thus null and void.
 - b. A declaration that the Committee which was in charge of phase TWO was unconstitutional and any action therefrom is null and void, and title deed arising therefrom are revoked.
 - c. A declaration directing the Cabinet Secretary for Land to appoint an identification Committee pursuant to Section 134 (4) of the *Land Act*, 2012 and Section 89 (c) of the Land Laws Amendment Act of 2016 to identify beneficiaries for fresh allocation under Mwachabo Settlement Scheme.
 - d. The Costs of this suit be provided for.

II. The Petitioners/Applicants' case

3. From the filed Notice of Motion application, the Petitioners/Applicants sought for the following Conservatory orders, to wit:
 - a. The Court be pleased to stop issuance of title deeds from phase two of the exercise or from any other previous exercise conducted at Mwachabo Settlement.
 - b. The Court be pleased to stop any further allocation of the Mwachabo Settlement Scheme by any agent of the Respondents until this matter is heard and determined.
 - c. The Court be pleased to compel the Defendants to produce report of the current status of Mwachabo Settlement Scheme.
 - d. Costs be in the cause
1. The application was premised on the grounds that:-
 - a. The second phase (phase two) of Mwachabo Settlement Scheme begun in the year 2019 and the Certificate of title deeds from the allocation process were being issued



including on 21st January, 2021. This was an exercise led by the then Governor Samboja of the County Government of Taita Taveta at a place called Manoa.

- b. The Phase 2 of the Settlement Scheme was conducted by an illegal Committee for Identification of beneficiaries which fell short of the requirements under the provisions of Sections 134 and 89 of the Land Laws Amendment Act, No. 6 of 2012.
 - c. The document on the Mwachabo Settlement Scheme were public documents in the hands of the 1st and 2nd Respondents herein, including the line Ministry which were represented by the Hon. Attorney General.
 - d. On 7th December, the Settlement manager proceeded to appoint a Committee for identification of beneficiaries under phase three of the Mwachabo Settlement Committee.
 - e. Phase three (3) of the Settlement scheme was ongoing without the participation of the local Member of the National Assembly, the National Land Commission or a representative of the County Government as required in law.
 - f. Phase three of the Mwachabo Settlement Scheme was being conducted by an illegal Committee.
 - g. The Issuance of title deeds was likely to happen anytime from now.
5. Further to this, the Application was based on testimonial facts and the averments made out under the 29th Paragraphed Supporting Affidavit of sworn by Mr. Ludlordivick Mcharo Kamunde and Mr. Jackan Mwaiyo Mombo and dated on 21st January, 2022 and eleven (11) annexetures marked as CWS – 1 to 11. They deponed as follows:-
- a. They were residents of Chawia ward, Mwachabo location and Chawia Location respectively of Mwatate Sub County the County of Taita Taveta in the Republic of Kenya. The Chawia Council of Elders and Wumari Sechu Communities comprised of 45 members and 50 members respectively. There were a total of seven (7, 000) thousand registered community members.
 - b. They were duly the elected Chairpersons of Wumari Sechu and Chawia Council of Elders which were registered on 31st July, 2015 and October 2018 respectively. They attached copies of the Certificates of Registration and marked as “CWS – 1”.
 - c. The current situation related to the allocation of Plots in Mwachabo Settlement Scheme covering Chawia wards, Mwachabo Location and part of Chawia Location; Mruru Manganga, Wumari Sechu, Chawia and Mwachabo sub location within Mwatate Constituency.
 - d. They represented members of the community and had keen interest into this matter because they feared that there were arising problems from the process of allocation in the settlement scheme which would disturb the peace of the community and entire society where they lived.
 - e. There were pending cases dating back to Phase one, Phase two and the ongoing Phase three which the project manager, one Mr. Mwangi K. Wanjohi, with his team, had refused to resolve, while phase two had more challenges, and the same would likely to proceed to Phase three of the settlement schemes. In the year 2021, they invited the area Member of Parliament for Mwatate Constituency, the area Deputy County Commissioner and the Project Manager for the settlement scheme to resolve the matter but their requests were not adhered with causing



them anxiety and frustrations thereof. They copies of Minutes from the said meetings attached and marked as “CWS – 2”.

- f. They were not consulted as a Council of elders regarding the Committee which was appointed to foresee the Identification under Phase two in the year 2019 of the settlement scheme as well as those appointed on 7th December, 2021. Thus, the Committee never respected the aspirations of the members of the Community and representatives.
- g. The Committee appointed to Identify Beneficiaries under Phase three of the Mwachabo Settlement Scheme had seven (7) people. It had no representation from Chawia Community Members. The Committee members were:-
 - i. Titus Ndome
 - ii. Willy Kenyatta
 - iii. Mnyika Ngure
 - iv. Jenipher Wakesho
 - v. Syombua Issac
 - vi. Anna Nafula
- h. They had sought for slots in the Committee but were denied, including. While attending the meeting with the settlement committee Manager on 6th September, 2021 their request was ignored (Annexed was the minutes dated 6th September, 2021 from the said meeting held at Mruru Pentecostal Church marked as “CWS – 3”).
 - i. As leaders of the Community, they requested the Project Manager to have the list of the beneficiaries/the community members to be presented that before the squatter settlement scheme was entirely completed, for perusal and verification but the same was declined. (See the Notes on Mwongozo wa Kutekeleza kazi na kupima Mashamba OCT/NOV 2021 marked as “CWS – 4”).
- j. The Councils had pointed out that some of the previous committee members such as one Douglas Mjomba Kimburi had been wrongly allocated at least 8 plots under phase two. The Plots were numbers 49, 68, 612, 664, 665, 1282, 1311 and 1375. They urged that no titles should be issued. They feared that the same illegal and wrong mistakes was likely to be repeated by the current Committee members (see the Mwachabo Settlement Scheme – the List of Beneficiaries documents - 3 marked as “CWS – 5”).
- k. Their members such as Patrick Mwasi, Cosmas Ropaki Kisombe, Mwaegwa Mwadime from Mwachabo Scheme had been displaced and their portion of land offered to Mr. Kaleb Munda Mwacharo. All these had been reported to the authorities but no action was taken (See the Complaints of the Wamuru Sechu Council of Elders attached hereto and marked as “CWS – 6”).
- l. Some community members such as one old men called Mzee Liverson Mwakesi and Mr. Msala Vabi were completely left out while others got huge parcels of land. This was unfair and causing resentment, animosity and hatred among the community members. It would lead to violence.
- m. They noted that the sequence of numbering had been skipped hence 138 parcels of land could not be accounted for – They referred Court to a List of Beneficiaries document 3 marked as “CWS – 5”).



- n. Access Cultural Public Utility Space known as Mbula, the public roads, farm access and footpath had not been demarcated. Despite their complainant and report, the same had not been resolved (See attached was a letter dated 2nd November, 2020 to the Deputy County Commissioner and marked as “CWS – 7”).
- o. The Council of elders and members of the Community had been denied an opportunity to verify the lists of the plots allocated under phase two of the Squatter Settlement Scheme despite their earlier agreement to the same.
- p. They had reports that the names of those who were allocated titles had been sent to Nairobi. That they were about to be issued with title deeds in the week of January, 2022 when the President of the Republic of Kenya would be visiting Mombasa.
- q. The office of the Member of Parliament, Mwatate Constituency, the National Land Commission and the County Government of Taita Taveta were not involved in establishing the Committee for identification of Beneficiaries as required under law. (They attached and marked as “CWS – 8, 9 and 10” were Letters from the Member of Parliament Hon. Andrew Mwadime, National Land Commission, County Government of Taita Taveta respectively.
- r. Similarly, mistakes were done in establishing the Committee that led the improper Identification of Beneficiaries under phase two of the Mwachabo Settlement Scheme, which begun in the year 2019 after the Judgment was delivered in *the Constitution* Petition No. 281 of 2012. (Annexed hereto and marked as “CWS – 11” was a copy of the said Judgment.)
- s. The Committee responsible for Phase two in Mwachabo Settlement Scheme allocation was unconstitutional. It consisted of the following persons and had no representation of the members of the Council of Elders:
 - i. Leonard Nyange.
 - ii. Pamela Mwasi.
 - iii. Margret Mrumwa.
 - iv. Raphael Msagha.
 - v. Liverson Mwakesi
 - vi. Lawrence Mwanda.
 - vii. Augustine Kimburi Mjomba.
 - viii. Jimmy Mduruma.
 - ix. Dorah Mwasi.
 - x. Ludovick Mwamba.
 - xi. Austine Vita Mzee.
 - xii. Agness Mwambuwa.
 - xiii. Martha Kitawa.
 - xiv. Hellen Kitonga.
 - xv. Mrs. Nyange Mjola.



- xvi. Raphael Mghosi.
- t. The entire list had all community Members and therefore no Government officer was part of this process.
- u. The titles to persons under Phase two scheme were about to be released despite the irregularities raised herein below and a fact was that the Committee which oversaw the process of allocation and identification of the beneficiaries being illegal.
- v. The Community would be deprived of representation in the Community, and therefore fail the test of proper identification of the actual beneficiaries under phase three of Mwachabo Settlement Scheme should the current committee proceed with the work at hand.
- w. They had raised challenges relating to the following facts but were completely ignored:
- a. Under phase one of the settlement scheme – land set aside for public utility like Ndomoko ya Mutavi at Mngama plot no. 1652 measuring 3.92 Hectares was hived and parts of it allocated to individuals;
 - b. There were complaints raised by the several persons but had not been resolved. An example was the parcel of one, Mr. Mwakajo Mwawasi, Wamwandu Mwawasi and Mr. Mbilo Mwajanja where their parcel of land was indicated in the name of Wakina Mwaghazi. The Parcel measures 9.13 hectares. The same had never been resolved.
 - c. In the earlier list of beneficiaries, there were Plot numbers that were deliberately skipped, such numbers 37, 309, 310, 506, 507 among others, as clearly spelt out under the list of beneficiaries.
 - d. Under phase two of the Mwachabo Settlement Scheme, some community members had had the size of their plots reduced and given to people who had never lived in the area. This is evidenced in the case of the family of Flavian Malalo Shake relating to plots numbers 1854, 1855, 1856 and 1857 where her land was given to People not known to the community.
 - e. Under phase two, the community was not given a chance to verify the plots allocated to them as required before the release of title deeds – thus there were challenges of boundary disputes arising therefrom. The Title deeds due to be released from phase two were likely to heighten tension in the community.
 - f. Under phase two, public utility parcels like Kitengo Cha Mbula which was expected to be bigger than what they have today, had been hived off some parcels to 9.61 hectares set aside for public use had been reduced and allocated to people who were not part of the settlement scheme, thus the confusion among the list of beneficiaries in phase two settlement.
 - g. There were no places set aside for pathways to the farms under phase two allocations.
 - h. The Community had sought to resolve these matters with the right committee but the same has not taken place.
- x. The project manager, one Mr. Mwangi K. Wanjohi had begun the process of allocating plots under phase three with the illegally appointed committee. The program began on 11th January, 2022.



- y. The issuance of title under phase two or the Settlement scheme could be done anytime from now because allocations had been conducted.
 - z. There were a number of contested titles and legality of the committee and should those titles be released, the current endeavor for justice for members of the community would be compromised.
6. The President was due to come to the Coast region on 20th January, 2022 and would likely issue the title deeds for phase two of Mwachabo Settlement Scheme. They had received information from officers within government.
 7. It was in the interest of justice that the Committee which identified Beneficiaries under phase two of the parcels and the current committees be declared unconstitutional and a proper begin to clear the matters afresh.
 8. They stated that their averments were in good faith and for the benefit of the community.
 9. Vide an 8th Paragraphed Further Affidavit sworn by Mr. Ludlordivick Mcharo Kamunde and Mr. Jackan Mwaiyo Mombo and filed on 3rd March, 2022 and they averred as follows:-
 - i. The Chawia Council of Elders and Wumari Sechu Communities had 45 members and 50 members respectively representing over 7,000 community members.
 - ii. They were duly elected chairpersons of Wumari Sechu and Chawia Council of Elders registered on 31st July, 2015 and October 2018 respectively.
 - iii. The affidavit was sworn in relation to the issuance of titles in phase 2 of the Mwachabo Phase II Settlement Scheme. Soon after the title deeds were issued on the 21st January, 2022 at Manoa in Mwachabo location by Hon. Samboja (Governor of Taita Taveta County) there emerged issues with the said titles.
 - iv. The residents had a number of issues which ranged from incorrectly capture details to lack of allocation despite being in physical possession of the parcel of land. Detailed below are some of the issues raised by the Residents. (They attached and marked “CWS – 2” copies of the title documents and list of affected sample residents):
 - a. Leonard Mnjala Mwashigadi (Taita Taveta/Mwachabo Phase II S. Scheme/ 654) – contended that the names in the title had been incorrectly captured in addition to the incorrect acreage specified in the title deed.
 - b. Douglas Mwasaga Mwashighadi – contended that he had been displaced from the area on which he was tilling, the plot had erroneously been allocated to Ronald Mzame.
 - c. Chrispus Ngwai Mwakio (Taita Taveta/Mwachabo Phase II S. Scheme/1053) – contended that the land acreage is incorrectly captured in the title deed.
 - d. Stephen Nyange Warugha (Taita Taveta/Mwachabo Phase II S. Scheme/1105) – contended that the land acreage was incorrectly captured in the title deed.
 - e. Ronald Lela Mwagharo – contended that he has been displaced from the area on which he was tilling, the plot has erroneously been allocated to Lawrence Ighombo Mlamba.
 - f. Darius Masanju Mwangwai(Taita Taveta/Mwachabo Phase II S. Scheme/1143) – contended that the land acreage is incorrectly captured in the title deed.



- g. Ronald Nyange Mwazo(Taita Taveta/Mwachabo Phase II S. Scheme/1256) – contended that the names have been incorrectly capture in the title deed.
 - h. Judith Mbuwa Mwakio – lacked of allocation of parcel of land.
10. Aside from the issues raised above it was contended that the process of title collection was never explained to the residents of Mwachabo as such sensitization on the avenues to channel grievances and issues was not availed to the community.
 11. The project manager, one Mr. Mwangi K. Wanjohi had been complacent in his duties to investigate the issues raised herein as a result the residents were not aware when their concerns would be addressed despite the fact that phase III of the Scheme continued and was completed.
 12. In conclusion, and in the interest of justice, the Petitioners urged Court to allow the prayers sought from the application so that the Committee which identified the Beneficiaries under Phase II of the parcels and the current committees be declared unconstitutional and a proper process begin to clear the matters afresh.

III. The 1st and 2nd Respondents’ case’

13. On 22nd February, 2022, the 1st and 2nd Respondents through the Honorable Attorney General filed a Paragraphed Replying Affidavit sworn by Mr. Mwangi K. Wanjohi and dated 22nd February, 2022 together with three (3) annexures marked as MKW – 1 to 3” annexed thereto. He averred as follows that:-
 - a. He was the Project Manager Mwachabo Settlement project and represent the 1st Respondent herein therefore competent to make and swear this affidavit.
 - b. He had have read and understood the contents of the Notice of Motion application dated 21st January, 2022, the Petition herein and the Affidavits in support thereof and wished to respond as hereunder.
 - c. This application and the Petition were frivolous, vexatious, premature and an abuse of this honorable Court.
 - d. This Petition offended the Doctrine of “Res Judicata” as the issues herein were determined in the ELC Constitution Petition No. 281 of 2012. Annexed is a copy of the Judgment marked “MKW – 3”.
 - e. The orders being sought by the Petitioners were unattainable as they had not established the threshold of being granted the orders.
 - f. Prayer one in the application had been overtaken by events, the picking, survey, identification and verification of beneficiaries of Mwachabo Settlement Project Phase II having been completed in the year 2012, the issuance of titles had been stalled due to an injunction and the case filed ELC. Petition No. 281 of 2012. But when Judgment was delivered on 15th January, 2019, the list of beneficiaries was forwarded to the Director of Land and Adjudication which led to tilting and issuance of title deeds.
 - g. In reference to Paragraph 6 above, if the Petitioners had any grievances to be addressed concerning the same, they had ample time to raise the same with the relevant administrative bodies.



- h. In further reference to the contents of Paragraph 6, the beneficiaries settled in their land, some had invested heavily and even sold to this parties, the Petitioners should have enjoined them so that they would be able to defence themselves.
- i. The Petitioners were not clear in the application nor the Petition for what orders they were seeking for; Was it for Phase II or Phase III and had not stated with precision as to how the scheme was conducted by an illegal committee.
- j. The Petitioners at Prayer 3 and Ground 3 of their application were seeking the Court to order the Respondent to produce report and document of Mwachabo Settlement Scheme. It was the averment by the Deponet that the Petitioners were in breach of the [Access to Information Act](#) No. 31 of 2016, Section 8 and whole of its entirety.
- k. The Petitioners had not demonstrated to this honorable court as to whether they applied the above Act and sought to get information and were denied or any complain to the relevant body that the access had been denied. Further, the list of undisputed beneficiaries of Phase II was made public and the Petitioners had even attached the same.
- l. The 1st Respondent was not bestowed with the duty of issuance of title deeds, that the issuance of title under any Kenyan law could only be done by the Land Registrar.
- m. He averred that the settlement was a process and not an event; that the process currently taking place to establish and draw a pictorial view of how the squatters were on the ground. After establishing how the squatters were settled, then the committee for identification and verification was formed.
- n. The persons mentioned at paragraph 8 of the application and 11 of the Petition were the persons in the Picking Committee, involved in the process as mentioned above.
- o. He was advised by his advocates to record that the Respondents were not in breach of the provision of Section 134 of the [Land Act](#), No. 3 of 2012. That once the picking process was complete then a selection committee would be established in accordance with the provisions of the Law.
- p. From the letters attached in the Petitioner's supporting affidavit, letter dated 18th January, 2022 from the member of Parliament Mwatate Constituency, letter dated 19th January, 2022 from the County Coordinator and letter dated 18th January, 2022 from Mwatate sub-county administrator all indicate no knowledge of formation of the identification and verification committee because the project was still at its preliminary stage.
- q. A reading of the provision of Section 134 (4) of the [Land Act](#), No. 3 of 2012 provides as follows:-

Identification of beneficiaries shall be carried out and verified by a sub-county selection committee appointed by the Cabinet Secretary comprising of the following persons-

- a. The deputy county commissioner;
- b. The sub-county administrator;
- c. A representative of the Commission;
- d. A national government representative, who shall be the secretary;



- e. A representative of persons with special needs;
 - f. A representative of women;
 - g. A youth representative; and
 - h. A representative of elders; Provided that – (i) the persons appointed under Paragraphs (e), (f), (g) and (h) shall be nominated by the area member of the National Assembly.
- r. It was clear from the above reading that the 1st Respondent was not bestowed with the responsibility or appointing the identification and verification committee members.
 - s. It was instructive to note that by the reading of the Judgment in the ELC Constitution Petition No. 281 of 2012, that it was established by this Honorable Court that “.....the suit land was Government Land Settlement programmes shall, for the purposes of this Act, include, but not be limited to provision of access to land to squatters, persons displaced by natural causes, development projects, conservation, internal conflicts or other such causes that may lead to movement and displacement”.
 - t. The provisions of Article 40 (1) of *the Constitution* provides that; Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property (a) of any description; and (b) in any part of Kenya. Ownership of land was not preserve of any community or group of people.
 - u. The Petitioners though a letter dated 6th August, 2021 written by their area Member of Parliament to the Cabinet Secretary ministry of land and physical planning at paragraph one of the letter it reads... “Chawia/Wumari Sechu elders who are bonafide owners of Mwachabo Settlement Scheme.” The Respondents held that this was government owned land in which a settlement scheme had been established and was not private land or land owned by a Council of Elders as alleged. Annexed is a copy of the letter marked “MKW -1”.
 - v. Further at Paragraph 2 of the letter it stated that ... “the ones listed by the elders with issues should be given back to the advisory committee of elders.....” out or more that 1400 cases forwarded only 312 have issues.” That out of 312 persons listed, tilted; disapproved by elders were from one ethnic community. This was a cosmopolitan area where 30% were from the Kamba community.
 - w. The Petitioners, as read through the various minutes attached to their pleadings, one tilted Mwongozo wa kutekelza kazi ya kukagua na kupima mashamba ya mwachabo scheme October/November 2021 had gone ahead and formed and appointed various members and given them roles/duties to oversee the project. The Deponent submitted that this was a government project to oversee the settlement of the people and that the government had appointed its officials to oversee the same. This was an indication of the Petitioners trying to impose and direct how government is to abdicate its functions.
 - x. The provision of Section 134 of the *Land Act*, No. 3 of 2012 clearly stipulated the persons to be appointed in the verification and identification process and not a group of people or a member of the Council of Elders as insinuated by the Petitioners. In terms of demarcation of roads and public utility spaces, no land could be registered by the Director of Survey without access roads, further, they were the custodians/involved in mapping thus if there were any numbers missing as alleged by the petitioners, the right office to approach would be that of the Survey.



- y. In response to the contents of Paragraphs 19 and 20 of the supporting affidavit to the Petition, the Deponent stated that the persons highlighted therein were elected by the community members of which the Petitioners purported to represent on 13th February, 2019 at Danida hall Mwatate to work in conjunction with government officials. Further, they had not stated the unconstitutionality of the alleged committee. He deposed that no such process could take place without the involvement of government officers. Annexed was a copy of the letter with the list of members marked as “MKW – 2”.
- z. The 1st Respondent in response to paragraph 23 of the supporting affidavit to the Petition stated that they had pending case in any court of law. The last case to be dealt concerning disputes in the scheme with was thrown out in the year 2019 by this Honorable Court. Further, the plots stated were numbers 854, 1855, 1856 and 1857 were not in Mwachabo Phase II and that even in their attachment the numbers ran upto numbers 1465.
- aa. The Deponent was advised by his Counsel on record that the Petitioners had not established the constitutional threshold to claim that their constitutional rights had been violated. In the case of Anarita Karimi Njeru –versus- Republic (No.1) [1979] KLR 154

“If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
- ab. This Petition was marred with malice, tribalism and political interference and he urged this Honorable Court not to entertain the same. Just as the contents of Paragraphs 26 and 27 of ELC Constitution Petition No. 281 of 2012. He prayed that this Honorable Court dismisses this Petition with cost to the Respondents.

IV. Submissions

- 14. On 22nd June, 2022 while all parties were in court on the 21st June, 2022 consented to canvassing the Notice of Motion application dated 21st January, 2022 by the Petitioners/Applicants through written submissions and a ruling date was set on Notice. All the parties filed their written submissions accordingly.

A. The Written Submissions by the Petitioners/Applicants

- 15. On 16th June, 2022 the Learned Counsel for the Petitioners/Applicants through the Law firm of Messrs. M. K. Oyaró & Company Advocates filed their written submissions. Mr. Oyaró Advocates stated that the case at hand emanated from the allocation of plots in Mwachabo Settlement Scheme which covered huge parcels of land ranging from Chawia ward, Mwachabo Sub Locations within Mwatate Sub County within the County of Taita Taveta.
- 16. The Learned Counsel submitted that the allocations were being done in phases. There was phase one and two, and currently the allocations had progressed to phase three under the management of Mr. Mwangi K. Wanjohi. The Applicants propounded that the Mwachabo Settlement Programme had been carried out without the engagement of the County Government of Taita Taveta. Further, the Sub – County Selection Committee that was charged with identification and verification of beneficiaries



was not properly constituted as it failed to involve and seek participation of the Community Members and specific public officers as expected in law.

17. He averred that the Applicants sought to establish that the Member of National Assembly, Mwatate Constituency, the National Land Commission and the County Government of Taita Taveta were not involved in the establishment of the Sub- County Selection Committee. That the Sub-County committee as constituted could not consider and protect the interest of the public and the special interests' groups such as persons with disabilities, the elderly and women. Consequently, the Applicants contended that this had led to and could still lead to further injustices and unfair allocation and subsequently unjust enrichment of some of the improperly established members to the detriment of genuine legitimate beneficiaries.
18. He contended that the allocation of plots under Phase 3 was ongoing un-procedurally, irregularly and as a result an illegality for non - participation and non - presentation of the stated stakeholders in the Sub-county selection committee.
19. The Learned Counsel submitted on three issues:
 - a. Whether the Petition offended the doctrine of “Res Judicata”?
 - b. Whether the procedure for identification, verification of beneficiaries and allocation of plots under the Mwachabo Settlement Scheme was legal?
 - c. Whether the Petitioners had met the threshold of being granted the sought orders?
20. The Learned Counsel on the issue of the Petition offended the “Principle of Res Judicata”. He submitted that the doctrine of Res Judicata was a principle of law that was directed towards the competence of the suit. In this particular case, the 1st Respondent claimed that the Petition herein breach the principle of Res Judicata as it raised issues that were raised were heard and determined in *the Constitution* (ELC) Petition No. 281 of 2012. The Petitioners/Applicants herein were clear and refuted that this suit herein was not Res Judicata and any claims of the same should be dismissed. The doctrine of res judicata was set out under the provision of Section 7 of the *Civil Procedure Act*, Cap. 21. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
21. The Learned Counsel submitted that for the barrier of Res Judicata to be effectively raised and upheld it must satisfy the following five essential elements laid down in the case of :- “Invesco Assurance Company Limited – Versus - Auctioneers Licensing Board & another; Kinyanjui Njuguna & Co. Advocates & another (Intended Interested Parties) [2020] eKLR,

“as conjunctive terms as opposed as disjunctive terms;

The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.



- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
22. Applying these legal principles to the instant case, the Learned Counsel asserted that a close reading of *the Constitution* (ELC) Petition No. 281 of 2012 it established that the former matter involved the determination of whether the property in question was Government or Public Land and subsequently whether the same was to be allocated through adjudication or settlement scheme. Further, the Court in Constitution (ELC) Petition No. 281 of 2012 determined whether the Petitioner's rights had been infringed in the implementation of Mwachabo Settlement Scheme. He held that the stated matters in that case were not in issue in the current suit.
23. The Learned Counsel submitted that in contrast to the present suit and motion the Petitioners/Applicants were seeking for the determination of the Court onto the legality of identification and verification of the beneficiaries of Mwachabo Settlement Project Phase II & III and the subsequent allocation of plots under the said settlement scheme. Whether the institution that conducted the process of identification and verification of beneficiaries was the right one in law, and whether leaving out key legal requirements was procedural. By then, the issues raised in the former suit were different from the ones being raised in the current suit. Thus, they prayed that the Court finds that "the doctrine of Res Judicata" was not applicable in this case.
24. On the issue of whether the procedure for identification, verification of beneficiaries and allocation of plots under the Mwachabo Settlement Scheme was illegal, the Learned Counsel submitted that the Petitioners contend that they were not consulted on the establishment of selection committee charged with the responsibility of identifying and verifying the beneficiaries of the Mwachabo Settlement Programme. Further, through letters from the relevant stakeholders presented in the joint Supporting Affidavit of Ludlordvick Mcharo Kamunde and Jackan Mwaiyo Mombo as "CWS – 7" to "CWS – 10", the Petitioners have established lack of participation from the offices of the member of National Assembly, Mwatate Constituency, the National Land Commission and the County Government of Taita Taveta in Mwachabo Settlement Scheme Phase II and III.
25. The Learned Counsel argued that under the provision of Section 134 (4) of the *Land Act* as amended by the Land Laws Amendment Act, 28 of 2016, the law provided that the identification of beneficiaries shall be carried out by the sub-County Selection Committee appointed by the Cabinet Secretary and shall comprise of the Deputy County Commissioner, the Sub – County Administrator, a representative of the commission, national government representative, a representative of persons with special needs, a representative of women, a youth representative and a representative of the elders. The Chawia Council of Elders and Wumari Sechu Council of Elders assert that in the least case scenario there was no representative of elders in the selection committee constituted in Phase One, Two and Three.
26. The Learned Counsel averred that a close reading of the 1st Respondent's Replying Affidavit in paragraph 13 and 14 states that the process is currently at the 'picking of land claims' in Mwachabo Settlement Scheme by the Squatters in order to establish and draw a pictorial view of how the squatters are on the ground. Further stating that for the said purpose a picking committee had been established.
27. The Learned Counsel submitted that to this response, the Petitioners/Applicant contended that "picking of land claims by squatters" raised eyebrows as it led to questions which squatters and how had they been identified for their land claims to be "picked". The said process had no legal basis and was not provided for under any statute. Further that the picking process was a schemed phase referring to the process of identifying and establishing beneficiaries of the settlement scheme.



28. He argued that on the same case it would be interesting for the Respondents to explain, how the mere picking to draw the picture ended up in issuance of title deeds. It would have been useful to explain, when the process would involve the right institutions in the statute, yet the processes under phase one and two had ended with beneficiaries having titles.
29. The Learned Counsel submitted that further a keen reading of Paragraph 24 of the Replying Affidavit established that the verification committee in phase two was constituted by election by being voted in by the members of the unidentified local committee contrary to being nominated by the relevant stakeholders in contravention to the provision of Section 134(4) of the *Land Act* as amended by the Land Laws Amendment Act, 28 of 2016. The Letter containing the list of the Sub-County Selection Committee did not in any way evidence the participation of the National government and the County Government of Taita Taveta. That in fact the list did not have any Government officer.
30. The Learned Counsel held that it followed then that as regards public participation, the Petitioners stated that under the provision of Articles 10, 69 (1)(d), 174(c) and 227 of *the Constitution* provided for active citizenry in the running of their affairs and all matters affecting the public interest were ignored. The Petitioners argued that the involvement of the members of National Assembly, Mwatate Constituency, the National Land Commission, the National Government and the County Government of Taita Taveta County in this case did not rise anywhere near the level envisaged in *the Constitution* and the *Land Act*. In particular, it was dispositive, that the local people - including the County Government and the National Government was not involved when it came to the creation of the Sub-County Selection Committee. For lack of public participation in this way, the Petitioners prayed for the Court declaration that the Selection Committee in Phase Two and three and their subsequent actions and decisions unconstitutional, null and void.
31. The Learned Counsel contended that the Petitioners/ Applicants had approached the Court seeking injunctive orders in order to avert an eminent infringement/ threat or violation of human rights due the manner in which allocation of plots under Mwachabo Settlement Scheme phase one and two conducted, and how phase three was being conducted devoid of public participation as envisaged in *the Constitution*. Under the provision of Article 23 of *the Constitution* of Kenya spoke of when a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed or is threatened. ‘
32. On the issue on whether the Applicant had met the conditions for grant of an order for temporary injunction. The Learned Counsel submitted that the Petitioners/Applicants had approached the Court seeking injunctive orders in Order to avert an eminent infringement/threat or violation of human rights due to the manner in which allocation of plots under Mwachabo Settlement Scheme Phase two and three was being conducted devoid of public participation as envisaged in *the Constitution*.
33. The Learned Counsel submitted that the principles guiding the grant of interlocutory injunctions were well settled. Those principles were set out in the case of “East Africa Industries – Versus - Trufoods [1972] EA 420 and “Giella – Versus - Cassmann Brown & Co. Ltd [1973] EA 358. Restating the said principles, G.V.Odunga J in the case of:- “Peter Kasimba & 219 Others – Versus - Kwetu Savings & Credit Co-operative Society Limited (Formerly Masaku Teachers Savings Co-operation Society Ltd) & 11 Others [2020] eKLR set them out as follows:
 - i. A prima facie case with a probability of success at trial;
 - ii. If the Court is in doubt about the existence or otherwise of prima facie it should decide the application on a balance of convenience;



- iii. The applicant is likely to suffer an injury, which cannot be adequately compensated in damages.
34. On whether they had a prima facie case with a probability of success the Learned Counsel submitted that in the case of Civil Appeal No. 39 of 2002 “MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 Others (2003) eKLR, the Court of Appeal held that:
- “.....a prima facie case is more than an arguable case, there must be evidence showing an infringement of a right, and the probability of success of the Applicant’s case upon trial.....”
35. The Court further sated that:
- “...it is a case that a tribunal properly directly itself will conclude that there exists a right which has apparently been infringed based on the material presented to court.”
36. In the case of Nguruman Limited – Versus - Jan Bonde Neilsen & 2 Others, CA No. 77 of 2012; [2014] eKLR (supra) the Court is clear on what an Applicant must present before it to warrant such prayers stating:-
- “The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”
37. The Learned Counsel was of the view that the Petitioners/Applicants herein had demonstrated to the Court by way of evidence and in law that the selection committee was illegally constituted and the decision made therein could not be valid. Further, the Petitioners/Applicant’ case vide the further Affidavit of Ludlordvick Mcharo Kamunde and Jackan Mwaiyo Mombo demonstrated discrepancies in the allocations of Plots this far, by setting case of disenfranchisement of genuine beneficiaries and unjust enrichment of some of the committee members which were infringements on their right to property.
38. On the issue of whether the Plaintiff/Applicant would suffer an injury that could not be compensated in damages if the orders sought were not granted, the Learned Counsel submitted that the Petitioners right to own property enshrined under Article 40 had been infringed and was at the risk of further infringement by the 1st and 2nd Respondents. The lack of proper process had led to the consequences where a number of Petitioners who have lived in the land have not received any parcel of land. Also, there were parcels that were agreed upon collectively as public utilities but the same were currently in private hands. While some of the Plots were indicated or numbered, the same had not been properly indicated as to who owned them. The Participation of representatives nominated by the Member of



Parliament Mwatate Constituency and those from the National Land Commission prevented the consideration and input of pertinent stakeholders therefore making the allocation and settlement of beneficiaries in Mwachabo Settlement Scheme. In fact, the Petitioners had laid out their grievances in Paragraph 4 of the Further Affidavit that had emanated and eminent due to the arbitral and unilateral activities the 1st and 2nd Respondents.

39. In the case of “Nguruman Limited (supra) the Court was clear on what an Petitioners/Applicants must present before it to warrant such prayers stating;

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

40. The Court further went on to expound:

“How do all these principles, conditions and guidelines relate to this appeal? A temporary injunction would issue under Order XXXIX of the repealed Civil Procedure Rules in the following instances: If it is proved that while a suit is pending determination any property in dispute in the suit is in danger of being wasted, damaged, alienated or wrongfully sold in execution of a decree by any party to the suit, or the other party intends to remove or dispose of his property to avoid execution; or where the other party threatens to commit a breach of contract or other injury arising out the contract or related to a property or right.”

41. The Learned Counsel submitted that the restriction of the acreage of plots as indicated in the title documents in contravention to the size early allocated, displacement of some beneficiaries from all the allocated plots are prejudicial losses that could not be remedied by an award of damages. It was argued that the Petitioners/Applicants had this far suffered irreparable harm that could not be compensated by way of damages by infringement of their right to property.

42. On the issue of whether the Petitioners/Applicants had demonstrated that the balance of probability tilted in their favour or whether the conduct of the Petitioners/Applicants met the approval of the Court of equity submitted that in analyzing the equity principles for grant of injunctive orders the court in “Michael Gitere & Another – Versus - Kenya Commercial Bank Limited [2018] eKLR the Court stated:

“.....the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true, for example, when he denies being served with the statutory notices and considering the already exposed untruth of the applicant with



regard to service of statutory notices one is not inspired to have much confidence in the truth of her deposition.....”

43. According to the Learned Counsel the Petitioners/Applicants had indicated that they had reached out to the Director of Land Adjudication and Settlement on the grievances regarding the allocation of plots in Mwachabo Settlement Scheme but they had been ignored and their concerns remained unaddressed to date. The Petitioners/Applicants herein had demonstrated good faith and had been kept in advocating for the rule of law. As demonstrated by the Petitioners that there was no representation of the Elders in the least case scenario. All the letters from the relevant authorities indicated that non-participation of relevant stakeholders in complete disregard of the law. The Petitioners place reliance on the sentiments of Ringera J (as he was) in the case of:- “Dr. Simon Waiharo Chege – Versus - Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001 as captured in the case of”Michael Gitere & Another (supra) in paragraph 45:

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”

44. In conclusion, the Learned Counsel held that on the basis of the contention that the Sub- County Selection Committee in Phase 2 and Phase 3 were constituted in contravention with Section 134(4) of the *Land Act*, the Court should establish that the Petitioners/Applicants had demonstrated “a prima facie case, and had swayed the balance of probability in their favor. Hence, the Petitioners/Applicants should benefit from the Equity since their action was propagated towards promoting the rule of law.

B. The Written Submissions by the 1st & 2nd Respondents

45. On 7th July, 2022, the Learned Sate Counsel from the office of the State Counsel, Honorable Attorney General for 1st and 2nd Respondents filed their written dated 6th July, 2022. M/s. Kiti Advocate commenced her submission by stating that the suit was instituted by the Petitioners/Applicants herein through a Constitution Petition and a Notice of Motion application dated 21st January, 2022 seeking several orders which included:
- a. The court be pleased to stop issuance of title deeds from phase II of the exercise or from any other previous exercise conducted at Mwachabo Settlement Scheme.
 - b. The court be pleased to stop any further allocation of the Mwachabo settlement scheme by any agent of the respondent until this matter is heard and determined.



- c. The court be pleased to compel the Defendants to produce report of the current status of Mwachabo Settlement Scheme.
46. The Learned Counsel submitted that it was the Petitioners/Applicants' allegation that Phase II of Mwachabo Settlement Scheme begun in year 2019 was conducted by an illegal committee for identification of beneficiaries. The committee was appointed in contravention of the provision of Section 134 of the Land Act and Section 89 of the Land Laws Amendment Act with regards to its Constitution.
47. The Learned Counsel submitted that the Petitioners/Applicants further alleged that the settlement manager proceeded to appoint a committee for identification of beneficiaries under Phase 3 of the Mwachabo settlement scheme, without including the member of National Assembly, National Land Commission or a representative of the County Government as required by law. They told the court that in their submissions they would seek to address whether prayers 1, 2 and 3 in the Notice of Motion application dated 21st January, 2022 appropriately lied in favour of the Petitioners/Applicants in the following terms. In response to prayer 3 of the Notice of Motion application, the Court should be pleased to compel the Respondents to produce report of the current status of Mwachabo Settlement Scheme the Learned Counsel submitted that under Article 35 of the Constitution the law provides that:
- “(1) Every citizen has the right of access to;
- a. information held by the State; and
- b. information held by another person and required for the exercise or protection of any right or fundamental freedom.”
48. The Learned Counsel submitted that pursuant to this Article, there was enactment of the Access to Information Act, No. 31 of 2016 whose preamble is in these terms
- “An Act of Parliament to give effect to Article 35 of the Constitution to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.”
49. The Learned Counsel submitted that the provision of Section 3 (a) of the Access to Information Act, No. 31 of 2016 provides as follows:
- “The object and purpose of this Act is to give effect to the right of access to information by citizens as provided under Article 35 of the Constitution;
50. The Learned Counsel submitted that by reason of the above enactment, Part III of the act makes provision for Access to information and then at Section 7 (1) thereof provided as follow:
- “A Chief Executive Officer of a public entity shall be an information access officer for purposes of this Act.
51. The Learned Counsel submitted that such an having been established; the provision of Section 8 makes provisions for the Application for access to such information as follows:
1. An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.....



4. A public entity may prescribe a form for making an application to access information, but any form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the Applicant has not used the prescribed form.”
52. The Learned Counsel submitted that once such an application had been made, provision is made at Section 9 of the manner in which this information is to be processed. That section provides as follows:
- “Subject to Section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty- one days of receipt of the application.”
53. The Learned Counsel submitted that the Commission on Administrative justice may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act. The *Access to Information Act* in Section 23(3) and 23 (4) further provides for the procedure to Appeal a decision made by the Commission for Administrative Justice in carrying out its functions under Section 14:-
- “Section 23 (3) A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty – one days from the date the order was made.
- Section 23(4) An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.”
54. The Learned Counsel submitted that where there existed other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the Court process if the dispute could be dealt with in that other forum. In case of:- “Savraj Singh Chana – Versus - Diamond Trust Bank (Kenya) Limited & Another [2020] eKLR, Korir J observed that;
- “.....it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute.
- The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute..... What the Petitioner seeks from this Court is readily available to him before the Commission on Administrative Justice.”
55. The Learned Counsel contended that the Petitioners/Applicant had rushed to this Honourable Court without following the requirements of the provisions of the *Access to Information Act* 2016. In the light of the foregoing, they submitted that the Act had a comprehensive procedure to be followed by any citizen in need of any information from a public body. The mode of applying for such information had been set out. The manner of complaining against any unfavourable decision of the commission had been given. The manner of applying for Review of a decision of the Commission had also been provided for. These procedural requirements had all been flouted, if not forgotten by the Petitioners/Applicants. The above showed that this Court has no jurisdiction to entertain, hear or determine any



application made to it in its original jurisdiction for the purpose of any access to information under Article 35 of *the Constitution*. In the premises, they submitted that the Petitioners/Applicants had come to this Court prematurely, and had therefore not properly invoked the jurisdiction of this Court for the Orders that they now sought. The Learned Counsel submitted that in response to prayer 1, the court be pleased to stop issuance of title deeds from Phase II of the existence or from any other previous exercise conducted at Mwachabo Settlement Scheme in grounds that it was conducted by an illegal committee for identification of beneficiaries we submit that under section 135(4) of the *Land Act*, the law provided that identification of beneficiaries shall be carried out and verified by a sub-county selection committee appointed by the Cabinet Secretary comprising of the following persons:

- a. The deputy county commissioner
- b. The sub-county administrator
- c. A representative of the commission
- d. A national government representative, who shall be the secretary
- e. A representative of persons with special needs
- f. A representative of women
- g. A youth representative
- h. A representative of the elders

Provided that the persons appointed under paragraph (e), (f), (g) and (h) shall be nominated by the area member of National Assembly.

56. The Learned Counsel argued that the Petitioners/Applicants failed to recognize that the Respondent did not have a duty or did not take part in choosing the identification and verification committee as outlined under Section 134(4) of the *Land Act*. (paragraph 17 of the Respondents' Replying Affidavit). This responsibility is bestowed upon the area member of the National Assembly and the Petitioners should address the same with him.
57. The Learned Counsel averred that the Petitioners failed to recognize that the Respondent did not have a duty or does not take part in choosing the identification and verification committee as outlined under section 134(4) of the *Land Act* (paragraph 17 of the Respondents Replying Affidavit). The responsibility was bestowed upon the area Member of National Assembly. Thus the Petitioners are claiming that phase II was conducted by an illegal committee falling short of section 134 of the *Land Act*, then it was their area Member of National Assembly who chose them and not the 1st Respondent and it should be directed to him as such.
58. In response to prayer 2 on the Court being pleased to stop any further allocation of the Mwachabo Settlement Scheme by any agent of the Respondents until this matter was heard and determined the Learned Counsel submitted that the prayer had been overtaken by events. In its replying affidavit dated 22nd February, 2022 the Respondents stated at paragraph 6 that prayer one in the application had been overtaken by events, the picking, survey, identification and verification of beneficiaries of Mwachabo Settlement Project Phase II was completed in the year 2012, the issuance of titles had been stalled due to an injunction and the case filed *the Constitution* (ELC) Petition No. 281 of 2012 and when the Judgment was delivered on 15th January, 2019, the list of beneficiaries was forwarded to the Director of Land Adjudication which led to titling and issuance of title deeds.



59. She held the view that as the matter stood now, it was Res Judicata. The issues raised herein were already determined in Constitution (ELC) Petition No. 282 of 2012 and the Petitioners/Applicants had ample time to address any grievances with the relevant administrative bodies. In case of:- “E.T. – Versus - Attorney General & Another (2012) eKLR the Court stated:

“The Court must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In this case of Omondi vs National Bank of Kenya Limited and Others (2001) EA 177 the Court held that, ‘ parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njagu – Versus - Wambugu and Another Nairobi HCCC NO. 2340 of 1991 (unreported) where he stated, ‘ if parties were allowed to go on litigating forever the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of Res Judicata.....”

60. In conclusion, the Learned Counsel urged the Court to dismiss the application with costs to the 1st and 2nd Respondents.

V. Analysis and Determination

61. I have given due consideration to the pleadings filed – the Petition- the application by the Petitioners/ Applicants, the affidavits and all the documents filed by the parties in support and in opposition to the motion. I have also carefully considered the rival written submissions made on behalf of the parties and all the authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
62. Having done so, I find that four (4) key issues crystalize for my determination of the subject matter. These are:
- a. Whether this Honorable Court is seized of the jurisdiction to hear and determine the filed Petition and the Notice of Motion application on the ground of breach of “Doctrine Res Judicata”.
 - i. If the answer to issue no. (i) is in the affirmative, whether the Petition and the application are incompetent and fatally defective.
 - ii. If the answer to issue no. (ii) is in the negative, whether the Applicants is entitled to the interim reliefs sought in the application.
 - b. Who will bear the Costs of the application.
 - a). Whether this Honorable Court is seized of the jurisdiction to hear and determine the filed Petition and the Notice of Motion application on the ground of breach of “Doctrine Res Judicata”.
 - i. If the answer to issue no. (i) is in the affirmative, whether the Petition and the application are incompetent and fatally defective.



- ii. If the answer to issue no. (ii) is in the negative, whether the Applicants is entitled to the interim reliefs sought in the application.
63. The doctrine of "Res Judicata" is set out in the provision of Section 7 of the Civil Procedure Act, 2010. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a Court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

Ideally, this Principle has been provided for by the Provisions of Under Section 7 of the Civil Procedure Act Cap. 21. Inter alia:-

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

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

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

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

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

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

From the above legal provisions, the following are the ingredients that constitutes and the bar of the Doctrine of Res Judicata to be effectively raised and upheld an account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:-

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or this suit in which the issue is raised.



64. It is trite law that “Res judicata” is a point of law and a true preliminary objection, if proven to exist a court ought to allow its procession and dismiss the entire suit. The Court of Appeal in IEBC – Versus - Maina Kiai & 5 others (2017)eKLR observed that:-

‘Res Judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. ... Thus for the bar of Res Judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or this suit in which the issue is raised.

The rule or doctrine of Res - Judicata serves the salutary aim of bringing finality to litigation and afford parties closure and respite from the specter of being vexed, haunted and hounded by issues and suits that have already been determined by competent court. It is designed as a pragmatic and common sensual protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, y a multiplicity of suits and for a, to obtain at last outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of Res Judicata this rest in the public interest for swift, sure and certain justice.’

65. A close reading of Section 7 of the Act reveals that for the bar of “Res Judicata” to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

- a. The suit or issue raised was directly and substantially in issue in the former suit.
- b. That the former suit was between the same party or parties under whom they or any of them claim.
- c. That those parties were litigating under the same title.
- d. That the issue in question was heard and finally determined in the former suit.
- e. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

66. Similarly, the provision of Section 28 of the Environment Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction. The doctrine of res judicata has stated has been explained in a plethora of decided cases. In the recent case of the “Independent Electoral and



Boundaries Commission – Versus - Maina Kiai & 5 Others (2017)eKLR, the Court of Appeal held as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a. The suit or issue was directly and subsequently in issue in the former suit.
- b. The former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

1. In this Case, the court explained the role of the doctrine thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice.”

68. Now the Honorable Court wishes to cause direct application of these legal principles to the instant case. From the foregoing, it is clear that for “the principle of Res Judicata to suffice, a Court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.
69. Firstly, the matter in issue should be directly and substantially the same as in the former suit. A close look at the Petition filed on 21st January, 2022, the Petitioners/Applicants seek from the Court orders to stop any further allocation of the Mwachabo Settlement Scheme and issuance of title deeds on the same scheme. They seek to have declarations to adjudge the committee selected for the allocation process unconstitutional and to have another committee appointed for fresh allocation of the plots in the scheme. It is common place between the parties that the Petitioners in *the Constitution* (ELC) Mombasa Petition no. 281 of 2012 sought similar prayers in the alternative for the same parcel of land.
70. The second and third tests are closely intertwined. That the former suit must have been between the same parties or parties under whom they claim and the parties must have litigated under the same title. The parties in *Constitution* (ELC) Mombasa Petition no. 281 of 2012 were representatives making the



Petition on their behalf and on behalf of the members of the communities known as Chawia, Wamuri, Sechu and Gambwa. The current Petition has been filed by the Counsel of Elders for Chawia and Sechu on their behalf and on behalf of the Chawia and Sechu community. From the face value, it goes without saying that the parties in both cases are similar and indeed litigating under the same titles.

71. Lastly for Principles of Res Judicata to be sustained, the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided. It is not in dispute that the Court seized with the Constitution (ELC) Mombasa Petition No. 281 of 2012 had the requisite jurisdiction to determine the dispute herein. See the provision of Article 162 (2) (b) of Constitution of Kenya, 2010 and Sections 3 & 13 Environment and Land Court Act, No. 19 of 2011.
72. The gist of Section 7 of the Civil Procedure Act, Cap. 21 defines the principle of res – judicata to apply where the issues in the previous suit ought to have been “heard and finally decided.”
73. The Black’s Law dictionary 10th Edition defines the terms “heard and determined” as follows: -

“of a case, having been presented to a Court that rendered Judgment.”
74. Likewise, the term “hearing” is defined in the same dictionary as follows: -

“A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying.”
75. In the case of: “Tee Gee Electrics and Plastics Company Ltd – Versus - Kenya Industrial Estates Limited [2005] KLR 97 the Court stated:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in The Tee Gee Electrics and Plastics Company Ltd – Versus - Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.
76. This Honorable Court is privy to the fact that the Judgment in the Constitution (ELC) Mombasa Petition No. 281 of 2012 was delivered on 19th January, 2019. The Petition was heard and determined on merit and the court delivered a verdict on the issues raised. I have taken cognizance to the argument advanced by the Petitioners/Applicants to the effect that the issues in the instant Petition and application were distinct to the ones from the former Petition and that they were never adjudicated and/or determined in the previous litigation and finally determined. Thus, to them this suit was not Res Judicata. Without wanting to appear to be tilting towards driving the Petitioners/Applicants from the seat of Justice, but clearly I see an attempt of them wanting to re – open a case that had already been heard and finally determined. That would be un-procedural and irregular. To this contention, I seek guidance from the decision of: “Gurbachau – Versus - Yowani Ekori (1958)EA 450, the Court of Appeal of Eastern Africa, while considering the Doctrine of “Res Judicata”, cited at page 453 a passage



from the judgment of the case of “Vice Chancellor in Henderson – Versus - Henderson (1) 67 ER 313 at page 319 wherein it was stated that:

“In trying this question I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time”

77. Therefore, having a direct application of the stated law to the facts before the Court, it is clear that the Petitioners/Applicants herein seek to open issues that were raised or ought to have been raised in the earlier proceedings as they were relevant to the issues that were decided by the courts in those cases. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. It is my view that, I reiterate that the Petitioners are trying to litigate a concluded matter by bringing issues or causes of action which rightly could have been raised in the former suits. Litigation must come to a conclusion. The Petition by the Petitioners/Applicants cannot succeed.

ISSUE No. c). Who will meet the Costs of this Application

78. It is now well established, and according to Rules 26 (1) & (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules , 2013 (The Mutunga Rules) hold that of the Costs are at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of a legal action, process or proceedings in any litigation. In exercising its discretion to award costs, the Costs shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms (See the Supreme Court Case of “Jasbir Rai Singh – Versus – Tarchalon Singh (2014) eKLR” and the Court of Appeal cases of Rosemary Wambui Munene – Versus Ihururu Dairy Co - operatives Limited (2014) eKLR and Kenya Sugar Board – Versus Ndungu Gathini (2013) eKLR where the Courts held that:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

79. In view of this, the Court has taken consideration of a number of issues. These include the fact that the Petitioners/Applicants are a well organized community legal entity with good intentions on attaining access to justice, fairness, equity and out there wishing to fight for the fundamental rights of over land affecting 7, 000 registered community members. For these reasons, therefore, it is just fair, reasonable and equitable that each party bears its own costs thereof.

VI. Conclusion & Disposition

80. Consequently, having conducted such an elaborate analysis to the framed issues, the Honorable Court concludes, by and large, that this present Petition and the application by Petitioners/Applicants against



the 1st and 2nd Respondents herein offends “the Principles of Res Judicata” as founded on law, the same issues and parties having been heard and determined in a former suit – “*The Constitution* (ELC) Mombasa Petition No. 281 of 2012. Thus, it is immaterial to deal with the other issues raised in the notice of motion application.

81. In the foregoing, and for avoidance of any doubts, the Honorable Court makes the following findings:-
- a. That the Notice of Motion application dated 21st January, 2022 by the Petitioners/Applicants herein against the 1st and 2nd Respondents herein lacks merit for offending “the Principles of Res Judicata” as founded on law, as the same issues and parties having been heard and determined in a former suit – “*The Constitution* (ELC) Mombasa Petition No. 281 of 2012 hence be and is hereby dismissed.
 - b. That an order of this Honorable Court made that this Constitution Petition as a consequence of the above order be and is hereby stands struck and matter closed.
 - c. That each party to bear their own costs.

It is so ordered accordingly

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS9TH DAY OFMARCH.....2023.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. No appearance for the for the Petitioners/Applicants.
- c. M/s. Kiti Advocate for the 1st and 2nd Respondents.

RULING: CONSTITUTIONAL PETITION NO. 01 OF 2022 Page 22 of 22 HON. L.L. NAIKUNI (JUDGE)

