



Swafi Ventures Limited v Platinum Distillers Limited & 4 others (Environment & Land Petition E040 of 2022) [2023] KEELC 18012 (KLR) (7 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E040 OF 2022**

JO MBOYA, J

JUNE 7, 2023

BETWEEN

SWAFI VENTURES LIMITED PETITIONER

AND

PLATINUM DISTILLERS LIMITED 1ST RESPONDENT

MULTIPLAN PACKAGING LIMITED 2ND RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

Introduction And Background

1. The Petition herein has been filed and/or mounted by the Petitioner who states that same is the registered proprietor and owner of L.R No. 9363/853 (I.R No. 143441/1), hereinafter referred to as the suit property. For good measure, the Petitioner contends that the neighbor, who is the registered owner/proprietor of L.R No. 9363/81, has blocked the Public road of access and thus breached and/or violated the Petitioners’ Right of access to the suit property.
2. Premised on the foregoing, the Petitioner has thus filed the Petition dated the 30th September 2022; and in respect of which same have sought for the following R eliefs;
 - i. A Declaration that the 1st and 2nd Respondents have grabbed/encroached on a public road;



- ii. A Declaration that the masonry perimeter wall, the gate and the structures erected by the 1st and/or 2nd Respondents on a public road blocking access to the Petitioner's property are illegal;
 - iii. An order compelling the 1st and 2nd Respondents to demolish the said wall and structures within 30 days of the order;
 - iv. An order allowing the 3rd or 4th Respondents; or the Petitioner to demolish the said wall and structures erected under the supervision of the Mwiki police Station in default of order iii;
 - v. A Permanent Injunction restraining the 1st and 2nd Respondents their agents and/or servants from grabbing or illegally acquiring a public road or erecting structures on a public road;
 - vi. A Declaration that the 3rd and 4th Respondents have abdicated their duty to safeguard public interest to prevent public land grabbing or illegal acquisition;
 - vii. Any other order the court may deem just and appropriate to issue;
 - viii. Costs of the Petition.
3. It is instructive to state and underscore that the Petition is supported by the affidavit sworn on the 30th September 2022; and a Further affidavit sworn on the 13th March 2023, respectively.
 4. Upon being served with the instant Petition, the 1st Respondents filed a Replying Affidavit sworn by John Waweru Ndegwa on the 1st March 2023, whilst the 2nd Respondent filed a Replying affidavit sworn by Rayana Njoki Kingara, similar sworn on the 1st March 2023. Instructively, the 1st and 2nd Respondents denied and disputed the claims mounted at the foot of the Petition.
 5. On the other hand, the 3rd Respondent filed a Replying affidavit sworn by one, namely, W. S Ogola and which was sworn on the 24th February 2023.
 6. On behalf of the 4th Respondent, a Replying affidavit was sworn by one Matheka J K and same is sworn on the 27th February 2023. For clarity, the deponent of the Replying affidavit has, inter-alia, averred that all Public roads and thoroughfares, constitute and comprise of Public land, which fall within the mandate of the National Land Commission by dint of Article 62(1) (h) of *the Constitution* 2010.
 7. It is important to state that the subject Petition came up for mention on the 13th February 2023; whereupon the advocates for the respective Parties agreed to canvass and ventilate the Petition on the basis of affidavit evidence and written submissions.
 8. Consequently and in this regard, directions were thereafter given whereby the Respondents who had not filed their substantive responses to the Petition were granted liberty to file and serve such responses albeit within the prescribed timeline.
 9. Furthermore, the Petitioner was also granted Leave to file and serve a Supplementary affidavit, if need be, as well as written submissions. For coherence, it was incumbent upon the Petitioner to file the Supplementary affidavit and the written submissions simultaneously.
 10. Other than the foregoing, the Respondents herein were thereafter at liberty to file and serve their written submissions within a set timeline from the date of service by the Petitioner.



11. For completeness, it is appropriate to state and underscore that all the Parties duly complied with the timelines and filed their respective submissions, which forms part of the record of the court and shall therefore be adverted to shortly.

Submissions By The Parties

a. Petitioner's Submissions:

12. The Petitioner filed written submissions dated the 13th march 2023 and in respect of which same has raised, highlighted and amplified three issues for consideration by the court.
13. Firstly, Learned counsel for the Petitioner has submitted that there exist a Road of access between the Petitioner's parcel of land, namely, the suit property and the neighboring parcel of land, (sic) belonging to and registered in the names of the 1st and 2nd Respondents. In addition, Learned counsel has submitted that the 1st and 2nd Respondents herein have nevertheless proceeded to and illegally encroached upon the said Road of access by constructing and erecting a perimeter wall fence thereon.
14. Furthermore, Learned counsel for the Petitioner has submitted that the Road of access in question was meant and calculated to facilitate access to, inter-alia, the suit property and hence the illegal actions by the 1st and 2nd Respondents, culminating into the blockage thereof have denied and deprived the Petitioner of her statutory right and entitlement to use the named Road of access.
15. Additionally, Learned counsel for the Petitioner has submitted that the 1st and 2nd Respondent have not only blocked the Road of access, but have also constructed thereof. In this regard, Learned counsel for the Petitioner has invited the Honourable court to take cognizance of various photographs which have been attached to the supporting affidavit and which photographs are contended to exhibit the offensive wall, which encroaches onto the Public Road of access.
16. On the other hand, the Learned counsel for the Petitioner has also submitted that the Petitioner herein proceeded to and engaged a Licensed surveyor who carried out and undertook a survey exercise, culminating into the preparation of a Survey Report dated the 8th March 2023; and which has confirmed the offensive encroachment onto the Public Road of access.
17. Secondly, Learned counsel for the Petitioner has submitted that even though the 1st and 2nd Respondents have disputed that same are not the registered owners of L.R No. 9363/81, same has however not availed any evidence to prove and establish the allegations contained at the foot of the Replying Affidavit.
18. In addition, Learned counsel for the Petitioner has submitted that premised on the allegations by and on behalf of the 1st and 2nd Respondents that same are not the registered owners of L.R No. 9363/81, the Petitioner herein proceeded to and issued a Notice to Produce dated the 25th November 2022, calling upon the 1st and 2nd Respondents to produce the title showing that L.R No. 9363/81 belongs to and is registered in the name of a Third Party.
19. Nevertheless, Learned counsel for the Petitioner has contended that despite being issued and served with the Notice to Produce, the 1st and 2nd Respondents have failed and/or neglected to comply with the terms of the Notice to Produce. Consequently and in this regard, Learned counsel for the Petitioner has therefore submitted that the 1st and 2nd Respondents cannot now be heard to contend that same are not the registered owners of L.R No. 9363/81.



20. At any rate, Learned counsel for the Petitioner has submitted that insofar as it is the 1st and 2nd Respondents who are contending that same are not the registered owners of L.R No. 9363/81, then it was incumbent upon the 1st and 2nd Respondents to prove the said allegation.
21. Notwithstanding the foregoing, Learned counsel for the Petitioner has submitted that the 1st and 2nd Respondents have failed to discharge the Burden of proof cast upon same as pertains to the question of ownership of L.R No. 9363/81. In this regard, counsel has therefore contended that the 1st and 2nd Respondents are thus the appropriate Parties to be sued in respect of the subject matter.
22. Thirdly, Learned counsel for the Petitioner has submitted that the Petitioner has been able to establish, demonstrate and prove that her Constitutional and Statutory rights, inter-alia, the right to use the Public Road of access, has been breached, violated and/or infringed upon by the 1st and 2nd Respondents herein.
23. In addition, Learned counsel for the Petitioner has also submitted that even though the 3rd and 4th Respondents have a Statutory mandate to ensure that the Public Road of access is protected and preserved for the use of all and sundry, same have failed to take appropriate and effective actions against the 1st and 2nd Respondents as pertains to the blockage of the Road of access.
24. In this respect, Learned counsel has thus submitted that the 3rd and 4th Respondents have abdicated their statutory and constitutional mandate and hence the necessity to compel same to take appropriate actions.
25. Owing to the foregoing, Learned counsel for the Petitioner has therefore impressed upon the Honourable court to find and hold that the Petitioner herein has duly established and demonstrated the Complaints alluded to and contained at the foot of the Petition.
26. Consequently and in the premises, the Petitioner thus prays that the Honourable court be pleased to grant the orders sought at the foot of the Petition dated the 30th September 2022.

b. 1st And 2nd Respondents' Submissions:

27. The 1st and 2nd Respondents filed submissions dated the 20th March 2023 and in respect of which same has raised, highlighted and canvassed two salient issues for due consideration and determination by the Honourable court.
28. First and foremost, Learned counsel for the 1st and 2nd Respondents has submitted that even though the 1st and 2nd Respondents have been sued as pertains to the claim concerning actions undertaken on L.R No. 9363/81, it is instructive that the said property does not belong to nor is same registered in the name of the 1st and 2nd Respondents herein.
29. In addition, Learned counsel for the 1st and 2nd Respondents has contended that it was incumbent upon the Petitioner to demonstrate and prove to the court that the 1st and 2nd Respondents are the owners of L.R No. 9363/81 and further, that same are the ones responsible for the offensive blockage of (sic) the Public Road of access.
30. Nevertheless, Learned counsel for the 1st and 2nd Respondents has submitted that the Petitioner herein has neither tendered nor adduced before the Honourable court any evidence to show that the 1st and 2nd Respondents have any connection to L.R No. 9363/81 or are responsible for the actions complained against.



31. Based on the foregoing, Learned counsel for the 1st and 2nd Respondents has therefore submitted and contended that the 1st and 2nd Respondents have been improperly sued and joined in respect of the subject matter. In this regard, Learned counsel has submitted that the suit as against the 1st and 2nd Respondents therefore ought to be struck out with costs.
32. Secondly, Learned counsel for the 1st and 2nd Respondents has submitted that issues complained of, namely, the blockage of (sic) public road of access, if at all, is an issue that ought to have been referred to the County Government of Nairobi, which is the Planning Authority for determination in accordance with, inter-alia, the provisions of Sections 29 and 30 of the *Physical and Land Use Planning Act*, 2019.
33. On the other hand, Learned counsel for the 1st and 2nd Respondents has also submitted that the issue in question also ought to have been addressed to the National Land Commission, who is the custodian of Public land, inter-alia, Public Roads and thoroughfares, in accordance with the provisions of Section 62(2) of *the Constitution* 2010.
34. However, Learned counsel has contended that despite the existence of appropriate Statutory Dispute Resolution Mechanism, outside the framework of the court, the Petitioner herein has failed to exhaust the laid down procedure and hence the subject Petition is contended to be premature and misconceived.
35. In support of the foregoing submissions, Learned counsel for the 1st and 2nd Respondents has cited and relied on, inter-alia, the case of Mercy Wangari Mbuku versus National Environmental Management Authority & 3 Others (2021)eKLR, Geoffrey Muthinja Kabiru versus Samuel Munga Henry & Others (2015)eKLR and Bethwel Allan Omondi Okal versus Telkom (K) Ltd & 9 Others (2017)EKLR, respectively.
36. Premised on the foregoing, Learned counsel for the 1st and 2nd Respondents has thus contended that the Petition before the Honourable court is not only premature; but same offends the doctrine of Exhaustion. In this regard, counsel has invite the court to strike out the Petition with the cost to the 1st and 2nd Respondents.

c. 3rd Respondent's Submissions

37. The 3rd Respondent filed written submissions dated the 28th March 2023; and in respect of which same has raised and canvassed two (2) pertinent issues for consideration and determination by the Honourable court.
38. Firstly, Learned counsel for the 3rd Respondent has submitted that the Petition beforehand does not plead with the requisite particularity and specificity the provisions of *the Constitution*, 2010; that are claimed to have been breached, violated and/or infringe, if at all, by the 3rd Respondent.
39. Furthermore, Learned counsel has also contended that the subject Petition has also not supplied the requisite particulars pertaining to and concerning the actions, if any, that are alleged as against the 3rd Respondent.
40. In addition, Learned counsel has further submitted that other than the failure to speak to the provisions of *the Constitution*, 2010; which have been infringed upon and the failure to provide particulars of the actions complained of, the Petitioner has similarly failed to tender evidence to establish and or demonstrate the infringements which are complained of or at all.
41. Premised on the foregoing submissions, Learned counsel for the 3rd Respondent has contended that in the absence of the requisite specificity, the instant Petition is fatally deficient and thus incompetent.



42. In support of the foregoing submissions, Learned counsel for the 3rd Respondent has invited the Honourable court to take cognizance of the holding in the cases, inter-alia Annarita Karimi Njeru versus Republic (1979)eKLR and Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 Others (2013)eKLR, respectively.
43. Secondly, Learned counsel for the 3rd Respondent has submitted that the Complaints alluded to and espoused vide the Petition beforehand, do not meet the Constitutional threshold. In this regard, Learned counsel has pointed out that the issues in dispute relate to breach of ordinary statutory provisions and hence same ought to have been ventilated through the ordinary Civil process and not by way of a Constitutional Petition.
44. In this respect, Learned counsel has contended that the invocation of *the constitution* by and at the instance of the Petitioner herein was therefore inappropriate and misconceived. Consequently, Learned counsel has invited the Honourable court to strike out the petition, which in any event ought not to have been filed in the first instance.
45. To anchor the foregoing submissions, Learned counsel for the 3rd Respondent has cited and relied on, inter-alia, the case of Grays Jepkemoi Kiplagat versus Zakayo Chepkoga Cheruiyot (2021)eKLR, Godfrey Paul Okutoi & Others v Habil Olaka & Another (2018)eKLR, Bernard Murage versus Fine Serve Africa Ltd & Others (2015)eKLR and C. O. D & Another versus Nairobi City Water & Sewerage Co. Ltd (2015)eKLR, respectively.
46. Lastly, Learned counsel for the 3rd Respondent has submitted that the 3rd Respondent has been diligent in the performance, execution and discharge of her Constitutional mandate/obligations. In this regard, Learned counsel has pointed out that if the Petitioner herein was keen to invoke the intervention of the 3rd Respondent then same ought to have lodged an appropriate Complaint in line with the provisions of the *Physical and Land Use Planning Act*, 2019.
47. However, Learned counsel has added that the Petitioner herein has neither lodged nor presented any Complaint with the 3rd Respondent to warrant the intervention of the 3rd Respondent. Consequently, counsel has submitted that the allegations that the 3rd Respondent has abdicated her constitutional mandate has therefore been made prematurely and in vacuum.

d. 4th Respondent's Submissions

48. The 4th Respondent filed written submissions dated the 27th march 2023 and in respect of which same has raised, highlighted and canvassed two (2) issues for consideration by the Honourable court.
49. First and foremost, Learned counsel for the 4th Respondent has submitted that the Public Road of access, which is complained of and which colors the Petition herein, constitutes and forms part of Public Land in terms of Article 62(1) (h) of *The Constitution*, 2010.
50. In addition, Learned counsel for the 4th Respondent has also submitted that insofar as all Public Roads constitutes Public land, same cannot therefore be disposed of or otherwise be used except with accordance with prescription of an Act of Parliament.
51. Notably and in this regard, Learned counsel has pointed out that where there is an appropriation of a Road or access road, contrary to the prescription of the law, a suitable complaint ought to be made and mounted with the National Land Commission to facilitate interrogation and necessary determination.



52. Be that as it may, Learned counsel for the 4th Respondent has submitted that the Petitioner herein has never lodged nor mounted any Complaint with the 4th Respondent to warrant the intervention of the 4th Respondent.
53. Secondly, Learned counsel for the 4th Respondent has also submitted that the space between the suit property and L.R No. 9363/81, constitutes an access road and hence the same cannot be blocked and/or otherwise built on by any one, the 1st and 2nd Respondents, not excepted.
54. Notwithstanding the foregoing, the 4th Respondent has contended that in the absence of any prior Complaint having been filed or lodged with the 4th Respondent, the contention that the 4th Respondent has abdicated her Constitutional mandate is therefore misleading and erroneous.
55. In a nutshell, the 4th Respondent has impressed upon the Honorable court to find and hold that the subject Petition does not disclose any reasonable cause of action and thus ought to be struck out as against the 4th Respondent.

Issues For Determination

56. Having reviewed the entire Petition, together with the supporting and Further affidavits attached thereto; and upon considering the Responses by and on behalf of the Respondents; and upon taking into account the written submissions filed on behalf of the respective Parties, the following issues do arise and are worthy for determination;
 - i. Whether the 1st and 2nd Respondents are the Registered owners/proprietors of L.R No. 9363/81 and if not; whether same are responsible for (sic) the impugned blockage of the Public access road.
 - ii. Whether the Petitioner herein has established, demonstrated and proved the allegation pertaining to the blockage of the Public access road in the manner contended or otherwise.
 - iii. Whether the Petition beforehand has captured the requisite particulars of the provisions of *the Constitution* alluded to and thereby met the requisite threshold as enumerated in the Landmark Case of Annarita Karimi Njeru versus Republic (1979)eKLR.
 - iv. Whether the instant Petition contravenes the Doctrine of Exhaustion.

Analysis And Determination

Issue Number 1

Whether the 1st and 2nd Respondents are the Registered owners/proprietors of L.R No. 9363/81 and if not; whether same are responsible for (sic) the impugned blockage of the Public access road.

57. The Petitioner herein has alleged and/or contended that the 1st and 2nd Respondents are the registered owners and/or proprietors of L.R No. 9363/81, and furthermore that the 1st and 2nd Respondents have encroached on to and constructed a perimeter wall which has thus blocked a Public access road that serves, inter-alia, L.R No. 9363/853, belonging to and registered in the name of the Petitioner.
58. On the other hand, upon being served with the instant Petition, the 1st and 2nd Respondents filed Replying affidavits and in respect of which same denied, inter-alia being the registered/beneficial owners of L.R No. 9363/81, either in the manner alleged by the Petitioner or at all.



59. Furthermore, the 1st and 2nd Respondents have also denied that same have erected or constructed a perimeter wall blocking the Public road of access, as alleged by the Petitioner herein.
60. Premised on the denial by and on behalf of the 1st and 2nd Respondents that same are neither the registered nor beneficial owners of L.R No. 9363/81, it was incumbent upon the Petitioner herein to procure and place before the honorable court appropriate and suitable evidence to confirm the averments at the foot of the Petition.
61. For good measure, it was the duty and obligation of the Petitioner to discharge the burden of proving that indeed the 1st and 2nd Respondents are the registered/beneficial owners of L.R No. 9363/81; and that same are the ones who have (sic) illegally encroached upon and grabbed the public access road.
62. To my mind, the burden of proof in this respect laid at the door step of the Petitioner and not otherwise. Consequently, the Petitioner cannot be heard to allege that to the extent that the 1st and 2nd Respondents have denied being the registered and beneficial owners of L.R No. 9363/81, then same ought to have placed before the Honorable court evidence to justify their denial of ownership.
63. In addition, it is also erroneous and mistaken for Learned counsel for the Petitioner to contend that insofar as the Petitioner had issued and served a Notice to Produce upon the 1st and 2nd Respondents, then the 1st and 2nd Respondents ought to have gone the extra mile to tender before the Honourable court the Certificate of Title belonging to the Third Party, in the manner adverted to in the Replying affidavits filed.
64. Similarly, it is also erroneous for Learned counsel for the Petition to contend that having failed to respond to and comply with the terms of the Notice to Produce dated the 25th November 2022, duly served upon them (1st and 2nd Respondents) then same cannot now be heard to contest the issue that the said land belongs to same.
65. In my humble view, a Notice to Produce is generated and issued by the issuer to the adverse Party and same serves the purpose of calling upon the adverse Party to produce and avail to the issuer original copies of the named documents. Nevertheless, the Notice to Produce also acts as a forerunner on behalf of the issuer that in the event of default by the adverse Party to comply; then the issuer will be at liberty to produce before the court Secondary copies of the named documents, which are in the custody of the issuer.
66. To this end, it may be appropriate and imperative to reproduce the contents of Section 69 of The *Evidence Act*, Chapter 80 Laws of Kenya, which premises/ anchors the issuance and service of a Notice to Produce.
67. For ease of reference, same are reproduced as hereunder;

69. Notice to produce a document

Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case: Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—

- i. when the document to be proved is itself a notice;



- ii. when from the nature of the case, the adverse party must know that he will be required to produce it;
- iii. when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- iv. when the adverse party or his agent has the original in court;
- v. when the adverse party or his agent has admitted the loss of the document;
- vi. when the person in possession of the document is out of reach of, or not subject to, the process of the court;
- vii. in any other case in which the court thinks fit to dispense with the requirement.

68. In my humble view, the issuance and service of a Notice to Produce upon the adverse Party, does not shift the legal burden of proof, in respect of a particular issue in dispute to the adverse Party. Essentially, the legal burden of proof rests and remains with the Party who is making the impugned allegations.
69. Consequently and in this regard, it is the Petitioner, who is contending that the 1st and 2nd Respondents are the registered and beneficial owners of L.R No. 9363/81 and hence it is the said Petitioner who is charged and chargeable with the burden of proof and not otherwise.
70. Furthermore, where a Petitioner makes averments and allegations at the foot of a Petition, it is incumbent upon the Petitioner to place before the Honourable court cogent, credible and plausible evidence to enable the court to come to the conclusion that indeed the averments have been proven. In this regard, the Petitioner cannot succeed by alleging that because issued a Notice to Produce then the adverse Party ought to assume the burden.
71. Sadly, I must point out that the extensive and elaborate arguments by and on behalf of the Petitioner surrounding the issuance and service of the Notice to Produce are misconceived and in any event; unhelpful.
72. For good measure, it is important to underscore that whereas the evidential burden of proof does shift from time to time, depending on the nature of evidence tendered and the requirement of rebuttal evidence; the Legal burden remains static and cast upon the Petitioner to prove his/her case on a preponderance of probabilities.
73. In this respect, it is appropriate to recognize and take cognizance of the succinct exposition of the Law by the Supreme Court in the case of Samson Gwer & 5 others versus Kenya Medical Research Institute & 3 others [2020] eKLR, where the court stated and held thus;

(49) Section 108 of the [Evidence Act](#) provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

74. Other than establishing and demonstrating ownership of L.R No. 9363/81, which the Petitioner has not been able to demonstrate, it was also incumbent upon the Petitioner to prove that indeed the Public road of access has been blocked by the construction/erection of a perimeter wall and a gate.
75. Be that as it may, the issue of whether the Petitioner has established and proved that the Public Road of Access has been blocked shall be discussed in the next discourse, shortly.

Issue Number 2

Whether the Petitioner herein has established, demonstrated and proved the allegation pertaining to the blockage of the Public Access Road in the manner contended or otherwise.

76. Towards and in a bid to prove that indeed the Public road of access has been blocked, in the manner alluded to in the Petition, the Petitioner has placed before the Honourable court assorted photographs, namely, Exhibits 4a, 4b, 6a, 6b, 6c, 6d and 6e, respectively, attached to the supporting affidavit sworn on the 30th September 2022.
77. Nevertheless, it is instructive to point out that despite annexing and exhibiting the assorted photographs (whose details have been alluded to in the preceding paragraph), the Petitioner has neither availed nor tendered to the court any Electronic Certificate to authenticate the impugned photographs, as required by dint of the provisions of Sections 106A and 106 B of The *Evidence Act*, Chapter 80 Laws of Kenya.
78. I beg to point out that in the absence of the requisite Electronic certificate as prescribed and provided under the law, the assorted photographs are rendered cosmetic and in any event, same become bereft of probative value.
79. As pertains to the importance and significance of Electronic Certificate, it is appropriate to adopt, restate and reiterate the elaborate pronouncement by the Court of Appeal in the case *County Assembly of Kisumu & 2 others versus Kisumu County Assembly Service Board & 6 others* [2015] eKLR, where the court stated and observed as hereunder;
1. Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”



1. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the [Evidence Act](#) in its entirety:

“106B (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electromagnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

- (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
 - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - (b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
- (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on



over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—

- (a) by combination of computers operating in succession over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - (c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
 - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.
- (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”



1. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person's activities using a computer or some other electronic device and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.

1. The *Evidence Act* does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.

1. In this case as we have said the electronic record was made by one Denis Kongo, a freelance photojournalist. He, however, did not annex to his affidavit sworn on 11th December 2014 the required certificate. The averments in that affidavit themselves did not meet the above stated threshold of sub-section 106B(2) of the *Evidence Act*. Those averments therefore fell short of the required certificate. In the circumstances, we agree with counsel for the appellants that the electronic evidence of Denis Kongo was inadmissible and the learned Judge erred in relying upon it.



80. Thirdly, the Petitioner has also presented before the court a survey report dated the 8th March 2023 and prepared by a private/licensed surveyor and in respect of which same seeks to prove the fact that the Public road of access has been blocked.
81. Be that as it may, it is important to underscore that where there is a contest pertaining to the extent of and blockage of a public access road, it is imperative that a complaint of such a nature be lodged with the office of the Chief Land Registrar or such other designated Land registrar, who shall thereafter involve the Director of Survey and undertake visitation to the locus in quo, for purposes of ascertaining encroachment and blockage or otherwise.
82. Nevertheless, in respect of the instant matter, there is no evidence that a complaint relating to encroachment onto and blockage of a Public access road has hitherto been lodged with the office of the Chief Land Registrar to facilitate visitation to the locus in quo and to facilitate the generation of an appropriate report.
83. Unfortunately, what has been placed before the Honourable court is a report by (sic) a licensed surveyor, who was reportedly engaged by the Petitioner, albeit without the participation and involvement of the adverse Parties.
84. Clearly, if there was need to visit the locus in quo with a view to determining encroachment onto and blockage of the road of access, then it behooved the Petitioner herein to involve the adverse Party, which was not the case.
85. In any event, it is not lost on the Honorable court that the survey report dated the 8th March 2023, arises out of a survey exercise carried out and undertaken long after the filing of the instant Petition. Consequently, there is a high likelihood that the contents therein were tailored- made to fit the whims of the Petitioner.
86. In spite the foregoing, I must point out that where the law requires the intervention of a Public officer, in this case the Chief Land Registrar and the Director of survey, their intervention cannot be substituted by that of a private/licensed surveyor. For good measure, I beg to state that the contents of the impugned survey report does not help the Petitioner's case.
87. Other than the foregoing, it is also instructive to note that the contents of the survey report dated the 8th march 2023; also do not carry the Petitioner's case any further, insofar as same has not identified the person responsible for the alleged encroachment/blockage of the public access road.
88. Based on the foregoing, I come to the conclusion that the Petitioner herein has neither proved nor established that the 1st and 2nd Respondents are the registered owners of L.R No. 9363/81; or has same proved the 1st and 2nd Respondents are culpable for the offensive encroachment onto and blockage of the Public access road.
89. Before departing from the issue herein, there is one more item that merits mention and a short address. For coherence, the item herein relates to the response to Demand letter dated 28th September 2021, which has been annexed as annexure DKN 8a.
90. Instructively, the response to demand letter, which has been alluded to in the preceding paragraph, has been annexed with a view to showing/establishing that the 1st Respondent herein indeed admitted and acknowledged encroachment onto and blockage of the public access road.
91. Nevertheless, it is imperative to state and underscore that the impugned Letter was generated and issued on a Without prejudice basis and hence same cannot be attached to the supporting affidavit or in any event, be admissible in evidence, as against the First Respondent herein.



92. In short, the Petitioner herein was called upon to place before the Honourable court cogent and credible evidence to prove, inter-alia, the offensive encroachment onto and blockage of the Public access road, without resorting to shortcuts. Clearly, the impugned letter which was generated on a without prejudice basis does not help the Petitioner's case.

Issue Number 3

Whether the Petition beforehand has captured the requisite particulars of the provisions of *the Constitution* alluded to and thereby met the requisite threshold as enumerated in the Landmark Case of Annarita Karimi Njeru versus Republic (1979)eKLR.

93. From the onset, it is important to state that every litigant, who is keen to mount and prosecute a constitutional Petition, the Petitioner herein not excepted, is required to craft the Petition in such a manner as to reflect the requisite provisions of *the Constitution* being invoked, to show the actions complained off and avail particulars relative to the action complained of; and finally to demonstrate the persons, if any, responsible for the impugned actions.
94. Additionally, it is also incumbent upon every Petitioner to endeavor to and to supply the requisite particulars, in a concise and precise manner, which will enable the court to appreciate the nature of complaint being mounted and the person against whom the complaint is mounted.
95. For good measure, the necessity to craft the Constitutional Petition with necessary particularity and specificity, especially as concerns the violation/infringements complained of and the person responsible for such infringement, cannot be emphasized and/or gainsaid.
96. In the case of Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, the Honourable court underscored the importance of concise and precise pleadings in a Petition by stating and observing thus;

(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

(42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly



unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent.

97. Having taken cognizance of the importance of particularity and specificity in the pleadings required over Petition, it is now appropriate to revert back and consider the subject Petition.
98. The Petitioner herein has averred that the 1st and 2nd Respondents have encroached upon and blocked the public road of access and thus breached, violated and infringed upon her (Petitioner’s) Constitutional Rights.
99. However, having made the foregoing allegations, the Petitioner herein has not ventured to articulate which provision of *the constitution* anchors this alleged breach and/or infringement and furthermore same has not also supplied particulars relating to the impugned breach/infringement.
100. On the other hand, the Petitioner has also contended that the 3rd and 4th Respondents have abdicated their statutory and constitutional mandate in protecting and preserving Public roads. However,



despite making the foregoing averments, it has not been stated and articulated how and in what manner the impugned abdication has arisen or ensued.

101. Moreover, the Petitioner has not contended that same has hitherto mounted or lodged a complaint with either the 3rd or the 4th Respondents, with a view to having the said 3rd and 4th Respondents to undertake investigations into the complaint and thereafter redress the complaint.
102. Contrarily, the 3rd and 4th Respondents have deponed and averred in their respective affidavits that the Petitioner herein has never lodged and/or mounted a complaint with them to enable same to undertake appropriate investigations. For good measure, the contention by the 3rd and 4th Respondents have neither been disputed nor controverted.
103. Surely, having neither mounted nor lodged a complaint with the 3rd and 4th Respondents, in line with the statutory provisions, can the Petitioner now be heard to contend that the 3rd and 4th Respondents have abdicated their statutory/constitutional mandate.
104. To my mind, the contention that the 3rd and 4th Respondents have abdicated and abandoned their statutory/constitutional mandate, other than not being duly particularized, has not been established/proved.
105. In view of the foregoing, it is my humble finding that the Petition beforehand has fallen short of the prescription established in the case of Annarita Karimi Njeru versus Republic (1979)eKLR, as reinforced and reiterated in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.
106. Similarly and on account of want/lack of the requisite specificity, I would be minded to terminate and dismiss the current Petition. Nevertheless, it is also worthy to point out that other than the deficiencies that have been alluded to in the preceding paragraphs, the Petitioner herein also failed to tender and or avail the requisite evidence to prove and/or demonstrate the purported breach/infringement of her Constitutional Rights and fundamental freedom or at all.

Issue Number 4

Whether the instant Petition contravenes the Doctrine of Exhaustion.

107. The complaint beforehand touches on and concerns the alleged encroachment onto and construction of a Masonry perimeter Wall across the public road access. Instructively the complaint herein relates to an illegal development, contrary to and in violation of the *Physical and Land Use Planning Act, 2019*.
108. It is appropriate to state and underscore that any proponent of a development is called upon to procure and obtain the requisite approval prior to and before undertaking any development, including the erection of a masonry perimeter wall.
109. Furthermore, where a proponent carries out and undertakes the development relating to Physical and Land Use Planning, albeit without obtaining the requisite approval from the planning authority, then such a development is illegal and unlawful and thus amenable to demolition by and at the instance of the Planning Authority.
110. In addition, any person who is aggrieved by such illegal development of construction is at liberty to lodge a complaint with the Planning authority, who shall thereafter issue and serve the requisite Enforcement Notice. In this regard, it is instructive to take cognizance of the provisions of Sections 56, 57 and 72 of the *Physical and Land Use Planning Act, 2019*.
111. For ease of reference, the said provisions provides as hereunder;



56. Power to undertake development control

Subject to the provisions of this Act, the *Urban Areas and Cities Act*, 2011 (No. 13 of 2011) and the *County Governments Act*, 2012 (No. 17 of 2012), the county governments shall have the power within their areas of jurisdiction to—

- (a) prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;
- (b) control or prohibit the subdivision of land;
- (c) consider and approve all development applications and grant all development permissions;
- (d) ensure the proper execution and implementation of approved physical and land use development plans;
- (e) formulate by-laws to regulate zoning in respect of use and density of development;
- (f) reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical and land use development plans; and
- (g) consider and determine development planning applications made in respect of land adjoining or within reasonable vicinity of safeguarding areas.

57. Development permission

- (1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.
- (2) A person who commences any development without obtaining development permission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.
- (3) A county executive committee member shall require a person who has commenced a development without obtaining development permission to restore the land on which the development is taking place to its original condition or as near to its original condition as is possible and that such restoration shall take place within ninety days.
- (4) Where a person who is required to do so fails to comply with the provisions of subsection (3), the relevant county executive committee member may undertake to restore the land as required and shall recover the cost of the restoration from the person required to undertake the restoration.
- (5) A county executive committee member may revoke development permission if the applicant has contravened any provision of this Act or conditions imposed on the development permission for any justifiable cause.
- (6) A county executive committee member may modify the conditions imposed on development permission where circumstances require it or for any justifiable cause.

72. Enforcement notice



- (1) A county executive committee member shall serve the owner, occupier, agent or developer of property or land with an enforcement notice if it comes to the notice of that county executive committee member that—
 - (a) a developer commences development on any land after the commencement of this Act without the required development permission having been obtained; or
 - (b) any condition of a development permission granted under this Act has not been complied with.
 - (2) An enforcement notice shall—
 - (a) specify the development alleged to have been carried out without development permission or the conditions of the development permission alleged to have been contravened;
 - (b) specify measures the developer shall take, the date on which the notice shall take effect, the period within which the measures shall be complied; and
 - (c) require within a specified period the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.
 - (3) Where a person on whom an enforcement notice has been served is aggrieved by that notice, that person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen days of being served with the notice and the committee shall hear and determine the appeal within thirty days of the appeal being filed.
 - (4) Any party aggrieved with the determination of the county physical and land use planning liaison committee may appeal to the court only on a matter of law and the court shall hear and determine the appeal within thirty days.
 - (5) A person who has been served with an enforcement notice and who refuses to comply with the provisions of that notice commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two months or to both.
112. From the foregoing provisions, it is evident and apparent that where a particular person is aggrieved by a development, which appears to have been undertaken without the requisite approval of the Planning authority, then it behooves the aggrieved person to lodge a complaint with the Planning authority, who shall thereafter undertake appropriate and due investigations; and if satisfied issue and serve and enforcement notice.
113. In my humble view, if the impugned development, which has culminated into (sic) the blockage of the public road of access was true, then it behooved the Petitioner to follow and comply with the named provisions of the *Physical and Land Use Planning Act*, 2019.
114. Other than the foregoing, it is also not lost on this Honourable court that all roads and thoroughfares constitutes and comprise of Public land under the care and custody of the National Land Commission by dint of Article 62(2) of *The Constitution*, 2010.



115. Consequently, where an issue does arise pertaining to and concerning blockage of Public access road, one would also have expected the Petitioner herein to lodge and mount a complaint with the National Land Commission for her investigation and appropriate action.
116. Clearly and to my mind, there exists appropriate statutory dispute resolution mechanism which the Petitioner herein ought to have actualized, with a view to addressing the complaint beforehand.
117. However, despite the existence of the appropriate statutory dispute resolution mechanism, there is no evidence before the court that the Petitioner herein has previously attempted to and complied with the laid down procedure.
118. Granted, that this Honorable court is similarly conferred and bestowed with Jurisdiction to entertain and address the issue pertaining to blockage of Public access road, but it must remembered that where there exists an alternative dispute resolution mechanism out side the framework of the court, then it behooves the Applicant to first and foremost exhaust the available dispute resolution mechanism before approaching the Jurisdiction of the court.
119. Invariably and to this end, the decision in the case of Geoffrey Muthinja & another versus Samuel Muguna Henry & 1756 others [2015] eKLR, is instructive and pertinent.
120. For coherence, the Court of Appeal observed and stated as hereunder;

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

121. Instructively, the same position was adopted and reiterated by the Court of Appeal in the case of Bethwel Allan Omondi Okal versus Telkom (K) Founders Ltd (2017)eKLR, where the court held thus;

The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425.

122. In my humble view, the complaint that colors the current Petition ought to have been addressed and lodged before the appropriate statutory dispute resolution mechanism/authority, inter-alia, the relevant planning authority (read Nairobi City County Government) for purposes of appropriate action.
123. Insofar as the available statutory dispute resolution mechanism was neither approached nor appropriated, I come to the conclusion that the Petition beforehand was prematurely presented before this Honorable court. In this regard, the Petition is not only misconceived, but prohibited by the hallowed Doctrine of Exhaustion.



Final Disposition

124. Having analyzed and considered the various issues that were enumerated herein before, it is now appropriate to bring the Judgment to a closure and make the Final pronouncement.
125. Nevertheless, in the course of addressing the various issues, the Honourable court has expressed its findings and holdings, as pertains to each and every issue.
126. Consequently and in the premises, I come to the conclusion that the Petition dated 30th September 2022; is not meritorious. In the premises, same be and is hereby Dismissed with costs to the Respondents.
127. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant

Mr Oguye h/b for Mrs. Chai for the Petitioner.

Mr. Mwachofi for the 1st and 2nd Respondents.

Mr. Karise for the 3rd Respondent.

Ms. Joyce Wanini for the 4th Respondent.

