



**Magiri (Suing as the legal representative of the Estate of Magiri Rinkanya  
(Deceased) & 3 others v Nuru & 4 others (Constitutional Petition  
E003 of 2023) [2023] KEELC 18743 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18743 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
CONSTITUTIONAL PETITION E003 OF 2023**

**CK NZILI, J**

**JULY 12, 2023**

**BETWEEN**

**DELIAS GITARI MAGIRI (SUING AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF MAGIRI RINKANYA (DECEASED) ..... 1<sup>ST</sup> PETITIONER  
ELIAS GITARI MAGIRI ..... 2<sup>ND</sup> PETITIONER  
JAMES KARANI MAGIRI ..... 3<sup>RD</sup> PETITIONER  
ELIZABETH NDURU MAGIRI ..... 4<sup>TH</sup> PETITIONER**

**AND**

**SALIMA NURU ..... 1<sup>ST</sup> RESPONDENT  
IDRIS NURU ..... 2<sup>ND</sup> RESPONDENT  
ROCKY RANCH LIMITED ..... 3<sup>RD</sup> RESPONDENT  
THE LAND REGISTRAR MERU COUNTY ..... 4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the court are two applications dated 15.3.2023 and 5.5.2023 hereinafter the 1<sup>st</sup> & 2<sup>nd</sup> applications. In the 1<sup>st</sup> application, the petitioners seek conservatory orders restraining the respondents, their agents, and family members from evicting, selling, leasing, charging, or otherwise interfering with their quiet, peaceful, actual occupation, user, development, and enjoyment of L.R. No. Abogeta/Upper Kithangari/859 pending hearing and determination of this Petition. The 2<sup>nd</sup> prayer is for issuance of an inhibition order restricting any dealings or transfer of L.R. No. Abogeta/U-Kithangari/859, pending hearing and determination of this Petition.



2. The application is based on the grounds on its face and in the supporting affidavit sworn by Elias Gitari Magiri, the 2<sup>nd</sup> petitioner dated 15.3.2023. The petitioners aver that they are the registered owners of L.R. No's Abogeta/U-Kithangari/1468, 2756, and 2757 which were resultant subdivisions of L.R. No. U-Kithangari/859 owned by Marai Nuru (deceased), as per annexed copies of title deeds marked E.N.M. 02 (a), (b) & (c), which had been bought by the late Magiri Rinkanya, the father of 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> petitioner as per agreement marked E.G.M. 01 – 03 then.
3. It is averred that the late seller delayed in transferring the 3 acres of land, leading to a consent judgment in Meru H.C.C. No. 203 of 2001 for specific performance which have never been set aside as per attached plaint defense and consent marked E.G.M. – 04, 05-06 (a) & (b) respectively.
4. Following the consent, it is averred that the initial land was subdivided into L.R. No's Abogeta U-Kithangari/1467, measuring 3 acres, and L.R. No.1468, measuring 2 acres, the former being transferred to the late Magiri Rinkanya on 20.12.2001 who took vacant possession and extensively developed the same.
5. The petitioners aver that their late father subdivided his No' land into L.R. No. Abogeta/U-Kithangari/2756 & 2757 transferred the former to the 2<sup>nd</sup> petitioner, the latter to the 3<sup>rd</sup> petitioner, and gifted L.R. No. Abogeta/U-Kithangari/2756 and 2757. The petitioners aver that in 2019 information reached them that their title deeds had been canceled out of a court order in Meru H.C. Succession Case No. 384 of 2003, without their knowledge, moved to court where they obtained a copy of rectified grant, filed an application to revoke it, obtained copies of the land register, the court order canceling the titles and the judgment, dated 1.3.2018, order dated 31.9.2018 and a temporary grant attached as annexures marked EGM 09, 010, 011 (a), (b), (c), EG. M012 – 014 respectively.
6. The petitioners averred that they filed summons dated 1.4.2019, in the succession cause for revocation or annulment of the grant to remove their parcel of land from the distribution schedule, which was heard and determined, while the 1<sup>st</sup> & 2<sup>nd</sup> respondents sought to join the suit and for the consent dated 27.11.2001 and adopted on 3.12.2001 be set aside. They attached the two applications as annexures marked E.G.M. 015 & 016, respectively.
7. It was averred that the 1<sup>st</sup> & 2<sup>nd</sup> respondents filed summons dated 9.1.2020 seeking for stay of the succession cause pending the determination of their notice of motion dated 19.1.2020 in Meru H.C.C. No. 203 of 2001 as per annexure marked E.G.M. 017 which the petitioners opposed by their replying affidavits sworn on 5.2.2020 attached as annexure marked as E.G.M. 018,
8. The petitioners further averred that on 4.3.2021, the ruling in Meru HCC NO. 203 of 2001 was delivered declining jurisdiction since it revolved around succession matters. The ruling was attached as an annexure marked E.G.M. – 019. As regards the summons dated 1.4.2019, the petitioners aver that it was determined on 21.11.2022 in which the court said that the issues revolving around L.R. No's 2756, 2757, and 1468 were beyond the jurisdiction of a probate court, but surprisingly dismissed their summons, which led to appeal in the Court of Appeal as per annexure marked E.G.M. 002 (a) & (b).
9. Further, the petitioners aver that the 1 & 2<sup>nd</sup> respondents have illegally sold and transferred their parcels of land to the 3<sup>rd</sup> respondent as per copies of the land registry marked as annexure E.G.M. 22 who between 12.2.2022 and 27.1.2023 came with hired goons, demolished the 4<sup>th</sup> petitioner's houses forcefully, illegally and unlawfully evicted the petitioners from the suit land as per annexed photographs O.B. and valuation reports marked E.G.M. 023 - 025 hence rendering them homeless and destitute.



10. The petitioners averred that the 3<sup>rd</sup> respondent acted with impunity while the 4<sup>th</sup> respondent acted ultra vires his powers and authority to cancel the title deeds without a court order on 1.3.2018.
11. The 1<sup>st</sup> application was opposed through a replying affidavit sworn by Idris Nuru, the 2<sup>nd</sup> respondent, on his own behalf and the 1<sup>st</sup> & 3<sup>rd</sup> respondents on the basis that it is frivolous, vexatious, and an abuse of the court process, full of falsehoods, misleading and contrary to the Law of Succession Act. Further, the 3<sup>rd</sup> respondent opposed the application by a replying affidavit sworn on 6.6.2023.
12. The 1<sup>st</sup> – 3<sup>rd</sup> respondents averred that L.R. No. Abogeta/U-Kithangari/859 reverted to the deceased's estate, was distributed to the beneficiaries, and was currently in the names of the 3<sup>rd</sup> respondent. They attached the official search, the judgment dated 1.3.2018, and the extracted order dated 19.11.2018, green cards, and annexures marked in "1" – "3". The 1<sup>st</sup> – 3<sup>rd</sup> respondents averred that their deceased mother, Mariam Nuru, had connived with the former administrator to fraudulently transfer the initial land to herself through Kadhi Succession Case No. 3 of 1998 and that the property was properly in the name of the late Nuru Kinoti until 1998.
13. Further, the 1<sup>st</sup> – 3<sup>rd</sup> respondents averred that there were no such grants in existence as per a letter dated 27.8.2018 from Isiolo Kadhi Court and a letter dated 23.8.2018 from the land registrar on which basis the court ordered the grant to be rectified. They attached the three letters and the rectified grant as annexures marked L.N. 6 – 8, respectively.
14. Additionally, the 1<sup>st</sup> – 3<sup>rd</sup> respondents averred that the petitioners should follow the estate known as Mariah Nuru but not Nuru Kinoti, for there was no grant ad litem to institute the suit on behalf of Mariah Nuru, more so when a letter dated 8.2.2019 and order dated 16.10.2018, attached as annexures marked I.N. 9 – 10, shows that the land reverted to its original status.
15. The 1<sup>st</sup> to 3<sup>rd</sup> respondents averred that they obtained a valid title deed, entered a sale agreement with the 3<sup>rd</sup> respondent, and followed due process in transferring the land up to the issuance of title as per annexures marked I.N. "11" & "12", respectively. Moreover, the 1<sup>st</sup> – 3<sup>rd</sup> respondents averred that it was their father, Nuru Kinoti, who had built the houses on the suit land and not the 4<sup>th</sup> petitioner and further that they recorded an O.B. as with the Murungurune Police Station when they established that the 4<sup>th</sup> petitioner was destroying the trees on the suit land. They attached the O.B. an annexure marked I.N. 13.
16. The 1<sup>st</sup> – 3<sup>rd</sup> respondents averred that all orders issued on 19.11.2022, 1.3.2018 & 16.10.2018, and the grant issued were yet to be appealed, reviewed, or set aside, and more importantly if there were already an appeal at the Court of appeal, one would wonder why the same issues were before this court. The 1<sup>st</sup> – 3<sup>rd</sup> respondents averred that the 4<sup>th</sup> petitioner was abusing the court process for he had filed Nkubu E.L.C. No. E009 of 2023 and a notice of motion dated 5.5.2023 as per annexure marked I.N. "14 (a) & (b)" and a preliminary objection raised herein as annexure marked I.N. 15. They urged the court to find the notice of motion an abuse of the court process.
17. The 3<sup>rd</sup> respondent insisted that it followed due process in the property's purchase, transfer, and registration under its name. It attached the sale agreement, land control board consent, transfer forms, valuation forms, search certificate, and stamp duty payments as annexures marked MM "20", "21" & "28". It pleaded that it was an innocent purchaser for value without notice who had obtained a valid title, occupation, and possession since the status quo orders were varied on 21.11.2022 as per annexure marked MM "29".
18. Through Elias Gitari Magiri, in a supplementary affidavit filed on 2.6.2023, the petitioners averred that the cause of action before this court was that their title deeds were irregularly and illegally canceled by



- the 4<sup>th</sup> respondent in collusion with the 1<sup>st</sup> – 3<sup>rd</sup> respondents without a valid court order hence violating their constitutional right to property and therefore the issues in the Petition transcended the probate court. Further, the petitioners averred that no court order specific to their parcels of land had been produced, which led to the cancellation of the title deed.
19. As to the pending Court of Appeal matter, the petitioners averred that it related to different issues over the removal of the suit properties from the distribution schedule for the estate of Nuru Kinoti and not on whether the title deeds were properly and legally canceled without an opportunity to be heard.
  20. As to the suit in Nkubu Law Courts, the petitioners averred that it was between the 1<sup>st</sup> – 3<sup>rd</sup> respondents and the 4<sup>th</sup> petitioner over malicious destruction of her sister's property and homestead, who had to spend sleepless nights in the cold together with her family as per police reports annexed as I.C. E9 – 06. They urged to find the case properly before the court.
  21. In the 2<sup>nd</sup> application, the 1<sup>st</sup> – 3<sup>rd</sup> respondents ask the court to dismiss both the 1<sup>st</sup> application and the Petition herein for want of jurisdiction or, in the alternative, for being an abuse of the court process. The grounds are contained in the face of the application and the supporting affidavit sworn by Idris Nuru on 5.5.2023. The 1<sup>st</sup> ground is that this court lacks supervisory jurisdiction over a court of concurrent jurisdiction. Secondly, the 1<sup>st</sup> – 3<sup>rd</sup> respondents state that the Petition is a non-starter, scandalous, frivolous, vexatious, and an abuse of the court process, since the petitioners are already in the Court of Appeal vide notice dated 30.11.2022 and cannot move from the High Court to a court of concurrent jurisdiction as regards the ruling dated 21.11.2022.
  22. Thirdly, the 1<sup>st</sup> – 3<sup>rd</sup> respondents averred that there is Nkubu PMC ELC No. E009 of 2023 involving the same parties; hence the petitioners were forum shopping. Fourthly the 1<sup>st</sup> – 3<sup>rd</sup> respondents aver that the petition and the notice of motion are a total abuse of the court process due to the Meru H.C. Succession Cause No—384 of 2002, which reinstated the parent title deed to the land. Briefly, the supporting affidavit reiterates the same grounds and facts as in the replying affidavit to the 1<sup>st</sup> application.
  23. The 1<sup>st</sup> – 3<sup>rd</sup> respondents averred that the properties of the subject matter of the Petition were non-existent due to previous orders by the probate court, which reinstated the parent title, which has since reverted to the estate of the deceased, was distributed to the beneficiaries who transferred it to the current owner as per the official search attached an annexure marked I.N. “1”. The 1<sup>st</sup> – 3<sup>rd</sup> respondents attached the judgment, order, certified copies of green card, a confirmation letter from the land registrar over the changes, letter from Isiolo Kadhi's Court, rectified letters of administration letter dated 8.2.2019 reinstating the title, order dated 16.10.2018, copy of the old title, copy of the new title in the name of 3<sup>rd</sup> respondent a O.B. report, plaint and notice of motion in Nkubu law courts, a notice of appeal to the Court of Appeal and a preliminary objection in Nkubu E.L.C. No. E009 of 2023 marked as annexures “1-16” respectively. They urged the court to allow the notice of motion since the reinstatement, of the title sale and transfer to the 3<sup>rd</sup> respondent was procedural, lawful, and legal.
  24. In a replying affidavit sworn by Elias Gitari Magiri on 2.6.2023, the 2<sup>nd</sup> application was opposed by the petitioners on the basis that the cause of action and complaint before this court was on an irregular, illegal, and unprocedural cancellation of the resultant title deeds by the 4<sup>th</sup> respondent in collusion with the 1<sup>st</sup> – 3<sup>rd</sup> respondents, without due process, fair hearing, and a court order hence violating their right to own the suit properties. Further, the petitioners, while reiterating the contents of the supporting and the supplementary affidavits to the 1<sup>st</sup> application, emphasized that the no court order has been displayed specifically relating to L.R. No's Abogeta/U-Kithangari/1468, 2756, and 2757, yet the land registers by the 4<sup>th</sup> respondent annexed as E.G.M. 02 (a), (b) & (c) indicate that the cancellation



- occurred on 29.11.2018. Therefore, the petitioners averred that the questions before this court are whether they were given a chance to be heard before the revocation as provided by the Constitution and, secondly, whether the process of the cancellation of the title deed was regular or legal, which the petitioners in their considered view are issues which were not determined in the previous suits or forming part of what is pending at the Court of Appeal.
25. With leave of court, parties herein agreed to canvass the two applications through written submissions. By written submissions dated 2.6.2023, the petitioners submitted that this court has jurisdiction under Sections 4 & 13 of the Environment and Land Court Act, to handle the Petition and the issues raised herein. Whether the petitioners are entitled to conservatory orders, it was submitted that the respondents' actions to cancel the title deeds and forcefully evict them without any court order were malicious, unlawful, harmful, discriminatory, and amounted to a breach of their constitutional right to own property.
  26. On the replying affidavit by the respondents, the petitioners submitted that no court order or justification has been given for the cancellation and eviction to justify such illegal and unconstitutional actions. On the 1<sup>st</sup> – 3<sup>rd</sup> respondents' application, the petitioners submitted that they were in the right court seized of jurisdiction to determine issues on use, occupation, and ownership of land which opportunity they did not have at the probate court. Reliance was placed on *Karisa Kyengo vs L.S.K.* (2014) eKLR, *Kenya Association of Manufacturers & others vs Cabinet Secretary Ministry of Environment and National Resources and others* (2017) eKLR, *Gatirau Peter Munya vs Dickson Mwenda Kithinji & others* (2014) eKLR, *Crew & others vs AG* NRB HC Petition No. 16 of 2011. *C.B.K & another vs Highway Development Ltd & others* *Hutchings Bremer Ltd vs B.B.K. Tritex Industries L.T.D. & others vs NHC & another* (2014) eKLR. *Anastacia Ntakira vs Christopher M'Mwari & another* (2020) eKLR.
  27. On the part of the 1<sup>st</sup> – 3<sup>rd</sup> respondents, it was submitted that the petitioners had no letters of grant ad litem to enable them to file the Petition on behalf of their late father's estate since E.G.M. 01 was limited to conducting Meru Succession No. 384 of 2002. Reliance was placed on Section 2 of the Law of Succession Act, *Basirico vs K Boat Service Ltd & Guirri* N.R.B. C.A 276 of 1998. *Beatrice Kuri Francis vs Susan Gatoria M'Mukira & Others; Eco Bank Limited (Applicant)* (2021) eKLR.
  28. Further, the 1<sup>st</sup> – 3<sup>rd</sup> respondents submitted that the Petition raises no constitutional issues guided by *Earnest Co. Muga vs A.G.* (2018) eKLR as the petitioners are engaging in placing a multi-bet in desperate attempts to obtain orders on their favor at whatever cost, which practice this court should not countenance. Reliance was placed on *Kennedy Mwaura Kibebe & others vs Hon. Annie Wanjiku Kibe & others* (2021) eKLR.
  29. The 1<sup>st</sup> – 3<sup>rd</sup> respondents submitted that this court could not sit as an appellate court against orders or decisions by sister courts of concurrent jurisdiction, and therefore the 4<sup>th</sup> respondent could not be faulted for obeying court orders which have not been reviewed, appealed, or vacated.
  30. It was submitted that the 3<sup>rd</sup> respondent was an innocent purchaser for value who exercised due diligence before purchasing the property as per the documents produced in its replying affidavit sworn on 6.6.2023.
  31. The 1<sup>st</sup> – 3<sup>rd</sup> respondents further submitted that cancellation of the title deeds was not a constitutional issue and, therefore, what was before the court was not a constitutional dispute since the petitioners had conceded that they were no longer in occupation of the suit land, there would be no need to issue conservatory and inhibition orders for non-existent parcels of land.



32. The petitioners' claim is based on the Petition dated 15.3.2023, invoking Articles 19, 20, 23, 24, 27, 40, 47, and 50 of the Constitution. The 1<sup>st</sup> petitioner describes himself as the legal representative of the estate of Magiri Rinkanya deceased and the registered owners of LR Abogeta U-Kithangari/1468, 2756, and 2757, the resultant subdivisions of L.R. No—Abogeta U Kithangari 859 the registered in the name of the 3<sup>rd</sup> respondent. The petitioners allege that the late father of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> petitioner had acquired 3 acres of the land from one Maria Nuru on 12.6.2001, who failed to attend the land control board to effect the transfers until a suit was filed against her for specific performance and a consent judgment entered before the court on 27.11.2001 which has never been set aside.
33. The petitioners averred that on 6.12.2001, the seller sold the remainder of the 2 acres of L.R. No. 1468 to the deceased, who, upon payment of Kshs.420,000/= transferred the land and took vacant possession. The petitioners further averred that the deceased proceeded to subdivide LR 1468 into L.R. No.2756 to the 1<sup>st</sup> petitioner, LR No. 2757 to the 2<sup>nd</sup> petitioner, and remained with LR No. 1468, which he gifted to the 4<sup>th</sup> petitioner, who has been occupying it until she was forcefully evicted and the extensive developments on it demolished by the 3<sup>rd</sup> respondent.
34. The petitioners averred that in 2019 they established that their title deeds had been canceled out of a court order in Meru H.C. Succession Cause No.384 of 2003, yet to date, they have never come across such an order issued by the court. Nevertheless, the petitioners averred that they lodged an application dated 1.4.2019 seeking to revoke or annul the grant and remove their parcels of land from forming part of the estate of the Nuru Kinoti in succession cause mentioned above, but their application was dismissed on 21.11.2022.
35. To set aside the consent dated 27.11.2001, the petitioners averred that the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought for leave by an application dated 19.1.2020 in Meru H.C. No. 203 of 2001, which was dismissed on 4.3.2021. The petitioners averred that they were aggrieved by the ruling delivered on 27.11.2022 and filed a notice of appeal at the Court of Appeal Nyeri.
36. Additionally, the petitioners averred that the 1<sup>st</sup> and 2<sup>nd</sup> respondents illegally sold and transferred the suit land to the 3<sup>rd</sup> respondent, who, between 8.12.2022 and 27.1.2023, demolished the permanent structures on the suit land and evicted them from the subject land, causing destruction valued at Kshs.3,817,250/=, following which they made a police report on 11.8.2022 and 19.11.2022 but so far no action has been taken against the 3<sup>rd</sup> respondent.
37. Similarly, the petitioners aver that no eviction orders were issued against them or issued to cancel their title deeds. They termed the respondents' acts malicious, unlawful unilateral, wrongful, illegal, harmful, discriminatory, and amounting to a breach of Article 40 of the Constitution. Further, the petitioners term the acts of the 3<sup>rd</sup> respondent as full of impunity since its agents had taken the law unto their hand. The petitioners sought;- a declaration that the decision and actions of the 4<sup>th</sup> respondent to revoke and or cancel the title deed and reinstate the initial parcel No L.R 859 as illegal, unconstitutional, null & void, and amounting to a violation of the petitioner's right to property; An order directed at the 4<sup>th</sup> respondent to rectify and or reinstate the names of the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> petitioners as absolute owners of L.R. No's Abogeta/U-Kithangari/2756, 2757 and 1468; declaration that the actions of the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents to forcefully evict without an eviction order destroy or damage their properties were illegal unconstitutional and amounted to violation and infringement of their fundamental property right; payment of Kshs.3,817,250/= compensation for the damaged properties.; permanent prohibitory injunction restraining the respondents from trespassing or interfering in any way with the petitioner's quiet use occupation and utilization of L.R. No's. Abogeta/U-Kithangari 2756, 2757 & 1468.



38. The Petition was accompanied by a list of witnesses' statements and documents dated 15.3.2023.
39. The 1<sup>st</sup> – 3<sup>rd</sup> respondents have, through the 2<sup>nd</sup> application, raised four key grounds, namely that this court lacks supervisory jurisdiction over orders or decrees issued by a court of concurrent jurisdiction, that the issues raised herein are before the Court of Appeal, and that the petitioners are forum shopping which amounts to an abuse of the court process.
40. Jurisdiction is everything; without it, a court must down its tools as held in the *Owners of Motor vessel Lillian "S" vs Caltex Oil Kenya Ltd* (1989) eKLR. What constitutes a constitutional petition was discussed in *Anarita Karimi Njeru vs Republic* (1979) eKLR and reiterated in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. The court said that a constitutional petition should precisely state the petitioner's complaint, the provision infringed, and how they are alleged to have been infringed, violated, or threatened.
41. The basic threshold of a constitutional petition has been set under Rule 10 of the *Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules (2013)* Mutunga Rules: the facts relied upon, provisions violated, nature of injury caused, and details of any civil or criminal cases related to the matters in issue. See *Earnest Muga* (*supra*) and *Kennedy Mwaura Kibebe* (*supra*).
42. A constitutional petition must also raise a constitutional question whose answer must flow from a Constitution, not a statute. In *Geoffrey Paul Okutoyi & others vs Habil Olaka & another* (2018) eKLR, the court observed that statutory rights were not fundamental rights under the Bill of Rights and that a breach of those statutory rights must go to an ordinary court of law as per the particular statute. The court said that not every violation of a statutory right should attract constitutional petitions. Further, the court held that a party should only file a constitutional petition for decrees or denial of a constitutional right and freedom.
43. In *Benard Murage vs Fine serve Africa Ltd* (2015) eKLR, the court said where there exists an alternative statutory remedy, such as a remedy, should be pursued first. Additionally, in *Patrick Mbau Karanja vs. K.U* (2012), Lenaola J held that invoking the Bill of Rights in matters where the state was not a party would certainly dilute the sanctity of the Bill of Rights.
44. What amounts to a constitutional question or matter was also discussed in *C.C.K. vs. Royal Media Services Ltd and five others* (2014) eKLR that a party must show the rights said to have been infringed and the basis of their grievance.
45. In this Petition, the petitioners allege that though the dispute pitting the parties has been subject to previous litigation at the High Court, the constitutionality of the acts of the respondents in canceling, demolishing, and or evicting them from the suit land hence denying them the right to own the land was novice, new and has not determined in the High Court or at the Magistrate's court and was not a subject of the appeal at the Court of Appeal.
46. Article 165 2 (b) of the *Constitution* grants the High Court and Courts of equal status the mandate to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened. The High Court has also mandated to hear any questions respecting the interpretation of the *Constitution*, including whether anything done under the authority of any law was inconsistent or in contravention of the *Constitution*.
47. The entries to L.R. No.2756, 2757 & 1468 canceling the title deeds and reinstating L.R. No.859 were all made on 29.11.2018. In paragraph 11 of the Petition, the petitioners aver that they became aware of the cancellation of their title deeds in 2019. In the application dated 1.4.2019, the parties sought



inhibition and restraining orders against some of the respondents herein on similar grounds as in this Petition, including the breach of property rights enshrined in the *Constitution*.

48. The petitioners in paragraphs 7 and 8 of the supporting affidavit of the 1<sup>st</sup> application raise lack of notification by the land office before the cancellation and a request to surrender the original title deed for cancellation. They had also attached a copy of an eviction notice as MR "3". The affidavits in support had been sworn by Magiri Rinkanya, Elias Gitari Magiri, and James Karani Magiri on 1.4.2019. In the application dated 9.1.2020, the 1<sup>st</sup> & 2<sup>nd</sup> respondents in Meru H.C. Civil Case No. 203 of 2001, Magiri Rinkanya, swore a replying affidavit on 5.2.2020 and in paragraphs 10, 11, 12 & 13 thereof raised specific complaints against the land registrar and the 1<sup>st</sup> & 2<sup>nd</sup> respondents herein.
49. In the ruling on 4.3.2021, the court rightly declined to decide whether Mariah Nuru could pass a good title of the deceased's estate to the 1<sup>st</sup> petitioner and whether the 1<sup>st</sup> petitioner was a purchaser of the deceased estate. Again, the court declined an invitation to determine whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents' claim was statute-barred, and lastly, if the consent judgment dated 27.11.2001 and adopted on 3.12.2001 should be set aside. The court said the issues should be determined in Meru H.C. Succession Cause No. 384 of 2002. There was no appeal filed against the said decision.
50. In the ruling by Meru H.C.C. Succession Cause No.384 of 2002 rendered on 21.11.2022, the 1<sup>st</sup> & 2<sup>nd</sup> petitioners were parties to it while the 1<sup>st</sup> & 2<sup>nd</sup> respondents were interested parties. On pages 5 – 7 of the ruling, the court extensively dealt with its jurisdiction as a probate court vis a vis the issues bordering on ownership raised by the 1<sup>st</sup> & 2<sup>nd</sup> and 3<sup>rd</sup> petitioners in this Petition. The court rightly held that the issues raised were beyond its jurisdiction. Guided by the words of Nyarangi JA in the Owners of Motor Vessel Lillian S vs Caltex (K) Ltd (1989) K.L.R. 1, the court downed its tools and found the application dated 1.4.2019 lacking merits.
51. After that, the 1<sup>st</sup> – 3<sup>rd</sup> petitioners filed a notice of appeal dated 30.11.2022 which was received by the Deputy Registrar on 6.12.2022 against the said decision.
52. In this petition, in general, and in particular, the further replying affidavits in support of the application dated 15.3.2023 and 2.6.2023, the 1<sup>st</sup> petitioner, on behalf of the rest of the petitioners, take the view that the issues before this court are rightly before it and are not pending in the Court of Appeal since the appeal relates to totally different issues. In particular, in paragraphs 18 & 19 of the affidavit sworn on 2.6.2023, the petitioners claim on oath that what is before the Court of Appeal is unrelated to what is now before this court or was handled by the probate court.
53. From paragraphs 27, 33 – 37 of the Petition, the petitioners narrate what has led them to the Court of Appeal. Prayers 1 -6 of the application dated 1.4.2019 are similar to the reliefs raised in the petitions before this court. Ground No's 1-7 in the application above are more or less identical to grounds numbers 1-38 of the ones in the 1<sup>st</sup> application herein. The contents of the affidavit in support of the application dated 1.4.2019 and the 1<sup>st</sup> application herein are more or less the same. The facts in the application of 1.4.2019 and the Petition herein are more or less similar save for paragraphs 28-32 of the Petition and prayers numbers 3-5.
54. The petitioners herein blame the probate court for not granting the orders sought or failing to determine the issues.
55. On the other hand, the 1<sup>st</sup> – 3<sup>rd</sup> respondents term the acts by the petitioners as amounting to both forum shopping and an abuse of the court process. In my view, some of the petitioners were calling the probate court to determine matters beyond its jurisdiction. It declined the invitation to do so. Similarly, the 1<sup>st</sup> – 2<sup>nd</sup> respondents had also invited the High Court to resolve issues that should have been raised



- before the probate court. The 1<sup>st</sup> – 2<sup>nd</sup> respondents did not appeal against the ruling of March 2021 on whether the consent judgment was lawful.
56. The petitioners moved to the Court of Appeal instead of moving to this court after the ruling was delivered on 21.11.2022. Even though the probate court did not pronounce itself on the legality of the cancellation of the title deed(s), reinstatement of the original title deed, the process of cancellation, and whether the petitioners ought to have been notified, summoned, or informed of the decision, unfortunately, the petitioners opted to go an appeal.
57. In the case of *Joel Kenduiywo vs DCIO Nandi & others* (2019) eKLR, the Court of Appeal held that Section 6 of the *Civil Procedure Act* was meant to prevent abuse of the court process, where there were parallel proceedings held before two different courts with concurrent jurisdiction or before the same court at different times, based on the same facts, evidence and cause of action. The court held that the appellant had not acted in good faith since he knew of the pending suit or stay order.
58. In this Petition, the petitioners knew that they had appealed to the Court of Appeal yet came to this court arguing that this was the right forum to ventilate the issues, unlike the probate court. Unfortunately, they have appealed against the decision made by a court of equal status to a higher court.
59. Once the petitioners opt to move to the Court of Appeal, they cannot detach and approach this court on the same facts, evidence and between the same parties for a determination. The dispute is already sub-judice in this court so long as it pends in the Court of Appeal. This was the holding in *Kenya National Commission on Human Rights vs A.G. IEBC & 16 others* (2020) eKLR that the doctrine of *res judicata* and *sub-judice* aim at avoiding conflicting decisions over the same subject matter. The court held that the latter case should be stayed to await the one made earlier.
60. Rule 3 (8) of the *Mutunga Rules* grants this court powers to make such orders as may be necessary for the ends of justice or to prevent the abuse of the court process. Similarly, Rule 23 thereof grants this court powers to consider and issue conservatory orders.
61. As to what amounts to an abuse of a court process, in *Safepak Ltd vs Henry Wambega & 11 others* (2019) eKLR, the trial court had before it an application seeking to strike out a petition for being time-barred and amounting to an abuse of the court process based on the ground that it was a matter falling under the jurisdiction of the National Land Commission and not a constitutional dispute being a historical injustice claim. The primary court had given the petitioner 30 days to elect the way forward in default, the petition to stand dismissed. The court cited with approval *James Kanyita Nderitu vs. A.G & another* Nai Petition No. 180 of 2011. and others on the proposition that although there was no time limitation in matters regarding breach of constitutional rights and freedoms, the same should be brought within a reasonable period and a court has to consider the circumstances of each case including the explanation for delay availability of witnesses, length of the delay and whether justice can still be done to the parties. The court said that since the trial court had found the petition was an abuse of the court process, the only remedy available was to strike out the petition and direct the petitioner to elect which actions to pursue and which to discontinue.
62. In *Silas Make Otuke vs A.G. & others* (2014) eKLR, the court observed that an appeal destroyed the finality of a decision and that a notice of appeal was deemed as an appeal for purposes of *res judicata*. The court cited with approval *Hunter vs Chief Constable of the West Midland Police and others* (1981) 3 W.L.R. and said that it could not be ruled out that the present proceedings were an abuse of the process of the court for having been initiated by the petition for purposes of mounting a collateral attack upon a final decision by a competent court. As to whether a court could strike out a petition, the court observed that the petitioner was improperly avoiding the criminal procedure standard of proof applicable to fraud to a much lower standard of balance of probabilities in civil litigation. The court



further observed that to the extent that the Petition was brought to the court directly before other constitutionally mandated organs had an opportunity to process the complaint, it was premature. It struck out the petition in limine.

63. In this petition, the petitioners had sought more or less similar reliefs before the probate court. They have filed an appeal before the Court of Appeal but at the same time have added the 3<sup>rd</sup> and 4<sup>th</sup> respondents to the dispute as well as the 4<sup>th</sup> petitioner, who is also said to have filed a suit at Nkubu Law Courts.
64. The petitioners, given the added parties and the transfer of the suit property by the 1<sup>st</sup> – 2<sup>nd</sup> respondents to the 3<sup>rd</sup> respondents, coupled with the alleged eviction, demolition, and destruction by the 3<sup>rd</sup> respondent, urge the court to find that it has jurisdiction under Sections 3 and 13 of the Environment and Land Court Act to hear this matter. On the other hand, the 1<sup>st</sup> – 3<sup>rd</sup> respondents believe that this court cannot sit on appeal of a decision rendered by a court of concurrent jurisdiction.
65. In the case of Robert Alai Onyango vs Cabinet Secretary in Charge of Health & Others (2017) eKLR, the court observed that a High Court under Article 165 6 (6) of the Constitution has no supervisory jurisdiction over superior courts.
66. In this Petition, this court sitting as a constitutional court is being asked to declare decisions made by the 4<sup>th</sup> respondent out of court orders by a court of concurrent jurisdiction as illegal, null and void, unconstitutional, and violative of the petitioner's constitutional rights. Further, to reverse the registration of title deed in favor of the 1<sup>st</sup> – 3<sup>rd</sup> respondents by the 4<sup>th</sup> respondent invalidate the eviction actions over the petitioners by the 1<sup>st</sup> – 3<sup>rd</sup> respondents, order for payment of compensation out of damaged properties and general damages and lastly to grant a permanent prohibitory injunction restraining the respondents from trespassing and or interfering with the petitioners quite use occupation and utilization of the suit properties.
67. The bottom line is that all that petitioners are asking of this court are actions arising out of valid court orders and decisions which, other than the decisions made on 27.11.2022, were never reviewed, appealed against, or challenged in any known forum by the petitioners. The court is being asked to assume a supervisory role and invalidate those decisions or orders when there exists or exists alternative dispute resolution mechanisms, including a right of appeal to the Court of Appeal.
68. Other than the application dated 1.4.2019, there is no evidence before this court that the petitioners made a formal complaint with the land registrar and the Hon. AG, the 4<sup>th</sup> & 5<sup>th</sup> respondents in this Petition, since learning of the title deeds cancellation in 2019.
69. There is no indication if the petitioners invoked Article 47 of the Constitution as read together with the Fair Administrative Actions Act provisions as a first port of call for the complaint to be investigated and addressed. There is no indication if the petitioners took any remedial action to caution or register restrictions on the title deeds to stop any adverse action, including the transfer to third parties such as the 3<sup>rd</sup> respondent.
70. Even after filing the notice of appeal and seeking typed copies of proceedings and ruling, there is no indication if the petitioners went under a certificate of urgency to the Court of Appeal to seek stay orders. Additionally, the delay of close to six months before filing this petition and the application for conservatory orders has not been explained yet; the actions by the 1<sup>st</sup> – 3<sup>rd</sup> respondents, as per paragraph 30 of the petitioners, are said to have occurred between 11.8.2022 and 19.11.2022.
71. In Kenya Hotels Properties Ltd vs. AG & 5 others (2018) eKLR, a petition was dismissed seeking to overturn a Court of Appeal decision on the basis that one of the judges of appeal had been removed



- by the vetting board. The court termed acceding to the petition as amounting to judicial heresy and upheaval of the hierarchy of the courts. When the matter went to the Court of Appeal in *Kenya Hotels Properties Ltd vs AG & 5 others* (2020) eKLR, the court held that the *Constitution* delineates and demarcates what the High Court can and cannot do of the latter being to supervise the superior court under Article 165 (6) and what the Court of Appeal can do under Article 164 (3) of the *Constitution*.
72. The matter was escalated to the Supreme Court in *Kenya Hotels Properties vs A.G. & another* (2020) eKLR. The Supreme Court held that a High Court could not re-open cases finalized by an apex court.
  73. The petitioners have submitted this Petition as a different cause of action from what was in the probate court and is now before the Court of Appeal. In *Kennedy Mwaura Kibebe & 3 others* (*supra*) cited with approval *Black Laws Dictionary* where a cause of action was defined as a group of operative facts giving rise to one or more basis for suing a factual situation that entitled one person to obtain a remedy in court from another person. The court also cited with approval *Kenya Sections of the International Commission of Jurists Vs Ag & others* (2012) eKLR, where it was observed that an abuse of court process as a party's guilty action with a perceived attempt to maneuver the court's jurisdiction in a manner incompatible with the goals of justice.
  74. In this Petition, the court has set out what pleadings and issues were before the High Court sitting as a probate court, what was taken to the Court of Appeal, and what is now before this court. The facts as pleaded are more or less the same. The documents in support of the petition and the supporting affidavit to the application for conservatory orders are the same documents and decisions made before the High Court and the probate court.
  75. The court is being urged to sit as a constitutional court while exercising its jurisdiction under Sections 3 & 13 of the *Environment and Land Court Act*. Parties need to appreciate the architecture of our court system as set out under Chapter 10 of the *Constitution* in general and, in particular, the superior courts. Each has a defined and delineated mandate. The High Court and courts of concurrent jurisdiction have equal status. Both have a mandate to sit as constitutional courts. There can be no sibling rivalry. Each is mandated to serve Kenyans and litigants. As held in *Samuel Kamau Macharia & another vs. K.C.B. Ltd & 2 others* (2012) eKLR, a court of law can only exercise the jurisdiction conferred by the *Constitution* or any other written law.
  76. The petitioners are inviting this court to sit on appeal of decisions by courts of concurrent jurisdiction before my elder sibling, the Court of Appeal.
  77. This court has no powers to hear and determine matters properly before the Court of Appeal by dint of Article 164 of the *Constitution*.
  78. The issue of conservatory orders in the manner suggested by the petitioners would be tantamount to staying valid and legal orders properly before the Court of Appeal and orders made by my sibling, the High Court. This court lacks the power to untie those shoelaces. I have said enough to demonstrate that the Petition and the applications are maneuvered by the petitioners to avoid the appeal before the Court of Appeal and purport to wear a different hat of a constitutional petition, yet what is before the court is a disguised memorandum of appeal over some decisions or orders by a court of concurrent jurisdiction whose period of appeal expired and the decision became implemented. The petitioners are guilty of laches and indolence to the extent that potential witnesses may no longer be alive.
  79. The upshot is that I find the Petition before me an abuse of the court process and incompetent. The same is struck out with costs to the 1<sup>st</sup> – 3<sup>rd</sup> respondents. Any interim orders issued herein are hereby discharged forthwith.



**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON  
THIS 12<sup>TH</sup> DAY OF JULY 2023.**

In Presence Of:

C.A John Paul

Arithi for petitioners

Ashava for Mutuma for 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Mbaikyatta for 4<sup>th</sup> & 5<sup>th</sup> respondents

**HON. CK NZILI**

**ELC JUDGE**

