



**Nyiro & 200 others v Total Oil Products (East Africa) Limited & 3 others (Environment & Land Case 52 of 2021) [2023] KEELC 21593 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21593 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 52 OF 2021  
LL NAIKUNI, J  
NOVEMBER 1, 2023**

**BETWEEN**

**MWALUNGO MWAMBUI NYIRO ..... 1<sup>ST</sup> PLAINTIFF  
SAFARI CHARO NGAO ..... 2<sup>ND</sup> PLAINTIFF  
MARY TUNJE MAKUPE ..... 3<sup>RD</sup> PLAINTIFF  
JUMA MANGI KALUME ..... 4<sup>TH</sup> PLAINTIFF  
DONALD CHOME DZOMBO & 196 OTHERS ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**TOTAL OIL PRODUCTS (EAST AFRICA) LIMITED ..... 1<sup>ST</sup> DEFENDANT  
HEDGE FARM LIMITED ..... 2<sup>ND</sup> DEFENDANT  
DONALD GRAHAM GEBBETT ..... 3<sup>RD</sup> DEFENDANT  
AFRA NORMAN GEBBET ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. What is before this Honorable Court for its determination are three (3) Notice of Motion applications. The said applications are dated 4<sup>th</sup> March, 2022 by the 1<sup>st</sup> to 57<sup>th</sup>, 81<sup>st</sup> to 156<sup>th</sup> and other Plaintiffs, another is dated 11<sup>th</sup> April, 2022 by the 2<sup>nd</sup> Defendant and the third one is dated 6<sup>th</sup> May, 2022 by the 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs respectively. In a nutshell, the filed applications revolving around citing parties for contempt of Court for disobeying Court orders and striking out of pleadings.
2. Upon service of these applications, some of the Respondents did file their responses. The Honourable Court will deal with them herein below. For good order, the Honourable Court will handle these



applications separately but simultaneously. The parties will be referred to simply as Plaintiffs and Defendants for ease of flow.

## II. The Notice of Motion application dated 4<sup>th</sup> March, 2022 by the 1<sup>st</sup> to 57<sup>th</sup>, 81<sup>st</sup> to 156<sup>th</sup> and other Plaintiffs

3. The Application was brought under Sections 1A, 1B, 3A, 63(c) and 63(c) of the Civil Procedure Act, Cap. 21, Order 40 Rule 3(1) and (3) of the Civil Procedure Rules (2010), Article 159 (1) & (2)(c) of the Constitution of Kenya, 2010. The Plaintiffs sought for the following orders:
  - i. Spent.
  - ii. That this Honourable Court be pleased to cite the Directors of the 2<sup>nd</sup> Respondent's for Contempt of Court Orders granted by this Honourable Court on 14<sup>th</sup> December 2021 and commit them to civil jail for a period of six (6) months or less as the Court shall please.
  - iii. That the 2<sup>nd</sup> Respondent be ordered to give possession of the Land Reference Numbers CR. 5770 Plot No. 5/III/MN and or CR.13026 Plot No. 470/III/MN to the Applicant for purpose of reclaiming their homes and farms for shelter and farming and accessing the well for the adequate supply of water, pending the hearing and determination of this Application.
  - iv. That the subdivision on the Land Reference Numbers CR.5770 Plot No.5/III/MN and or CR.13026 Plot No. 470/III/MN be nullified and any subsequent sales be vacated.
  - v. That the costs of this Application be borne by the Respondents.
4. The Application is based on the grounds, testimonial facts and the averments made out under the 16 Paragraphed Supporting Affidavit of Mwambogo Kashihiri sworn and dated 4<sup>th</sup> March, 2022 together with seven (7) annexures marked as “MK – 1 to 7” annexed thereto. He deponed as follows That:-
  - a. On 5<sup>th</sup> July, 2021 the Plaintiffs filed an Application seeking injunctive Orders against the Defendants which inter alia, to restrain them by themselves, their agents or any other person from evicting, demolishing, harassing, selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance transfer of any concluded by public or private treaty, taking possession, appointing receivers or exercise any power conferred by the provision of Section 90 (3) of the Land Act, 2012, from leasing, letting, charging or otherwise interfering with all That parcels of land known as Land Reference Numbers CR. 5770 Plot No.5/III/MN and/or CR. 13026 Plot 470/III/MN (Original No. 5/3) situated at Kikambala (Hereinafter referred to as “The Suit Land”);
  - b. On 19<sup>th</sup> January 2022, this Honourable Court issued elaborate and concise Orders which directed and ordered, inter alia, That;
    - “ 1) .....
    - 2) .....
    - 3) That an interim injunction do issue against the Defendants by themselves, their agents or any other person from evicting, demolishing, harassing, selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance transfer of any concluded by public or private treaty, taking possession, appointing receivers



or exercise any power conferred by section 90 (3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with all That parcels of land known as Land Reference Numbers CR.5770 Plot No.5/III/MN and/or 470/III/MN pending the bearing and determination of the main suit of the Originating summons herein.

- 4) That an order be issued directing the Land Registrar to prohibit or restrict dealings to all parcel land known as Land Reference Numbers CR.5770 Plot No. 5/III/MN and/or 470/III/MN pending the bearing and determination of the main suit of the Originating summons herein.
- 5) That the OCPD Mtwapa Police Division, DCC Majengo, OCS Mtwapa & OCS Kijipwa police station do assist in compliance of these orders and further restrain and/or evicting and/ or demolishing and/ or harassing and/or interfering in any manner with the Plaintiff's / Applicant's occupation of all That parcel of land known as Land Reference Numbers CR. 5770 Plot No. 5/III/MN and/or 470/III/MN pending the hearing and determination of the main suit of the Originating summons herein.
- 6) .....
- 7) .....
- 8) .....
- 9) .....
- 10) That the status quo to be maintained on the land meaning to remain as is without any activities or development taking place is beard and determined.

- c. This Honourable Court granted the Plaintiffs Interim Orders on 14<sup>th</sup> December, 2021, inter-alia restraining the Defendants against from evicting, demolishing, harassing, selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance transfer of any concluded by public or private treaty, taking possession, appointing receivers or exercise any power conferred by Section 90 (3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with the suit land pending the hearing and determination of the main suit. (Annexed hereto and marked as “MK - 1” was true copy of the Order issued on 14<sup>th</sup> December, 2021).
- d. The interim orders not only meant to bar any change of ownership of the suit property but were also to maintain the occupation of the Plaintiffs, status and condition of the suit land.
- e. The record of the proceedings and the copy of the order issued on 14<sup>th</sup> December, 2021 demonstrated That the said Interim Orders were issued in the presence of the 2<sup>nd</sup> Defendant's Advocate and as such the 2<sup>nd</sup> Defendant had at all material times been well versed with the terms, effect and purpose of the Order.
- f. Despite service on the relevant stakeholders and in deliberate blatant defiance of the subsisting Court Orders, the directors of the 2<sup>nd</sup> Defendants in full knowledge of the existing interim orders, circumvented the Court Order, initiated and caused their agents and/or servants,



in liaison with OCPD Mtwapa Police Station, OCS Kijipwa and the Coast Region GSU Commander and other security agencies unknown to the Plaintiffs, (Annexed hereto and marked as “MK - 2” were true copies of photographs of the aftermath of the demolition and eviction) defied the Court Order and had harassed, forcefully and illegally demolished the Plaintiffs’ homes, evicted them from their ancestral land being the suit land rendering them squatters and homeless. Annexed hereto and marked as “MK - 3” were true copies of photographs of the aftermath of the demolition and eviction.

- g. The 2<sup>nd</sup> Defendant with the help of OCPD Mtwapa Police Station, OCS Kijipwa and the Coast Region GSU Commander and other security agencies unknown to the Plaintiffs proceeded construct a wall (Annexed hereto and marked as “MK-4” were true copies of photographs of the wall) completing demarcating the suit land and hence taking possession of the same, erecting beacons (Annexed hereto and marked as “MK - 5” were true copies of photographs of the various beacons erected on the property) and sub-dividing the parcel into smaller portions, advertising the same for sale by private treaty (Annexed hereto and marked as “MK - 6” was a copy of the photograph of the notice of sale banged on the wall) in complete disregard and disdain to the Court’s Order of 14<sup>th</sup> December, 2021.
- h. A copy of the search record obtained by the Plaintiffs on the suit land indicated That the 2<sup>nd</sup> Defendant was the registered owner of the same. (Annexed hereto and marked as “MK - 7” was a copy of the Certificate of Search as on 21<sup>st</sup> May, 2021).
- i. Unless the Application was urgently heard and the orders sought herein granted, the Order of 14<sup>th</sup> December 2021 would continue to be trifled, ridiculed and ignored at and risk being orders in futility while the Plaintiffs continued to suffer substantial loss and damage.
- j. The defiance of the said Orders exposed the Plaintiffs to the very risk That the Court intended to curtail in its interim orders of 14<sup>th</sup> December, 2021 and it was imperative That Court Orders be obeyed in order to administer justice and safeguard the Rule of Law.
- k. The Said court orders had neither been appealed against, stayed or varied meaning That the Defendants were intentionally defying the existing operational orders issued by this Court with impunity and ought to be found in contempt of the same.
- l. This Honorable court has jurisdiction to grant the orders sought.
- m. Indeed the interest of justice shall be served if orders sought herein were granted.
- n. It was in the interest of justice That the orders sought herein be granted.

**A. The response by the 2<sup>nd</sup> Defendant’s to the Notice of Motion application dated 4<sup>th</sup> March, 2022**

- 5. The 2<sup>nd</sup> Defendant opposed the application by way of a 28<sup>th</sup> paragraphed Replying affidavit of Karim Alarakhia, a director of the 2<sup>nd</sup> Defendant sworn on 11<sup>th</sup> April, 2022 together with six (6) annexures marked as “KAA 1 to 6” annexed thereto. He averred as follows:
  - a. The application was made in bad faith, malicious, without any basis. It was only meant to harass, intimidate and frustrate the 2<sup>nd</sup> Defendant in an attempt to have them abandon their property so That the Plaintiffs could go ahead and acquire it.
  - b. Their company purchased the said suit land for a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) as consideration thereof and hence acquired it from Donald Graham Gebbett



and Ilfra Norma Gebbett (Annexed herewith and produced as exhibit was the Transfer instrument dated 20<sup>th</sup> June 1980 and marked as “KAA – 1”).

- c. Their Company was the Registered and absolute owner of the Property known as Sub Division No. 470 (Original No. 5/3) of Section III Mainland North – the suit land - situated in Kikambala (Annexed herewith and produced as exhibit was the Certificate of Title and marked as “KAA - 2”).
- d. Since the purchase of the said parcel of land in the year 1980 the company had been in occupation of the whole portion of land measuring approximately 50.182 Hectares carrying out its farming business of poultry, agriculture and dairy.
- e. To date, the company had been in occupation and possession of the whole parcel of land where it still undertook the business of poultry rearing, dairy farming and vegetable farming.
- f. On 24<sup>th</sup> May, 2018 he received a report from Hime and Zimmerline Licensed Surveyors pursuant to instructions given to them to locate and check all the boundary beacons of the property.
- g. The said Hime and Zimmerline prepared a report whereby they made the following confirmations and observations:
  - i). That there were existing structures on the property covers an area of about 8 Hectares;
  - ii). The remainder of Plot No.470 Section III Mainland North had no structures at all;
  - iii). There were no squatters on the property during the time of survey;
  - iv). There were no structures That did not belong to the owners of Plot No. 470 as at 11<sup>th</sup> May 2018. (Annexed herewith and produced as exhibit is the Report dated 24<sup>th</sup> May 2018 and marked as “KAA -3”).
- h. In addition to the above, Lady Justice A. Omollo during a site visit conducted 16<sup>th</sup> November 2018 which was done in “ELC (Mombasa) Case No. 142 of 2014 (O.S) Salim Bakari Mwinyi & Others – Versus - Mohamed Ali Moses alias Gandi & Others confirmed That there were no squatters at the suit land.
- i. In part of her report, when she made a visit to the suit land (then the 6<sup>th</sup> Defendant) she had the following observations to make:

The 6<sup>th</sup> Defendants portion was also on Malindi Road and was developed with 6<sup>th</sup> Defendants structures and housing used for their farming activities. She was able to see a farm of paw paws planted by the 6<sup>th</sup> Defendant.

The 6<sup>th</sup> Defendant employee stated That the land was sold to the 6<sup>th</sup> Defendant by Gabel. The farm glowed with maize and michicha’. (Annexed herewith and produced as exhibit was the said part of the Site Report dated 24<sup>th</sup> May 2018 and marked as “KAA – 4”).
- j. On 17<sup>th</sup> July 2021, she instructed Edward Kiguru Surveyor to undertake a survey over the suit land for purposes of ascertaining the area whereby his neighbors were farming and which was part of his parcel of land.
- k. Through his survey Report dated 17<sup>th</sup> July, 2021 made the following findings:



- i. The encroached area by the neighbor squatters was 1.15 Hectares;
  - ii. The boundary line on the ground be as pe the approved survey plan and not as claimed by squatters;
  - iii. There was neither a house nor a structure erected on the hatched area. The squatters had only done farming on this area hence claiming it belonged to them and was not part of Plot No. 470/III/MN;
  - iv. The squatters had also started planting palm trees on the area being claimed to be not part of the subject plot. (Annexed herewith and produced as exhibit was the Report dated 16<sup>th</sup> July, 2021 and marked as “KAA -5”).
- l. The suit property was sub - divided and a Certificate of subdivision obtained on 31<sup>st</sup> August 2021 before the ruling was issued therefore no contempt on their part since the order was not delivered at the time when the sub - division took place. (Annexed herewith and produced as exhibit was the Subdivision Certificate dated 31<sup>st</sup> August 2021 and marked as “KAA – 6”).
  - m. The plot number in question and subject of this suit was inexistent thus no rights -may arise thereof. They were shocked by the application dated 4<sup>th</sup> March 2022 brought by the Plaintiffs seeking contempt orders when in fact the report indicated That there were no structures erected on the property.
  - n. The orders issued by the Court on 14<sup>th</sup> December 2021 were not served on the 2<sup>nd</sup> Defendant’s Directors neither was there an affidavit of service on record, and as such the directors lacked the knowledge of the orders issued therein. The application and the supporting affidavit was incompetent and did not disclose adequate material and or information to warrant the orders sought. The Application was full of unfounded information and more specifically under the contents of Paragraphs 6 of the affidavit of Mwambogo Kashihiri were not supported by any fact and/or proof as to when the orders were breached.
  - o. The wild accusation contained in the contents of Paragraph 7 of the affidavit remained vague and unsubstantiated as it was not very clear to discern which day, place and time the said orders of 14<sup>th</sup> December 2021 were breached. It was utterly quite misleading for the Plaintiff to allege That the 2<sup>nd</sup> Defendant had proceeded to disobey the orders That had been issued by this Honourable Court. The contempt orders sought by the Plaintiffs were unfounded and unsubstantiated since the said orders had not in any way been breached.
  - p. The photographs annexed by the Plaintiffs did not meet the requirements of the Evidence Act in That there was no certificate attached in support thereof.
  - q. The 2<sup>nd</sup> Defendant was still the owner of the suit property and the Plaintiffs had not proved That the same had been disposed of and or transferred to third parties. Therefore there had been no breach on the orders issued on 14<sup>th</sup> December 2021. The contempt orders sought by the Plaintiffs was an attempt to mislead the court, the court ought not to grant the orders sought.
  - r. There wasno development on going and or which had been undertaken from the time the orders were issued and the allegations by the Plaintiffs was utterly false and only intended to mislead this Honourable Court.
  - s. The Plaintiffs’ application was unmeritorious, without any basis and only intended to waste precious judicial time and to settle personal scores.



- t. Therefore, he prayed That the Plaintiffs’ Notice of Motion application dated 4<sup>th</sup> March 2022 be dismissed with costs.

**B. The responses by the 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs to the Notice of Motion application dated 4<sup>th</sup> March, 2022**

6. The 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs further support of the said application by the Plaintiffs dated 4<sup>th</sup> March, 2022 through a 13<sup>th</sup> Paragraphed Replying affidavit sworn by Philip Ngari Karisa on 6<sup>th</sup> May, 2022 together with eleven (11) annexures marked as “PNK – 1 to 11” annexed thereto. He averred That:
- a. Sometimes in the year, 2021 they filed an originating summons application together with a notice of motion application and the later was amended with leave of the court on the 7<sup>th</sup> day of July, 2021 seeking to be declared as the owners of all That parcel of land known as MN/111/5 AND/OR MN/111/470 CR. NO. 13026 situate at Kijipwa in Kilifi County.
  - b. They fully supported the application dated 4<sup>th</sup> March, 2022 and fully subscribed to the contents of the application and the affidavit of Mwambugo Kahsihiri and in support of the application he swore this affidavit in reply and support of the same.
  - c. Sitting at Mombasa Justice Yano issued orders in the nature of Temporary injunctions restraining the Defendants and/or their agents from evicting, selling, offering for sale and/or completing by conveyance pending the hearing and/or determination of the application dated the 5<sup>th</sup> day of July, 2021 and/or the main suit. (Annexed herewith and marked as “PNK -1” a true copy of the order dated the 6<sup>th</sup> day of July, 2021).
  - d. Their Advocates on record effected service of all pleadings and/or the aforementioned order upon the Defendants and in particular the 2<sup>nd</sup> Defendant who through its authorized agents instructed the law firm of Messrs. Khalid Salim & Company Advocates to make an application lifting the orders dated the 6<sup>th</sup> day of July, 2021 an application which was dismissed with costs to them on the 14<sup>th</sup> day of December, 2021.
  - e. Immediately upon the service of the orders, the Defendants aided by the Law firm of Messrs. Khalid Salim & Company Advocates conducted a subdivision of the suit premises and obtained a new map of the same with new land registration numbers in violation of the orders of this court dated the 6<sup>th</sup> day of July, 2021. (Annexed herewith and marked as “PNK – 2” was a true copy of the map of the suit property after illegal sub - division of the suit property violation of the orders dated the 6<sup>th</sup> day of July, 2021).
  - f. On the 17<sup>th</sup> day of March, 2021, while conducting their daily activities on the suit property their attention was drawn of a foreigner one Mr. Daniel Kyalo Mwanthi whose presence on the premises seemed suspicious thus prompting the other Plaintiffs herein and/or himself to confront him to which he disclosed That he was doing physical inspection of the property as the 2<sup>nd</sup> Defendant had accepted his offer to buy part of the suit premises.
  - g. They demanded to peruse the documents in custody of Mr. Mwanthi and to their surprise they learnt That the conveyancing instruments had been drawn by the Law firm of Khalid Salim & Company Advocates and signed in particular by Mr. Khalid Salim. (Annexed herewith and marked as “PNK – 3” and “PNK – 4” were true copies of the letter of offer dated the 8<sup>th</sup> day of February, 2022 and the draft sale agreement respectively).



- h. Some of the Plaintiffs herein were agitated by the actions of the 2<sup>nd</sup> Defendants and Mr. Mwanthi thus called the police from Mtwapa Police Station who summoned Mr. Mwanthi recorded the statement vide OB NO. 48 of the 17<sup>th</sup> March, 2022 where he produced various correspondences received from Mr. Khalid Salim Advocate and Najat Seif all working for Messrs. Khalid Salim & Company Advocates (Annexed herewith and marked as “PNK – 5”, “PNK – 6”, “PNK – 7”, “PNK – 8”, “PNK – 9”, “PNK – 10”, “PNK – 11”, “PNK – 12” and “PNK – 13” were true copies of the OB dated the 17<sup>th</sup> day of March, 2022, letter of offer dated the 5<sup>th</sup> day of February, 2022, copies of titles of part of the suit property, email dated 15<sup>th</sup> day of February, 2022, email dated 8<sup>th</sup> day of February, 2022 email dated 11<sup>th</sup> day of February, 2022, email dated 23<sup>rd</sup> day of February, 2022, email dated 28<sup>th</sup> day of February, 2022 and email dated 17<sup>th</sup> day of March, 2022 respectively).
- i. They ought to participate in the notice of motion application dated the 4<sup>th</sup> March, 2022 for contempt on the part of the 2<sup>nd</sup> Defendant and they shall during hearing of the application intend to proceed by adducing viva voce evidence, As such they shall be calling representatives of the Law firm of Messrs. Khalid Salim & Company Advocates including Mr. Khalid Salim Advocate and Mr. Najat Seif as their witnesses being the advocates and/or firm of advocates with instruction to conduct conveyancing of the suit premises for the 2<sup>nd</sup> Defendant.
- j. It was imperative That Mr. Khalid Salim Advocate and all other Advocates practicing in the name and style of Messrs. Khalid Salim & Company Advocates, be disqualified from representing the Client – the 2<sup>nd</sup> Defendant in the matter herein.
- k. It was also in the interest of justice That the Replying Affidavit dated the 11<sup>th</sup> April 2022 by Mr. Karim Alarakhia and drawn by the Law firm of Messrs. Khalid Salim & Company Advocates with respect to the notice of motion application dated the 4<sup>th</sup> March, 2022 be struck out as the Advocate who drew the same was guilty of conflict of interest.

### **III. The Notice of Motion application dated 11<sup>th</sup> April, 2022 by the 2<sup>nd</sup> Defendant**

- 7. The Application was brought under the provision of Sections 1A, 1B, 3A, 6 and 7 of the [Civil Procedure Act](#), Cap. Order 2 Rule 15, Order 51 Rule 1 of the Civil Procedure Rules, 2010.
- 8. The 2<sup>nd</sup> Defendant in its Notice of Motion application sought for the following orders:
  - i. That the Plaintiffs’ Amended Originating Summons filed on 7<sup>th</sup> July 2021 and the entire suit be struck out with costs to the Defendants.
  - ii. That the costs of this application and the suit be awarded to the Defendant.
- 9. The application was grounded on the face of it and in the 21 Paragraphed affidavit in support of the same by Karim A. Alarakhira, a director of the 2<sup>nd</sup> Defendant sworn 11<sup>th</sup> April, 2022 where he averred That:
  - a. The Plaintiffs through Salim Bakari Mwinyi herein had initially instituted Mombasa Misc Application 142 of 2014. Salim Bakari Mwinyi & Others and Mohamed Ali Moses alias Gandi and Others against, the Defendant herein as the 6<sup>th</sup> Respondent, seeking for orders That they be declared owners of the Property known as Sub Division No.470 (Original No. 5/3) of Section III Mainland North CR No.13026 by way of adverse possession. (Annexed herein and produced as exhibit is a true copy of the Originating Summons dated 10<sup>th</sup> June 2014 marked as KAA 1).



- b. The Plaintiffs herein also instituted Petition No 2 of 2018: Henry Wambega and 733 Others – Versus - the Government of Kenya Through the Hon. Attorney General & Others against the Defendant herein as the 5<sup>th</sup> Respondent. (Annexed herein and produced as exhibit is a true copy of the amended Petition dated 29<sup>th</sup> July 2019 and marked as “KAA - 2”).
- c. The above Petition was filed by the Petitioners on behalf of the occupants of the suit premises amongst them, the Property known as Sub Division No. 470 (Original No. 5/3) of Section III Mainland North CR No. 13026 for which they sought to be declared owners by way of ancestral domain.
- d. The Plaintiffs later abandoned Mombasa Misc Application 142 Of 2014: Salim Bakari Mwinyi & Others and Mohamed Ali Moses alias Gandi after a Ruling by the Hon Lady Justice Omollo on the 13<sup>th</sup> December 2018 where she directed That the Petitioners elect which suit, they would pursue between Mombasa Misc Application 142 of 2014 and Mombasa ELC Petition No 2 of 2018, within 30 days. (Annexed herein and produced as exhibit was a true copy of the ruling dated 13<sup>th</sup> December 2018 marked as “KAA – 3”).
- e. On 26<sup>th</sup> February 2019, advocate on record for the Petitioners in Mombasa ELC Petition 2 of 2018 informed the court That they had elected to withdraw Mombasa ELC No 142 of 2014 and proceed with the Petition. (Annexed herein and produced as exhibit was a true copy of the Notice of withdrawal marked as “KAA – 4”).
- f. Mombasa ELC Petition No 2 of 2018 proceeded for hearing before the Hon. Justice Munyao who delivered a Judgment on 22<sup>nd</sup> October 2020 dismissing the Petition. (Annexed herein and produced as exhibit was a true copy of the Judgment dated 22<sup>nd</sup> October 2020 marked as “KAA – 5”).
- g. Therefore, the suit herein was “Res Judicata” in light of Mombasa Misc Application 142 of 2014: Salim Bakari Mwinyi & Others vs Mohamed Ali Moses Alias Gandi & Others which the Petitioners sought to abandon in favor of Mombasa ELC Petition No 2 of 2018.
- h. In Malindi ELC No. 224 of 2017, the Plaintiffs claimed to have brought the suit in their own capacity and on behalf of 538 other occupants of the suit property also sought to be declared its owners by way of adverse possession. (Annexed herein and produced as exhibit was a true copy of the Amended Originating Summons dated 26<sup>th</sup> June 2018 marked as “KAA – 6”).
- i. Hon. Justice Olola delivered a Ruling and dismissed the Plaintiffs Application seeking orders from the Court to allow them to bring a representative suit on their behalf and on behalf of 538 others. (Annexed herein and marked as exhibit was a true copy of the Ruling dated 5<sup>th</sup> December 2019 marked as “KAA – 7”).
- j. In the present suit the Plaintiffs claimed to have brought the suit in their own capacity and on behalf of 196 other occupants of the suit property also seeking to be declared its owners by way of adverse possession.
- k. In the above suit, the Plaintiffs had also sought similar orders as those sought herein and particularly That: A declaration That the Plaintiffs were the rightful owners of the suit land having obtained the same by way of adverse possession.
- l. Further, the suit herein was Res Judicata in light of the Petition No 2 of 2018 Henry Wambega & 733 Others the Government of Kenya Through the Hon. Attorney General & Others which was dismissed by Hon Justice Munyao in his Judgment of 22<sup>nd</sup> October 2020.



- m. In the alternative the suit herein was Sub Judice in light of Malindi ELC No. 224 of 2017 which was pending determination by the Malindi ELC before Lady Justice Odeny and a ruling scheduled to be delivered on 27<sup>th</sup> April 2022.
  - n. The above Originating summons as well as the Petition had been brought by the Plaintiffs on behalf of the occupants of the plots known as Plot No Sub Division No. 470 (Original No. 5/3) of Section III Mainland North CR No. 13026 on which the Plaintiff herein also claims to be occupants.
  - o. In the above suits as well as the present suit, the Plaintiffs seek That the subject matter mother land – the suit land - be allocated to the Plaintiffs/Petitioners and all individuals existing on it by way of adverse possession and ancestral domain.
  - p. This suit was fatally defective as it offended the mandatory provisions of Sections 6, 7 and 8 of the Civil Procedure Act, Cap. 21.
  - q. Therefore, the entire suit was misconceived, bad in law, an abuse of the Court process and ought to be dismissed with costs to the Defendant.
  - r. The Plaintiffs herein had resorted to misusing the judicial process by forum shopping and filing multiple suits in different courts seeking to deprive the defendant herein of its constitutional right to quiet possession and occupation of its legally acquired property.
10. The 2<sup>nd</sup> Defendant through its director Karim A. Alarakhia filed a 13 Paragraphed further affidavit sworn of 21<sup>st</sup> April, 2022 where he averred That:
- a. He reiterated the contents of his Affidavit in support of the application dated and filed on 11<sup>th</sup> April 2022 seeking this Honourable Court to strike out the entire suit for being “Res Judicata”.
  - b. The Plaintiffs herein preferred an appeal against the decision of Justice Munyao delivered on 22<sup>nd</sup> October 2020 dismissing ELC Petition 2 of 2018. Henry Wambega & 733 Others the Government of Kenya Through the Hon. Attorney General & Others being Mombasa Court of Appeal Civil Application No. 61 of 2021: Danson Mwagambo Mwadzoya & 484 Others vs Hedge Farm limited & Others.
  - c. The Applicants in the above suit filed an application dated 30<sup>th</sup> August 2021 seeking to extend time to file and serve their appeal.
  - d. The reason for not filing their appeal and record of appeal on time was That their advocate on record was out of the country sometime in March 2021 and could not receive instructions, and That they were not financially able to prepare the record of appeal on time due to its sheer volume and number of sets required and That some of the Applicants were aged and this had disoriented the process of preparing and filing record of appeal.
  - e. Upon parties filing their responses the court directed the parties to file their submissions with respect to the application.
  - f. When the matter came up for hearing of the application by the applicants, the Advocate for the applicants requested for 14 days within which to file their submission. The Respondents through their advocates opposed the request for adjournment.
  - g. The court found That the applicants had had sufficient time to file the submissions and proceeded to dismiss the application for extension of time (Annexed herewith and produced as



exhibit is the order of the Court delivered on 4<sup>th</sup> April 2022 by JA Gatembu marked as “KAA – 1”).

- h. In light of the above facts, the appeal preferred by the Applicants therein also stood dismissed.
- i. Therefore, the entire suit was misconceived, bad in law, an abuse of the Court process and ought to be dismissed with costs to the 2<sup>nd</sup> Defendant.
- j. The Plaintiffs herein had resorted to misusing the judicial process by forum shopping and filing multiple suits in different courts seeking to deprive the 2<sup>nd</sup> Defendant herein of its constitutional right to quiet possession and occupation of its' legally acquired property.
- k. The affidavit was in support of the Notice of Motion application dated 11<sup>th</sup> April, 2022.

#### **A. The Response by the 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs to the Notice of Motion application dated 11<sup>th</sup> April, 2022**

- 11. The 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs opposed the application by the 2<sup>nd</sup> Defendant through a 6 Paragraphed Grounds of Opposition dated 6<sup>th</sup> May, 2022 on the following basis:
  - a. That the application was incurably defective thus could not be resuscitated even with an amendment.
  - b. That the 2<sup>nd</sup> Respondent was raising a preliminary issue at trial as directions of trial and/or case management was dispensed with.
  - c. That the 2<sup>nd</sup> Respondent ought to have filed a notice of preliminary objection as opposed to a notice of motion application.
  - d. That the 2<sup>nd</sup> Respondent had not demonstrated the requisite elements of Res Judicata and neither had he demonstrated That parties were all the same and That the matters in contention were the same and/or were heard and determined by a court of competent jurisdiction.
  - e. That the 2<sup>nd</sup> Respondent sought to strike out the Applicants' suit actions which were of a draconian effect and ought to be exercised sparingly.
  - f. That the application lacked merit, an abuse of court process and meant to delay justice.

#### **IV. The Notice of Motion application dated 6<sup>th</sup> May, 2022 by the 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs**

- 12. The application was brought under the provision of Order 51 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3B of the Civil Procedure Act Cap. 21 and Article 159(2)(d) of the Constitution of Kenya of 2010.
- 13. The 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs sought for the following orders:
  - a. spent
  - b. spent
  - c. That this Honourable Court be pleased to Order That Khalid Salim and all other advocates practicing in the name and style of M/S Khalid Salim & Company Advocates, be and is hereby disqualified from representing the Client/Respondent in the matter herein.



- d. That the replying Affidavit dated the 11<sup>th</sup> April 2022 by Mr. Karim Alarakhia and drawn by the firm of Khalid Salim & Company Advocates with respect to the notice of motion application dated the 4<sup>th</sup> March, 2022 be expunged.
  - e. That the costs of this application be provided for.
14. The 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs through, Philip Ngari Karisa the 63<sup>rd</sup> Plaintiff herein supported the application through a 14<sup>th</sup> paragraphed affidavit where he averred That:
- a. Sometimes in the year, 2021 they filed an originating summons application together with a notice of motion application and the later was amended with leave of the court on the 7<sup>th</sup> day of July, 2021 seeking to be declared as the owners of the suit land.
  - b. Sitting at Mombasa Justice Yano issued orders in the nature of Temporary injunctions restraining the Defendants/Respondents and/or their agents from evicting, selling, offering for sale and/or completing by conveyance pending the hearing and/or determination of the application dated the 5<sup>th</sup> day of July, 2021 and/or the main suit. (Annexed herewith and marked as “PNK – 1” a true copy of the order dated the 6<sup>th</sup> day of July, 2021).
  - c. Their advocates effected service of all pleadings and/or the aforementioned order upon the Defendants and in particular the 2<sup>nd</sup> Defendant who through its authorized agents instructed the Law firm of Messrs. Khalid Salim & Company Advocates to make an application lifting the orders dated the 6<sup>th</sup> day of July, 2021 an application which was dismissed with costs to ourselves on the 14<sup>th</sup> day of December, 2021.
  - d. Immediately upon the service of the orders, the Defendants aided by the Law firm of Messrs. Khalid Salim & Company Advocates conducted a sub - division of the suit premises and obtained a new map of the same with new land registration numbers in violation of the orders of this court dated the 6<sup>th</sup> day of July, 2021. (Annexed herewith and marked as “PNK – 2” a true copy of the map of the suit property after illegal subdivision of the suit property in violation of the orders dated the 6<sup>th</sup> day of July, 2021).
  - e. The 2<sup>nd</sup> Defendant and his advocate Messrs. Khalid Salim & Company Advocates were guilty of failure to disclose material information to this court instead have at all times alluded to the fact That the suit property registration number is MN/III/5 and defending the present suit under the number MN/III/5 and once contempt of court proceedings are filed hiding under the fail That the registration number of the suit premises is MN/III/470.
  - f. On the 14<sup>th</sup> day of December, 2021, on the Teams Platform in the presence of their advocate Ms. Waithera holding brief for Mr. Atancha and Mr. Khalid Salim of Messrs. Khalid Salim & Company Advocates this court issued orders in the nature of temporary injunctions restraining the Defendants/Respondents from offering for sale and or selling the suit property pending hearing and determination of the main suit particulars which are well within the knowledge of Mr. Khalid Salim who immediately filed a notice of appeal citing dissatisfaction with the ruling of this court.
  - g. On the 17<sup>th</sup> day of March, 2021, while conducting their daily activities on the suit property their attention was drawn of a foreigner one Mr. Daniel Kyalo Mwanthi whose presence on the premises seemed suspicious thus prompting the other Plaintiffs herein and/or the Deponent himself to confront him to which he disclosed That he was doing physical inspection of the property as the 2<sup>nd</sup> Defendant had accepted his offer to buy part of the suit premises.



- h. They demanded to peruse the documents in custody of Mr. Mwanthi and to their surprise they learnt That the conveyancing instruments had been drawn by the law firm of Khalid Salim an Company Advocates and signed in particular by Mr. Khalid Salim. (Annexed herewith and marked as “PNK -3” and “PNK – 4” were true copies of the letter of offer dated the 8<sup>th</sup> day of February, 2022 and the draft sale agreement respectively.).
- i. Some of the Plaintiffs herein were agitated by the actions of the 2<sup>nd</sup> Defendant and Mr. Mwanthi thus called the police from Mtwap[a Police Station who summoned Mr. Mwanthi recorded the statement vide OB NO. 48 of the 17<sup>th</sup> March, 2022 where he produced various correspondences received from Mr. Khalid Salim and Najat Sei all working for Messrs, Khalid Salim & Company Advocates (Annexed herewith and marked as “PNK – 5”, “PNK – 6”, “PNK – 7”, “PNK – 8”, “PNK -9”, “PNK – 10”, “PNK – 11”, “PNK – 12” and “PNK – 13” were true copies of the OB dated the 17<sup>th</sup> day of March, 2022, letter of offer dated the 5<sup>th</sup> day of February, 2022, copies of titles of part of the suit property, email dated 15<sup>th</sup> day of February, 2022, email dated 8<sup>th</sup> day of February, 2022 email dated 11<sup>th</sup> day of February, 2022, email dated 23<sup>rd</sup> day of February, 2022, email dated 28<sup>th</sup> day of February, 2022 and email dated 17<sup>th</sup> day of March, 2022 respectively.).
- j. They had been informed by their client That they ought to participate in the notice of motion application dated the 4<sup>th</sup> March, 2022 for contempt on the part of the 2<sup>nd</sup> Defendant and during hearing of the application they intend to proceed by adducing viva voce evidence as such they shall be calling representatives of the firm of Messrs. Khalid Salim & Company Advocates including Mr. Khalid Salim and Mr. Najat Seif as their witnesses being the advocates and/or firm of advocates with instruction to conduct conveyancing of the suit premises for the 2<sup>nd</sup> Defendant.
- k. It was imperative That Mr. Khalid Salim Advocate and all other advocates practicing in the name and style of Messrs. Khalid Salim & Company Advocates, be disqualified from representing the Client - 2<sup>nd</sup> Defendant in the matter herein.
- l. It was also in the interest of justice That the Replying Affidavit dated the 11<sup>th</sup> April 2022 by Mr. Karim Alarakhia and drawn by the law firm of Messrs. Khalid Salim & Company Advocates with respect to the notice of motion application dated the 4<sup>th</sup> March, 2022 be struck out.

#### **A. The Response by the 2<sup>nd</sup> Defendant to the application dated 6<sup>th</sup> May, 2022**

15. The Learned Counsel for the 2<sup>nd</sup> Defendant opposed the application through a 31 paragraphed Replying affidavit sworn on 24<sup>th</sup> May, 2022 by Khalid Salim where he averred That:-
  - a. He was an Advocate of the High Court of Kenya and having the conduct of the matter on behalf of the 2<sup>nd</sup> Defendant herein hence competent and duly authorized to swear this affidavit.
  - b. The said application was made in bad faith, reeks of malice and was not founded on proper provisions of the law and in particular was not founded on the provisions of the [Advocates Act](#), which regulates the practice of law within the Country.
  - c. Owing to the fact no provision of the [Advocates Act](#) had been invoked, the application was not properly founded as the right and proper jurisdiction of this Honourable Court had not been invoked to warrant it to deal with the issues raised herein.



- d. The grounds relied upon by the Applicants in support of their motion seeking disqualification of the Deponent's Law firm in general, Najat Seif and him self from representing the 2<sup>nd</sup> Defendant in this matter were frivolous, vexatious and without any justifiable reasons whatsoever or at all.
- e. It should be appreciated from the onset That as at 14<sup>th</sup> December 2021 when this Honourable Court issued its orders, LR No. 470 Section III Mainland North was non - existent.
- f. Thus, the Orders of 14<sup>th</sup> December 2021 in so far as it related to LR No. 470 Section III Mainland North was in vain having been issued with respect to a parcel of land That was not in existent.
- g. Owing to the fact That the Orders were issued with respect to a non - existent parcel of land, as a matter of fact and law, there could not arise an action of contempt of the Orders of the Court in so far as LR No. 470 Section III Mainland North was concerned.
- h. In furtherance to the above, the action by the Plaintiff, which was in the nature of adverse possession allegedly with respect to LR No. 470 was incompetent as the parcel of land in which they allegedly claim to have occupied was non - existent.
- i. It was trite law That Court orders could not be issued in vain and as such, therefore it ought not to proceed to declare the Plaintiffs as owners of a non - existent parcel of land.
- j. Declaring the Plaintiff as owners of a parcel of land That was non - existent would amount to issuing orders That would be unenforceable. It would have no legal effect in law and amount to an embarrassment in the administration of justice and judicial process.
- k. The Orders of 5<sup>th</sup> July 2021, never concerned and or in any related to the 2<sup>nd</sup> Defendant as the parcel of land in issue in the said Order, being LR No. 5 Section III Mainland North CR No. 5770 was not owned by the 2<sup>nd</sup> Defendant in any way whatsoever.
- l. In response to Paragraph 6 of the Supporting Affidavit, the onus was on the Plaintiffs to disclose all information pertaining to the nature of their case and the reliefs upon which they sought. According to their original pleadings, the parcel of land which they sought to acquire by virtue of adverse possession was LR No. 5 Section III Mainland North, which never had any relation to the 2<sup>nd</sup> Defendant.
- m. The 2<sup>nd</sup> Defendant, could not therefore, by virtue of the fact That the said parcel of land did not belong to it, be bound by orders issued with respect to the said property.
- n. By the time orders of 14<sup>th</sup> December 2021 were being issued, as stated above, LR No.470 Section III Mainland North was also not in existent and thus the same was issued in vain.
- o. The mere fact That they acted for the 2<sup>nd</sup> Defendant in a conveyance transaction was not in itself a basis for seeking to have their Law firm be disqualified from representing it in this matter.
- p. In any case, the parcels of land in issue in the conveyance transaction and the parcels of land in issue herein were quite separate and distinct.
- q. The parcels of land in issue in this matter was LR No. 5 and 470 Section III Mainland North while the parcels of land in the conveyance transaction was LR Nos. 78284 and 78286 Section III Mainland North.



- r. The subject matter in the conveyance was unrelated to the issues and or the subject matter in this suit and as such, ought not to a basis to seek to disqualify an advocate from representing a party.
- s. The motion by the Plaintiffs was not supported by law, the fact relied upon in support thereof were unrelated to the issues herein, there is no mention of any conflict of interest in this matter and of any breach of any fiduciary duty That was owed by them to any party in this suit.
- t. Thus, the motion was misplaced, bereft of any grounds whatsoever and was just but an attempt to waste this court precious judicial time with frivolous, baseless and vexatious motions.
- u. Without prejudice to the above, there was no pending motion by the Plaintiffs and or any of them seeking to have them testify in this matter and or in any part of it regarding any issues herein.
- v. Mere mention of the intention to call a representative from their firm to give evidence was not in itself a ground to have their Law firm disqualified from representing the 2<sup>nd</sup> Defendant in this matter.
- w. There was no mischief and or any prejudice whatsoever That have been shown and or even established by the Plaintiffs to warrant the granting of the orders sought.
- x. The Orders sought seeking to have the Replying Affidavit sworn by Karim Alarakhia on 11<sup>th</sup> April 2022 be strike out was unsupported by any fact and or grounds at all. There was no basis That had been laid at all to support the request for the said order.
- y. Owing to the fact That the said request was not backed up by any factual and or legal ground, it ought not to be entertained at all and the request should therefore be dismissed. There was no prejudice That would be suffered by the Plaintiffs and or any of them if the orders sought were not granted.
- z. Therefore, it was prudent to allow the parties to have and exercise their Constitutional and well-established right of having a Counsel of their choice especially when no basis had been laid by any party in the suit That the continued participation of Counsel in a matter may result to a conflict of interest, may prejudice the right to a fair trial.
- aa. It was therefore in the best interest of justice and fairness That the Orders herein were granted.

## **V. Submissions**

- 16. While in the presence of all parties, this Honourable Court directed That the three (3) applications dated 4<sup>th</sup> March, 2022, 11<sup>th</sup> April, 2022 and 6<sup>th</sup> May, 2022 by the parties herein respectively be canvassed by way of written submissions.
- 17. Apparently, at the time of penning down this Ruling, only the 2<sup>nd</sup> Defendant had filed their written Submissions. For a reason or other, none of the Plaintiffs file their Submissions. Thus, the Honorable Court proceeded to make a decision on the impugned subject matter on its merit. Pursuant to which parties complied and a ruling date was reserved accordingly.

### **A. The Written submissions by the 2<sup>nd</sup> Defendant onto all the three applications**

- 18. On 13<sup>th</sup> June, 2022 the 2<sup>nd</sup> Defendant through the Law firm of Messrs. Khalid Salim & Company Advocates filed its written submissions dated 10<sup>th</sup> June, 2022. Mr. Khalid Salim Advocate commenced



its submission by providing a brief introduction and background over the subject matter. He submitted there were three Notices of Motion applications before this Honourable Court for determination i.e.

- a. The Plaintiffs' Notice of Motion application dated 4<sup>th</sup> March 2022;
  - b. The 2<sup>nd</sup> Defendant's Notice of Motion Application dated 11<sup>th</sup> April 2022; and
  - c. The Plaintiffs' Notice of Motion Application dated 6<sup>th</sup> May 2022.
19. The Learned Counsel stated That the first application was brought by the 1<sup>st</sup> to 57<sup>th</sup> Plaintiffs through their Notice of Motion application dated 4<sup>th</sup> March 2022. It sought to be granted the orders inter alia of possession of LR Nos. No.5/III/MN and or LR No. 470/III/MN for purposes of reclaiming their homes and farms for shelter and farming and accessing the well for the adequate supply of water. The 2<sup>nd</sup> Application was brought by the 2<sup>nd</sup> Defendant through its Notice of Motion Application dated 11<sup>th</sup> April 2022 seeking for orders That the Amended Originating Summons filed on 7<sup>th</sup> July 2021 and the entire suit be struck out with costs to the 2<sup>nd</sup> Defendants. The 3<sup>rd</sup> Application was brought by the 58<sup>th</sup> -80<sup>th</sup> Plaintiffs' through their Notice of Motion Application dated 6<sup>th</sup> May 2022 seeking stay of the hearing of the Notice of Motion dated 4<sup>th</sup> March 2022 (herein above mentioned) pending the hearing and determination of their application and further an order That Khalid Salim and all other advocates practicing in the name and style of M/S Khalid Salim & Co. Advocates be and is hereby disqualified from representing the 2<sup>nd</sup> Defendant in the matter herein
20. The Learned Counsel stated That the Court directed That all the above applications be heard and canvassed together. It was therefore prudent, for good order, to deal with the application dated 11<sup>th</sup> April 2022 filed by the 2<sup>nd</sup> Defendant which sought to have the entire suit (OS) struck out for being Res Judicata. In the event That this Honourable Court was satisfied That indeed this suit was res judicata in light of the already determined cases before courts of competent jurisdictions, then all the other pending applications will fall by the way side as the suit in which they were pegged on would be non-existent.
21. Thus, the Learned Counsel commenced the submissions by dealing with the Notice of Motion dated 11<sup>th</sup> April 2022 and beseeched this Honourable Court to determine the said application first in its Ruling before delving into any other. The basis being That due to the fact That it would amount to an academic exercise should the Court start by dealing with any other application other than the one of 11<sup>th</sup> April 2022. He held That when ultimately it may end up allowing the one of 11<sup>th</sup> April 2022 which would ultimately have the effect of disposing off the entire suit. It was therefore in the interest of justice and sound procedure That the application by the 2<sup>nd</sup> Defendant be heard and determined first, because the same if upheld had the effect of discharging the entire suit and all the applications therein.
22. The issues for determination for the Court according to the Learned Counsel were as follows:-
- i. On Application to strike out the entire suit by the 2<sup>nd</sup> Defendant dated 11<sup>th</sup> April 2022. Whether the suit was "Res Judicata" and "Sub Judice" offending the provisions of Sections 6 and 7 of the [Civil Procedure Act](#), Cap. 21. Whether the suit ought to be struck out.
  - ii. On the contempt application by the 1<sup>st</sup> to 57<sup>th</sup> Plaintiffs Whether the Plaintiffs' application dated 4<sup>th</sup> March 2022 was competent before the court; Whether the Director of the 2<sup>nd</sup> Defendant be committed to civil jail for disobeying the Honourable Court's order made on 14<sup>th</sup> December 2021



- iii. On the Application to disqualify the Advocates from representing the 2<sup>nd</sup> Defendant by the 58<sup>th</sup> -80<sup>th</sup> Plaintiffs Whether the Plaintiffs application was properly before the court
23. Firstly, on whether the suit was “Res Judicata” and “Sub Judice” and offended the provisions of Sections 6 and 7 of the *Civil Procedure Act*, Cap. 21. The Learned Counsel submitted That the 2<sup>nd</sup> Defendant opined That it was trite law That litigation must come to an end, and it was on the basis of this That the fundamental doctrine of Res Judicata flows. He referred Court to the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 on Res Judicata as follows:-.
- “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”
24. The Court in “Independent Electoral and Boundaries Commission – Versus - Maina Kiai 5 others [2017] eKLR” went on to state on the role of the doctrine and stated That:
- “The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits That have already been determined by a competent court. It is designed as a pragmatic and common sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute, or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”
25. He asserted That the rationale for the doctrine of Res Judicata existed to protect public interest so That a party should not endlessly be dragged into litigation over the same issue or subject matter That had otherwise been conclusively determined by a court of competent jurisdiction. He further referred Court to the High Court case of: “C.K. Bett Traders Limited & 2 others – Versus - Kennedy Mwangi & another [2021] eKLR” in analyzing the doctrine of Res Judicata stated That:
33. “.....Res Judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.”
26. To successfully raise and uphold the bar of the doctrine of res judicata on account of a formerly decided cases, the Learned Counsel further cited the case of the “Independent Electoral and Boundaries Commission vs Maina Kiai 5 others (Supra)” provided for elements to be satisfied conjunctively as:
- a) The suit or issue was directly and substantially in issue in the former suit.
  - b) That former suit was between the same parties or parties under whom they or any of them claim.
  - c) Those parties were litigating under the same title.
  - d) The issue was heard and finally determined in the former suit.



- e) The court That formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised
27. Similarly, the 2<sup>nd</sup> Defendant herein filed the application by virtue of previously decided cases being:
- a. Mombasa Misc Application 142 Of 2014: Salim Bakari Mwinyi & Others And Mohamed Ali Moses Alias Gandhi And Others in which the Plaintiffs' abandoned and elected to prosecute Mombasa ELC Petition 2 Of 2018: Henry Wambega And 733 Others The Government Of Kenya Through The Hon. Attorney General & Others on Orders issued by Lady Justice Omollo on 13<sup>th</sup> December 2018
- The suit they elected to prosecute proceeded for hearing and a judgement was delivered by a court of competent jurisdiction. On appealing the decision Justice Munyao delivered on 22<sup>nd</sup> October 2020 through Mombasa Court of Appeal Civil Application No. 61 of 2021:Danson Mk & 4 Others vs Hedge Farm limited & Others the Honourable Court dismissed the application to extend time to file their appeal which had the effect of dismissing the entire appeal.
- b. Malindi ELC No. 224 of 2017: Mwalungo Mwambui & 17 Others vs Hedge Farm Limited filed by the Plaintiffs is still alive pending determination of Malindi ELC before Lady Justice Odeny.
28. The Learned Counsel argued That on behalf of the 2<sup>nd</sup> Defendant That the current suit touched on the same subject matter being the property owned by the 2<sup>nd</sup> Defendant on which the Plaintiffs herein had laid a claim of adverse possession, it involved the same parties. Based on the evidence presented and the Plaintiffs own admission, it was clear That this suit was "Res Judicata" of the former suit. The Defendants had presented clear evidence of this. The subject matter in all three suits was similar, the orders sought were similar and the suits were brought on behalf of the persons occupying the suit properties.
29. To buttress on this point, The Learned Counsel relied on the case of "Diocese of Eldoret Trustees (Registered) – Versus - Attorney General (on behalf of the Principal Secretary Treasury) & another [2020] eKLR" in which the court stated:
- “Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit That is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.”
30. The Learned Counsel further asserted That it had successfully satisfied all the requirements and as such beseechs this Honourable Court to dismiss the suit in its entirety. Lastly, to borrow from the words of Ohungo J in the case of "Mwangi Stephen Muriithi – Versus - Daniel T. Arap Moi Another [2017] eKLR":
- “..... Res Judicata and Sub Judice are principles That go to the core of the rule of law as far as litigation is concerned. Any suit That runs afoul these two principles has zero chance of survival. In view of my findings That this suit offends both Sections 6 and 7 of the *Civil Procedure Act*, I am convinced That this is an appropriate case in which to exercise the drastic power of striking out. In the end, I strike out the suit with costs to the Defendants.”



31. Secondly, on the issue of whether the suit ought to be struck out. The Learned Counsel submitted That the suit offended the provisions of Sections 6 and 7 of the [Civil Procedure Act](#), Cap. 21 and the only recourse left was for this court to make an order striking out the suit as it amounted to an abuse of the court process by forum shopping and filing of multiple suits by the Plaintiffs.
32. Thirdly, on the issue of the 1<sup>st</sup> to 57<sup>th</sup> Plaintiffs’ contempt application dated 4<sup>th</sup> March, 2022. The Learned Counsel’s contention was That the application was not competent before the court. He averred That the 1<sup>st</sup> to 57<sup>th</sup> Plaintiffs’ application dated 4<sup>th</sup> March 2022 was brought by way of Notice of Motion and pursuant to various provisions of the law inter alia Order 40 Rule 3 of the Civil Procedure Rules 2010, 2010. The orders issued on 14<sup>th</sup> December 2021 and allegedly to had been breached by the 2<sup>nd</sup> Defendant were premised on an application dated 5<sup>th</sup> July 2021 seeking injunctive orders. The 2<sup>nd</sup> Defendant submitted That the jurisdiction and power of this Honourable Court to entertain contempt proceedings had been improperly invoked under the provisions of Order 40 Rule 3 of the Civil Procedure Rules 2010.
33. To support his point, the Learned Counsel cited the case of:- “Samuel M. N. Mweru & Others – Versus - National Land Commission & 2 others [2020] eKLR” after analysing the law relating to the procedure of instituting contempt proceedings and opined as follows:

“An application under Rule 81.4 (breach of judgement, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.
34. Furthermore, he averred That the prayer sought was premature before the Honourable Court as it presupposed the Court’s findings on the 2<sup>nd</sup> Defendant being guilty of contempt without according a chance on a notice to show cause why the 2<sup>nd</sup> Defendant officials should or should not be jailed for an alleged disobedience of a court order.
35. Therefore, the Learned Counsel submitted That the Plaintiffs’ Notice of Motion application dated 4<sup>th</sup> March 2022 was fatally defective in That it improperly invoked the jurisdiction of the court. Further, the application had not been brought by an Application Notice as required by law.
36. Fourthly, on whether the director of the 2<sup>nd</sup> Defendant be committed to civil jail for six months for disobeying the Honourable court’s order made on 14<sup>th</sup> December 2021. The Learned Counsel recapped That the Plaintiffs’ in their application for contempt dated 4<sup>th</sup> March 2022 averred That this Court delivered a ruling on 14<sup>th</sup> December 2021 restraining the 2<sup>nd</sup> Defendant from evicting, demolishing, harassing, selling, offering for sale, advertising, alienating, transferring by public auction or private treaty or otherwise completing by conveyance of the suit property, That the 2<sup>nd</sup> Defendant was duly represented by the Counsel and That despite being aware of the order, the 2<sup>nd</sup> Defendant harassed, forcefully and illegally demolished the Plaintiffs’ homes, evicted them from their ancestral land on the suit property in blatant breach, violation and disregard of the said order.



37. The Learned Counsel posed as such - What amounted to an act of contempt of court orders and what was required to prove the said contempt? He quoted from the case of “Abdi Satarhaji & another -Versus - Omar Ahmed & another [2018] eKLR”, where the Court of Appeal stated as follows:

“2. It is on That footing That the principle of contempt of court arises as espoused in the words of Lord Justice Clerk in the Scottish case of Robertson vs. Her Majesty's Advocate [2007] HCJAC 63:

“Contempt of court is constituted by conduct That denotes willful defiance of or disrepute towards the court or That willfully challenges or affronts the authority of the court or the supremacy of the law; whether in civil or criminal proceedings.” Therefore, contempt proceedings are a means of citing and punishing a party for disobedience of court orders.

3. Whenever a court is faced with an application for contempt it has a duty of determining first, whether the party accused of disobedience of the court order is indeed guilty of willful disobedience of its order. See the Indian Supreme Court's decision in Ram Kishan – Versus - Sir Tarun Bajah & Others- Contempt Petition No.336 of 2013. Thereafter, if it finds such a party is in contempt of a court order, it exercises its discretionary power to mete out a suitable punishment within the prescribed parameters. As regards the standard of proof, the Court went ahead and held:

26. As matters stood, the evidence before the Judge was not sufficient to establish willful disobedience by the 1<sup>st</sup> Appellant to the required standard as succinctly discussed by this Court in Mutitika – Versus - Baharini Farm Limited [1985] KLR 229:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...”

38. From the above legal reasoning, the Learned Counsel held That an Applicant thus had to show and prove on a standard higher than the balance of probabilities That the alleged contemnor had knowledge of the order and That there was willful and deliberate disobedience of the said order. To this front, the Counsel contended That it was disputed That the 2<sup>nd</sup> Defendant had knowledge of the Court order issued on 14<sup>th</sup> December 2021, because the order was not personally served upon the Director of the 2<sup>nd</sup> Defendant neither was an affidavit of service produced as proof of service. Nonetheless, in the event That the 2<sup>nd</sup> Defendant became aware of the Court order issued on 14<sup>th</sup> December 2021 by being represented by an Advocate. It was further disputed That the breach or disobedience of the court order of 14<sup>th</sup> December 2021, if any, was willful and deliberate. From the foregoing, the 2<sup>nd</sup> Defendant humbly submitted That it was not in breach of the orders issued on 14<sup>th</sup> December 2021 and if there was disobedience, which was still denied, then the same was not willful nor deliberate.

39. Further to this, the Learned Counsel opined That the suit property in dispute was at the time of issuance of the said orders non - existent since the property had long been sub - divided and certificate of sub - division issued to That effect. Therefore the orders issued were in vain because the same were unenforceable with no legal effect in law. In any event, the 2<sup>nd</sup> Defendant was not in breach of this



Courts orders and had nothing but respect for this Honourable court and its orders. The Plaintiffs had failed to prove its allegations.

40. The Learned Counsel submitted on behalf of the 2<sup>nd</sup> Defendant That the Plaintiffs' had failed to prove on the standard required That the 2<sup>nd</sup> Defendant had willfully disobeyed the court order of 14<sup>th</sup> December 2021. As such the Managing Director of the 2<sup>nd</sup> Defendant ought not to be committed to civil jail for six months for disobeying the Honourable Court's order. Finally, in the words of Judge E C Mwitwa came to fore in the case of "Sheila Cassatt Issenberg & another -Versus - Antony Machatha Kinyanjui [2021] eKLR".
41. But even as courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind That the power to punish for contempt was a discretionary one and should be used sparingly. That was why the court observed in "Carey vs Laiken (supra)", That if courts were to find contempt too easily,

"a court's outrage might be treated as just so much bluster That might ultimately cheapen the role and authority of the very judicial power it seeks to protect the court's contempt power should be used cautiously and with great restraint. It is an enforcement power of last resort rather than first resort."
42. From the above assertion, it was the Learned Counsel's submission That it was not in breach of the Court order of 14<sup>th</sup> December 2021 and thus ought not to be committed to civil jail.
43. Sixthly, on the application to disqualify the Advocates from representing the 2<sup>nd</sup> Defendant as sought by the 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs. The Learned Counsel submitted That the application was not properly before the court. His contention was That the application was neither founded in law nor in any principle in law which regulated the practice of law in Kenya. Furthermore, the Plaintiffs had not in any way shown the existence of a conflict of interest in their grounds warranting the disqualification of an advocate from representing a client and as such the application by the Plaintiffs which was bizarre in its nature.
44. According to the Learned Counsel, an advocate was not barred by law and/or in principle from representing a client in more than one dealing unless it touched on conflict of interest in which instance an advocate should discontinue their representation in so far as the matter was conflicting in nature. Therefore, the fact That the firm was representing the 2<sup>nd</sup> Defendant in a conveyancing transaction never formed a basis for an Advocate to be disqualified.
45. On an additional issue, the Learned Counsel cited the Court of Appeal case of : "Uhuru Highway Development Limited & 3 others – Versus - Central Bank of Kenya & 4 others [2003] eKLR" pointed out That disqualification of an Advocate may occur where there was an Advocate-Client relationship. In ascertaining whether there was such a relationship, the Court stated as follows:-

"Whether the Plaintiffs were the counsel's client may be discerned from a careful consideration of the correspondence on record. A careful consideration of the same is, of course, required."



46. To back up his argument, the Learned Counsel further relied on the case of: “Murgor & Murgor Advocates – Versus - Kenya Pipeline Co. Ltd [2021] eKLR” where the High Court relied on the following principles to guide the disqualification of Advocates from appearing for a client in a matter:-

- “(ii) Disqualification of an Advocate is only desirable in contentious matters and where there is or was an Advocate-Client relationship;
- (iii) It must be apparent That the Advocate sought to be disqualified will be required as a witness to give evidence in the matter;
- (iv) It is desirable That when the principle of confidentiality in an Advocate/Client fiduciary relationship will be prejudiced or where there is a possibility of real conflict of interest, then an Advocate sought to be disqualified ceases to appear in the matter;
- (v) The fact That an Advocate acted for a litigant does not, per se, lead to a situation of conflict of interest
- (vi) Conflict of interest is an issue of fact which must be proved by way of evidence
- (vii) It is not a requirement That in a situation where a firm of Advocates acted for the opposite party all the Advocates in the firm be disqualified from the matter. In such an instance, only the Advocates who are in possession of confidential information relevant to the matters in issue before Court or Tribunal may be called upon to cease from appearing in the matter;”

47. In applying these principles to the case at hand, the Learned Counsel argued That the Plaintiffs were not at any given point represented by the Law firm of advocates thus the issue of conflict of interest as a result of Advocate-Client relationship never arose neither did the risk of breach of confidentiality since the Plaintiffs’ and the advocates had not come into contact. The Plaintiffs had failed to show the existence of an Advocate-Client relationship. The mere fact That the Law firm was representing the 2<sup>nd</sup> Defendant in litigation and conveyancing did not expressly warrant a ticket for disqualification of the entire firm of advocates. Alluding to summon an advocate from the firm is also not sufficient ground for disqualification of an advocate.

48. Furthermore, the Learned Counsel averred, being a witness in a suit never disqualified an advocate since the disqualification was premised majorly on contentious facts. This issue was made out in the decision cited by the Counsel of:- “Kenya Commercial Bank Ltd – Versus - Mukeshkumar Kantilal Patel & another [2015] eKLR” the Court opined as follows:

“The starting point is Rule 9 f the Advocates Practicing Rules which provides as follows:-

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe That he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent That he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided That this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit in formal or non-contentious matter of fact in any matter in which he acts or appears.”



It will be seen from the above That an advocate may be prevented from appearing in a matter if he may be required as a witness. But this is not absolute, for an advocate can still appear for a party and still be a witness, so long as his evidence is confined to a formal or non-contentious matter of fact.”

49. The Learned Counsel further went on to argue That in any event if the advocate who drew the conveyancing instruments was summoned to give evidence, their evidence would be limited to the formal non-contentious matter of fact which involved production of such documents. However, the same was not practically possible because the conveyancing transactions was in relation to different parcels of land which never formed part of the suit property herein.
50. The allegation That the Replying Affidavit sworn on 11<sup>th</sup> April by the Director of the 2<sup>nd</sup> Defendant ought not to be expunged solely because it was drawn by the advocates law firm was unmerited and unfounded in law and fact. As such, the 2<sup>nd</sup> Defendant submitted That the Plaintiffs’ Notice of Motion application dated 6<sup>th</sup> May 2022 was fatally defective in That it never invoked the proper jurisdiction of the court.
51. In conclusion, the Learned Counsel stated That it had shown merit in its application dated 11<sup>th</sup> April 2022 for striking out the entire suit and the same should be allowed with costs. The 2<sup>nd</sup> Defendant had also demonstrated That the Plaintiffs applications dated 4<sup>th</sup> March 2022 and 6<sup>th</sup> May 2022 respectively were mala fides, unmeritorious and should be dismissed with costs, for being an abuse of the court process by filing multiplicity of suits. It was clear That the Plaintiffs were forum shopping.

### **VIII. Analysis and Determination**

52. I have keenly read and considered the all the three (3) applications herein dated 4<sup>th</sup> March, 2022, 11<sup>th</sup> April 2022 and 6<sup>th</sup> May, 2022 respectively filed by the both the Plaintiffs and the Defendants and the responses thereof, the written submission of both parties, the plethora of the cited authorities herein, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes.
53. For the Honourable Court to reach an informed, fair and just decision, it has crystalized the subject matter into Seven (7) (3) broad salient issues for its determination. These are:-
  - a. Whether the Directors of the 2<sup>nd</sup> Respondent’s are liable to be cited for Contempt of Court Orders granted by this Honourable Court on 14<sup>th</sup> December 2021 and commit them to civil jail for a period of six (6) months or less as the Court shall please?
  - b. Whether the 2<sup>nd</sup> Respondent can be ordered to give possession of the Land Reference Numbers CR. 5770 Plot No. 5/III/MN and or CR.13026 Plot No. 470/III/MN to the Applicant for purpose of reclaiming their homes and farms for shelter and farming and accessing the well for the adequate supply of water?
  - c. Whether the Plaintiff/ Applicant have made a case to have the subdivision on the Land Reference Numbers CR.5770 Plot No.5/III/MN and or CR.13026 Plot No. 470/III/MN be nullified and any subsequent sales be vacated.
  - d. Whether the 2<sup>nd</sup> Defendant has made a case to have the Plaintiffs’ Amended (O.S.) filed on the 7<sup>th</sup> July, 2021 and entire suit be struck out with costs to the Defendants.
  - e. Whether the 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs have made out a case for the disqualification of Advocates Khalid Salim and Company Advocates as the 2<sup>nd</sup> Defendant’s advocate?



- f. Whether the Replying Affidavit dated 11<sup>th</sup> April, 2022 should be expunged from the Court's Record?
- g. Who bears the costs of the Applications?

**Issue No. a). Whether the Directors of the 2<sup>nd</sup> Respondent's are liable to be cited for Contempt of Court Orders granted by this Honourable Court on 14<sup>th</sup> December 2021 and commit them to civil jail for a period of six (6) months or less as the Court shall please?**

54. Under this Sub – heading the issue of Contempt of Court proceedings is the main substratum. The Black's Law Dictionary 9<sup>th</sup> Edition, defines contempt as:

“The act or state of despising; the conduct of being despised. Conduct That defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

55. The provision of Section 5(1) of the Judicature Act which provides That:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and That power shall extend to upholding the authority and dignity of subordinate courts.”

56. Further, the provision of Section 29 of the Environment and Land Court Act, No. 19 of 2011 is clear to the effect That:-

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings (Kshs, 20, 000, 000.00/=) or to imprisonment for a term not exceeding two years, or to both.

57. At this juncture, I wish to refer to the case of “Exparte Langely 1879, 13 Ch D/10 (CA)” Thesiger L.J stated at P. 119 as follows:

“...the question in each case, and depending upon the particular circumstances of each case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court That you can infer from the facts That he had notice infact of the order which has been made” And, in a matter of this kind, bearing in mind That the liberty of the subject is to be affected, I think That those who assert That there was such a notice ought to prove it beyond reasonable doubt.”

58. Additionally, in the case of “North Tetu Farmers Co. Ltd – Versus - Joseph Nderitu Wanjohi (2016) eKLR” Justice Mativo stated as follows: ‘writing on proving the elements of civil contempt, learned authors of the book “Contempt in Modern New Zealand” have authoritatively stated as follows: -

“there are essentially four elements That must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases -

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;



- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.”

59. In yet another case of Charity Mpano Ntiayine – Versus - China Communication Constructions Company Limited & National Environment and Management Authority (2017) eKLR. Court held That there are three (3) elements That must be proved in contempt proceedings. These are:-

- a. Applicant must demonstrate terms of orders
- b. Applicant must demonstrate knowledge of terms by the Respondents and
- c). Applicant must demonstrate failure of Respondent to comply with the court order.

60. Now applying these principles to the instant case. According to the Plaintiffs on 5<sup>th</sup> July, 2021 the Plaintiffs filed an Application seeking injunctive Orders against the Defendants which “inter alia, barred the Defendants by themselves, their agents or any other person from evicting , demolishing, harassing, selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance transfer of any concluded by public or private treaty, taking possession, appointing receivers or exercise any power conferred by Section 90 (3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with all That parcels of land known as the suit land. Further this Honourable Court granted the Applicant Interim Orders on 14<sup>th</sup> December, 2021, inter-alia from evicting, demolishing, harassing, selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance transfer of any concluded by public or private treaty, taking possession, appointing receivers or exercise any power conferred by section 90 (3) of the Land Act, 2012, leasing, letting, charging or otherwise interfering with the suit land pending the hearing and determination of the main suit.

62. On the record of the proceedings and the copy of the order issued on 14<sup>th</sup> December, 2021 demonstrates That the said Interim Orders were issued in the presence of the 2<sup>nd</sup> Respondent’s Advocate and as such the 2<sup>nd</sup> Respondent has at all material times been well versed with the terms, effect and purpose of the Order.

Despite service on the relevant stakeholders and in deliberate blatant defiance of the subsisting Court Orders, the directors of the 2<sup>nd</sup> Respondents in full knowledge of the existing interim orders, circumvented the Court Order, initiated and caused their agents and/or servants, in liaison with OCPD Mtwapa Police Station, OCS Kijipwa and the Coast Region GSU Commander and other security agencies unknown to the Plaintiffs, (Annexed hereto and marked as “MK - 2” were true copies of photographs of the aftermath of the demolition and eviction) defied the Court Order and have harassed, forcefully and illegally demolished the Plaintiffs homes, evicted them from their ancestral land being all That parcel of the suit land rendering them squatters and homeless. Annexed hereto and marked “MK-3” were true copies of photographs of the aftermath of the demolition and eviction.

63. It is the 1<sup>st</sup> to 56<sup>th</sup> Plaintiffs/ Applicants’ case That the 2<sup>nd</sup> Respondents are in contempt of the interim orders issued on 14<sup>th</sup> December, 2021 and it is imperative That Court Orders be obeyed in order to safeguard the Rule of Law. The said court orders have neither been appealed, reviewed stayed nor varied whatsoever remain in operation. The Directors of the 2<sup>nd</sup> Defendant/Respondent are according to the Applicants conducted themselves in a manner That amounts to willful and intentional disobedience or disregard of court orders, judgments decrees or directions and this form of behavior opposes or defies the authority, justice and dignity of the court.



64. In opposition, the 2<sup>nd</sup> Defendant averred That their company purchased the said Parcel of Land for a consideration of a sum of Kenya shillings One Million (Kshs. 1,000,000/=) and subsequently acquired the said suit Property through a transfer from one Donald Graham Gebbett and Ilfra Norma Gebbett. The 2<sup>nd</sup> Defendant was the registered and absolute owner of the property known as Sub Division No. 470 (Original No. 5/3) of Section III Mainland North situate in Kikambala. Since the purchase of the said parcel of land in the year 1980, the company has been in occupation of the whole portion of land measuring approximately 50.182 Hectares carrying out its farming business of poultry, agriculture and dairy. The property known as plot no. MN/III/470 was subdivided and a certificate of subdivision obtained on 31<sup>st</sup> August 2021 before the ruling was issued therefore no contempt on our part since the order was not delivered at the time when the sub - division took place. The plot number in question and subject of this suit is inexistent thus no rights may arise thereof.
65. The 2<sup>nd</sup> Defendant also argued That the said orders were not brought to their attention. They were surprised to see the application dated 4<sup>th</sup> March, 2022 brought by the Plaintiff seeking contempt orders when in fact the report indicated That there were no structures erected on the property. There is no affidavit of service on record, and as such the directors lacked the knowledge of the orders issued therein.
66. As a general rule, no order of Court requiring a person to do or to abstain from doing any act may be enforced (by committing him/her for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question, or That the person had the knowledge of an order which supersedes personal service.
67. I take solace on this legal position from the Court of Appeal case of “Shimmers Plaza Limited – Versus - National Bank of Kenya Limited [2015] eKLR” emphasized That:-
- “It is important however, That the Court satisfies itself beyond any shadow of a doubt That the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”
68. Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like in the case of any other ordinary matter like service of summons to enter appearance or hearing notice upon a party, where, even if service was regular, Courts have found That ex parte proceedings or judgment made in default could still be set aside on terms in the discretion of the Court.
69. Be That as may, while making reference to “EXPARTE LANGELY 1879, 13 Ch D/10 (Supra)”, from the surrounding facts and inference made out herein the instant case, I find That the Plaintiffs have not proved to the required standard That the 2<sup>nd</sup> Defendant as cited were in brazen disobedience of the court order issued on 14<sup>th</sup> December, 2021. For these very reason, the application dated 4<sup>th</sup> March, 2022 by the Plaintiff must fail.

**Issue No. b). Whether the 2<sup>nd</sup> Respondent can be ordered to give possession of the Land Reference Numbers CR. 5770 Plot No. 5/III/MN and or CR.13026 Plot No. 470/III/MN to the Applicant for purpose of reclaiming their homes and farms for shelter and farming and accessing the well for the adequate supply of water?**

70. Under this sub heading, the Plaintiffs have sought to be given possession of the suit land. They have indicated That the order sought would be for purpose of reclaiming their homes and farms for shelter and farming and accessing the well for the adequate supply of water. From the face value, this prayer



by the Plaintiffs is of the nature of a permanent/ mandatory injunction. Courts have deliberated on this type of order indepth through case law and hence there will be no need to re – invent the wheel. However, this Court will proceed to cite some of the already decided cases on this area.

71. In the “Joseph Kaloki t/a Royal Family Assembly – Versus - Nancy Atieno Ouma [2020] eKLR” the court of appeal reaffirm its decision in “Kenya Breweries Limited & another – Versus - Washington O. Okeyo [2002] eKLR” and stated That

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but That if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”

72. Additionally, the Court also reaffirmed its decision in “Shariff Abdi Hassan – Versus - Nadhif Jama Adan [2006] eKLR” where it stated That:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above That the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure That justice is meted out without the need to wait for full hearing of the entire case.”

73. I am not convinced That any special circumstances exist in this matter That warrant the grant of giving possession. Further, I am also not convinced That this case is exceptionally clear That it ought to be decided at once. Neither, has there been any circumstances That the Defendants are trying to steal the match against the Plaintiffs to warrant being granted tis orders. Far from it. There are competing claims by both parties and these will require further interrogation by Court during a full trial. At this stage I cannot tell for sure That the Defendants have no claim over the suit parcel to grant the Plaintiffs possession.

74. For these reasons therefore, I decline to grant the orders for possession of the suit land at this interlocutory stage as sought by the Plaintiffs.

**Issue No. c). Whether the Plaintiff/ Applicant have made a case to have the subdivision on the Land Reference Numbers CR.5770 Plot No.5/III/MN and or CR.13026 Plot No. 470/III/MN be nullified and any subsequent sales be vacated.**

75. Under this Sub title, the Court has ben urged to nullify the process of the Sub – division of the suit land. As indicated above, likewise, nullification of the process of sub - division on the Land Reference Numbers CR.5770 Plot No.5/III/MN and or CR.13026 Plot No. 470/III/MN is a permanent order That cannot be granted without the examination of evidence from both parties. I need not belabor the point here.

76. For these reasons, I therefore decline to indulge the Plaintiffs further on final orders That can only be dealt with after evidence has been adduced during the full trial.

**Issue No. d). Whether the 2<sup>nd</sup> Defendant has made a case to have the Plaintiffs’ Amended (O.S.) filed on the 7<sup>th</sup> July, 2021 and entire suit be struck out with costs to the Defendants.**

77. The 2<sup>nd</sup> Defendant herein has moved this Court vide their application dated 11<sup>th</sup> April, 2022 under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010 to strike out the Plaintiffs pleadings – the Amended Originating Summons dated 7<sup>th</sup> July, 2021. The rule provides That a party may at any



stage of proceedings apply to strike out pleadings for disclosing no reasonable cause of action; being scandalous, frivolous or vexatious; for being prejudicial or embarrassing or for being an abuse of the court process.

78. The 2<sup>nd</sup> Defendant argued That the Originating Summons offended the doctrine of “Res Judicata” in light of Mombasa Misc Application 142 Of 2014: Salim Bakari Mwinyi & Others and Mohamed Ali Moses Alias Gandhi And Others in which the Plaintiffs therein elected not to prosecute Mombasa Misc Application 142 Of 2014 and prosecuted Mombasa ELC Petition 2 Of 2018: Henry Wambega And 733 Others the Government of Kenya Through the Hon. Attorney General & Others. There was a Judgment delivered by Honorable Justice Munyao on 22<sup>nd</sup> October 2020 dismissing the Petition Mombasa ELC Petition 2 of 2018: Henry Wambega And 733 Others the Government of Kenya Through the Hon. Attorney General & Others. Additionally, That the Originating Summons was “Sub – Judice” since there exists a suit filed earlier by the Plaintiff against the Defendant being Malindi ELC No. 224 of 2017: Mwalungo Mwambui & 17 Others vs Hedge Farm Limited.
79. Thus, the 2<sup>nd</sup> Defendant contended That the suit therefore offended the mandatory provisions of Sections 6, 7 and 8 of the *Civil Procedure Act*, 2010. The entire suit is misconceived, bad in law, an abuse of the Court process, devoid of any merit and should be dismissed with costs to the Defendant.
80. The 58<sup>th</sup> to 80<sup>th</sup> Applicants opposed the application through grounds of opposition dated 6<sup>th</sup> May, 2022 and they averred That the application is incurably defective thus cannot be resuscitated even with an amendment and the 2<sup>nd</sup> Defendant/ Respondent has not demonstrated the requisite elements of res judicata and neither has he demonstrated That parties are all the same and That the matters in contention are the same and/or were heard and determined by a court of competent jurisdiction.
81. The jurisdiction to strike out pleadings is now well established by our Courts. It is trite law the legal mandate to strike out pleadings is discretionary and must be exercised judicially. In the case of: “Postal Corporation of Kenya – Vrsus – Versus - I.T Inamdar & 2 Others [2004] 1 KLR 359”, the court stated That “the law is now well settled That if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend”.
82. Further, in the “Co-Operative Merchant Bank Ltd. – Versus - George Fredrick Wekesa (Civil Appeal No. 54 of 1999)” the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

83. This position was reinforced in case of:- “Yaya Towers Limited – Versus Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)” the same court expressed itself thus:

“A Plaintiff (Defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively That the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted That the Court has inherent jurisdiction to dismiss That, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified



merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

84. Similarly, and at the initial stages of jurisprudence building on this issue, the Court of Appeal in “D.T. Dobie & Company Kenya Limited – Versus - Joseph Mbaria Muchina & Another [1980] eKLR”, Madan JA, stated:

“No suit ought to be summarily dismissed unless it appears so hopeless That it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

85. From the instant case, I have gone through the current suit, and Misc Application 142 of 2014 and ELC Petition 2 of 2018 and it is clear That the suit are not in any way related to each other apart from the parties who are also not the same hence the claim for res judicata fails. On the issue of the suit being sub judice, the 2<sup>nd</sup> Defendant have not shown this court how this suit is identical to MALINDI ELC NO. 224 OF 2017 to warrant the striking out of the suit on the grounds of sub judice.
86. Applying the principles in the decisions cited above to the present circumstances, the application before this court cannot be allowed to se the light of day. Hence, I am compelled to arrive at the conclusion That the application lacks merit and therefore it be hereby dismissed with costs.

**Issue No. e). Whether the 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs have made out a case for the disqualification of Advocates Khalid Salim and Company Advocates as the 2<sup>nd</sup> Defendant’s advocate?**

87. The 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs have sought for the disqualification of Advocates Khalid Salim and Company Advocates as the 2<sup>nd</sup> Defendant’s advocates. I need not re produce the grounds upon which they are basing their assertion. Interestingly, I am yet to clearly decipher the formidable reason That would cause this Court to disqualify the law firm of Khalid Salim & Company from acting for the 2<sup>nd</sup> Defendant. The Court has not seen any where the existence of a Client – Advocate relationship between the Plaintiffs and the said Law firm to warrant the Court perhaps consider granting the order as sought. As indicated, the Court is not even sure it has the Jurisdiction to be dealing with the matter from the provisions of the law cited, “the Modus operandi” and the contents of averments and inferences have been made out by the Plaintiffs. Critically speaking, the whole issue is rather problematic for this Court. I am afraid the prayer will hardly fly.
88. Nonetheless, based on the provision of Article 159 ( 2 ) ( d ) of *the Constitution* of Kenya, 2010, I will proceed straight on to the point. To begin with, I will refer to the case of “Tom Kusienya & Others – Versus - Kenya Railways Corporation & others [2013] eKLR”, where Mumbi Ngugi J., held thus: -

- “ 19. The legal basis of the petitioner’s application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:

‘No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe That he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent That he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided That this rule does not prevent an advocate from



giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.’

20. From the text of this Rule, it is clear That an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit. In determining the circumstances under which this Rule would apply, the Court of Appeal in *Delphis Bank Limited - Versus - Channan Singh Chatthe and 6 Others* (supra) observed as follows:

“The starting point is, of course, to reiterate That most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases, however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.”

89. Furthermore, in the case of “*Guardian Bank Limited – Versus - Sonal Holdings (K) Limited & 2 Others* [2014] eKLR” the Court enumerated the issues to be considered in making determination whether to disqualify an Advocate from representing a party in a matter as follows:

- “(11) This application is about Rule 8 of the Advocates (Practice) Rules which provides as follows;

No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe That he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent That he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided That this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

- (12) I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is That, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument That “these advocates participated in the drawing and attestation of the Deeds in dispute”; as That kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive That those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say “I intend to call them as witnesses”. What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all That on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility That the arguments for disqualification



may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be “their counsel” in the conveyancing transaction. I say these things because That kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a lawsuit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in *the Constitution* as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize That the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced That real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of counsel will not be ordered.

90. Based on common knowledge, I am assuming That, the Law firm of Messrs. Khalid Salim and Company Advocates has associates who can handle the matter if the Plaintiffs are apprehensive of any conflict of interest. In the case of “Dorothy Seyanoi Moschioni (Supra)” the Court observed thus:

“The party applying must show there is real possibility of the advocate concerned using the privileged information to the detriment of the said party and or to the advantage of the other party.”

91. The Plaintiffs have not proved That there was any possibility of an occurrence of conflict of interest on the part of the Advocate and That he had information he could use against the opposite party. Therefore, as I had anticipated at the beginning, the prayer for disqualification of the 2<sup>nd</sup> Defendant’s advocate must fail.

**Issue No f). Whether the Replying Affidavit dated 11<sup>th</sup> April, 2022 should be expunged from the Court’s Record?**

92. Under this sub title, the 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs have asked this Honourable Court to expunge from the Court record the Replying affidavit dated 11<sup>th</sup> April, 2022 by virtue of the fact That it was drafted by the 2<sup>nd</sup> Defendant’s advocate.



93. A party ought not to be prejudiced owing to the acts or omissions of their Counsel on record. I bear in mind That this Court serves to administer justice and ought therefore not to be strictly bound by procedural technicalities especially in cases such as this where justice will be better served by admitting the Replying Affidavit on record. This to my mind is what the provision of Sections 3 & 13 of the Environment & *Land Act*, No. 19 of 2011 and Article 159(2)(d) of *the Constitution* sought to address on Court’s inherent powers and when it impressed the court to administer justice without undue regard to procedural technicalities. This is not to state That parties ought to disregard laid down rules of procedure, but to acknowledge That the parties herein embarked on a quest for justice and it is my duty to ensure, not only That justice is done, but That it is seen to be done. (See – “Johanna Kipkemei Too – Versus - Hellen Tum [2014] eKLR”).
94. In any event, to allow the Replying affidavit will not alter the character of the proceedings, but will only served to avail the 2<sup>nd</sup> Defendant a chance to respond to the averments raised in the Notice of Motion application dated 4<sup>th</sup> March, 2022, to expunge the same would not guarantee justice and fairness to the parties on an equal footing, on what can be termed their quest for administration of justice.
95. I seek solace in the Court of Appeal majority decision in “Nicholas Kiptoo Arap Korir Salat – Versus - Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR” where the court observed thus:
- “It is globally established That where procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...
- In modern times, the courts do not apply or enforce the words of statute or rules, but their objects, purposes and spirit or core values...reiterate what the court said in Githere V. Kimungu [1976 - 1985] E.A. 101, That:
- “.....the relation of rules of practice to the administration of justice is intended to be That of a handmaiden rather than a mistress and That the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do That which will cause injustice in a particular case.
- ...A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt That the courts today abhor technicalities in the dispensation of justice.”
96. Upon weighing the circumstances of this case, I consider it prudent to allow the Replying Affidavit in the interest of justice and further to avert piecemeal litigation. I deem it imperative to state That the Court must allow all information That would be relevant to ensure the ends of justice are met. Therefore, from the foregoing, I proceed to disallow the prayer to expunge the Replying Affidavit.



### **Issue g). Who bears the costs of the Applications?**

97. Previously, I have well stated in past precedents and most especially in “Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, That:

“ 58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds That Costs follow events. The Issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is That the Notice of Motion application dated 7<sup>th</sup> December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and That of the Defendants dated 21<sup>st</sup> December, 2021.”

98. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds That costs follow the events. In this case, as the Honourable Court has the discretion to award the costs, there shall be no orders as to costs.

### **VIII. Conclusion and Disposition**

99. From the foregoing indepth analysis of the framed issues, on a Preponderance of Probabilities and the balance of convenience, I do proceed to order as follows;

- a. That the Notice of Motion application dated 4<sup>th</sup> March, 2022 by the Plaintiff be and is hereby found to lack merit hence dismissed in its entirety.
- b. That the Notice of Motion application dated 11<sup>th</sup> April, 2022 by the 2<sup>nd</sup> Defendant be and is hereby found to lack merit and is hereby dismissed.
- c. That the Notice of Motion application dated 6<sup>th</sup> May, 2022 by the 58<sup>th</sup> to 80<sup>th</sup> Plaintiffs be and is hereby found to lack merit hence hereby dismissed.
- d. That for expediency sake this matter to be heard on 27<sup>TH</sup> MAY 2024. There shall be mention on 26<sup>TH</sup> FEBRUARY, 2024 for conducting a Pre – Trial Conference under the provision of Order 11 of the Civil Procedure Rules, 2010 and taking directions on the Amended Originating Summons filed on 7<sup>th</sup> July, 2021 pursuant to the provision of Order 37 Rules 13 and 16 of the Civil Procedure Rules, 2010.
- e. That there shall be no orders as to costs.

IT IS SO ORDERED ACCORDINGLY.

**RULING DELIVERED THROUGH MICRO SOFT TEAMS VIRTUAL MEAN, SIGNED AND DATED AT MOMBASA THIS 1<sup>ST</sup> DAY OF NOVEMBER 2023.**

**HON. JUSTICE L.L. NAIKUNI (MR.)**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

Ruling delivered in the presence of:-



Mr. Iddi Advocate holding brief for Mr. Attancha Advocate for the Plaintiffs.

c. M/s. Nafula Advocate holding brief for Mr. Khalid Salim Advocate for the 2<sup>nd</sup> Defendant.

