



**Mulinge & another v Charo & 3 others (Environment and Land Constitutional  
Petition 50 of 2019) [2022] KEELC 13454 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13454 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 50 OF 2019**

**LL NAIKUNI, J**

**OCTOBER 5, 2022**

**IN THE MATTER OF: VIOLATION OF PETITIONERS RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF: ARTICLES 19, 20, 21,  
22(1) (2) & (3), 23(1) & (3), 25(C), 27, 28, 40, 42, 47,**

**48, 50(1), 60, 64, 69, 70 AND 162**

**AND**

**IN THE MATTER OF: THE LAND ACT**

**AND**

**IN THE MATTER OF: SECTION 13(1), (2)(B), (D)  
& (E), (3) & (7) OF THE ENVIRONMENT & LAND**

**COURT ACT, 2011**

**AND**

**IN THE MATTER OF: LAND MEASURING APPROXIMATELY 0.418HA CONTAINED  
IN PLOT NO. LR. NO MV/VI/121 SITUATED AT ALDINA AREA IN JOMVU**

**BETWEEN**

**STEPHEN MUTUKU MULINGE ..... 1<sup>ST</sup> PETITIONER**

**BENEDATA KATHINI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KALAMA JUMA CHARO ..... 1<sup>ST</sup> RESPONDENT**

**ABDALLAH CHARO KALAMA ..... 2<sup>ND</sup> RESPONDENT**



DICKSON M. MUTUKU ..... 3<sup>RD</sup> RESPONDENT  
JOHN KARANJA MIRITU ..... 4<sup>TH</sup> RESPONDENT

## JUDGMENT

### I. Preliminaries

1. This judgment by the honorable court is one that pertains to the Constitution petition dated November 13, 2019 filed by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein on December 3, 2019. The Constitution petition is brought under the dint of the provisions of rules 3, 4, 10, 13, 23, 24 and 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules; sections 1A, 1B and 3A of the Civil Procedure Act cap 21 Laws of Kenya; section 65 & 66 of the Land Act, 2012 Laws of Kenya and section 13 of the Environment and Land Court Act. On the face of it, the petition has also cited several provisions of the Constitution of Kenya, 2010 including articles 19, 20, 21, 22 (1) (2) & (3), 23 (1) & (3), 25 (c), 27, 28, 40, 42, 47, 48, 50 (1), 6, 64, 69, 70 and 162 (2) (b) of the Constitution of Kenya, 2010.

### II. The 1st & 2nd Petitioners' Case

#### Facts relied upon

2. Based on the averments of the 12 paragraphed supporting affidavit of Stephen Mutuku Mulinge sworn and dated November 13, 2019 the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein state that on or about the August 14, 2012, entered into an agreement for sale of land measuring approximately 0.418 ha contained in plot No LR No MN/VI/121 situated within Aldina area in Jomvu within Mombasa county from one Kalama Juma Charo, the 1<sup>st</sup> Respondent, for valuable consideration of Kenya shillings six hundred thousand Kenya shillings (Kshs 600,000/= only), having carried out his due diligence and establishing the ownership of the parcel. The petitioner also stated that the 2<sup>nd</sup> respondent, Abdallah Charo Kalama, who the petitioners were informed was a brother to the 1<sup>st</sup> respondent was a witness to the sale agreement of the land measuring approximately 0.418 ha contained in plot No LR No MN/VI/121 situated within Aldina Area in Jomvu within Mombasa county. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were selling this land on behalf of their parents who had no identification cards to deal in their names. The petitioners therefore took and have been in possession, occupation and use of the property and build their house almost right in the middle of the property which house is present to date. The petitioner averred that sometime on or about October 6, 2013 they were informed that the 3<sup>rd</sup> respondent, one Dickson M. Mutuku proceeded to remove the beacons that the petitioners had legally set on the grounds. The petitioners stated that at the time, they had travelled for a visit upcountry when the 3<sup>rd</sup> respondent unlawfully fenced part of the land, uprooted the seedlings planted by the petitioner and commenced construction of a wall on part of the land measuring approximately 0.418 ha contained in plot No LR No MN/VI/121 situated within Aldina area in Jomvu within Mombasa county.
3. The petitioners maintained that the 3<sup>rd</sup> respondent's actions were wrongful, illegal and amounted to trespass and the trespass is still continuing. The petitioners averred that despite the numerous amicable attempts and means sought to request the 3<sup>rd</sup> respondent to move from the said land, they were neglected hence necessitating the filing of ELC case No 232 of 2013. Stephen M. Mulinge and Benedata Kathini v Dickson M. Mutuku & John Karanja Miritu. The petitioner stated that during the continuation of ELC case No 232 of 2013, one John Karanja Miritu, the 4<sup>th</sup> respondent joined



issue with the 3<sup>rd</sup> respondent to claim the land in contention as an alleged purchaser in good faith of a different part of the property purchased by the petitioners. The actions and/ or omissions of the respondents have breached, threatened and continue to breach the constitutional rights of the petitioners.

- a. Breach of article 40: - the petitioners aver that they have a right to own property either individually or in association with another person or other people. They hold that they rightfully and legally acquired the suit property in association with each other. This right has been jeopardized by the respondents jointly and severally through acts of trespass and conspiracy by the respondents to dispossess the petitioners of legally acquired land.
  - b. Breaches of article 50: - they claim that the 3<sup>rd</sup> and 4<sup>th</sup> respondents have and are still perpetuating an illegality, thus jeopardizing the constitutional rights of the petitioners herein. The aforesaid illegality involves the acquisition of land that belongs to the petitioners herein and the court process to effect and/or stamp the illegality.
  - c. Breaches of article 60: - the petitioners hold that they have a right to own property which is accompanied by the security that exists to protect their land rights. However, this right has been breached by the respondents jointly and severally through acts of wrongful ownership and/or acquisition.
4. It is the argument by the petitioners that the 3<sup>rd</sup> and 4<sup>th</sup> respondents are not in use of the property acquired and are therefore conspiring to sell the said property to an unsuspecting 3<sup>rd</sup> party. The petitioners being innocent purchasers for valuable consideration, have rights of the subject property shall suffer irreparably unless the trespass of the said land is stopped by this honorable court.
5. From the filed petition the petitioners sought for the following orders:-
- a. A declaration that the petitioners are the rightful owners of the land measuring approximately 0.418ha contained in plot No LR No MN/VI/121 situated within Aldina area in Jomvu within Mombasa county.
  - b. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had no capacity to sell because they had no property to pass therefore making the whole sale of the alleged property illegal.
  - c. A declaration that the actions of the respondents are directly infringing the petitioners' rights to own property under article 10 of the *Constitution* of Kenya 2010.
  - d. A declaration that the respondents be evicted and/or are in vacant possession of the land measuring approximately 0.418ha contained in plot No LR No MN/VI/121 situated within Aldina area in Jomvu within Mombasa county, belongs to the petitioners.
  - e. A declaration that the 3<sup>rd</sup> and 4<sup>th</sup> respondents are therefore trespassers and have no right over the land measuring approximately 0.418ha contained in plot No LR No MV/VI/121 situated within Aldina area in Jomvu within Mombasa county.
  - f. A declaration that that the 1<sup>st</sup> respondent's actions are therefore unconstitutional.
  - g. An order to issue of permanent injunction restraining the respondent herein, jointly and severally, their agents, servants, assigns and/ or employees to prevent, prohibit, inhibit and restrain them from entering, trespassing into or continuing to trespass into, alienating, disposing of, constructing, developing and/or in any way interfering with the land measuring approximately 0.418ha contained in plot No LR No MN/VI/121 situated within Aldina area in Jomvu within Mombasa county.



- h. Costs of the petition be provided for.
  - i. Any other orders it may deem fit in the circumstances.
6. As indicated above, the petition is premised on the testimonial facts, grounds and the averments made out in the 12<sup>th</sup> paragraphed affidavit of Stephen Mutuku Mulinge who averred that he was the 1<sup>st</sup> petitioner, hence competent to swear the affidavit on his own behalf and on the behalf of the 2<sup>nd</sup> petitioner. He annexed four (4) annexures thereof marked as “Smm – 1 to 4”. He also annexed the authority to act and marked it “Smm – 1”. He deponed that on or about the August 14, 2012 he entered into an agreement for sale of land measuring approximately 0.418 ha contained in plot No LR No MV/VI/121 situated within Aldina area in Jomvu within Mombasa county, from one Kalama Juma Charo, for valuable consideration of six hundred thousand Kenyan shillings (Kshs 600, 000/= only) having carried out his due diligence and establishing the ownership of the parcel. He annexed a copy of the sample agreement and bank statement and marked them as ‘Smm – 2’.
  7. He therefore took and had been in possession, occupation and use of the property without any interference from third parties until recently. Sometime on or about October 6, 2013, they were informed that the 3<sup>rd</sup> respondent one Dickson M. Mutuku proceeded to remove the beacons that the petitioners had legally set on the grounds. At the time, they had travelled for a visit upcountry when the 3<sup>rd</sup> respondent unlawfully fenced part of the land, uprooted the seedlings planted by the petitioners and commenced construction of a wall on part of the land measuring approximately 0.418 ha contained in plot No LR No MN/VI/121 situated within Aldina area in Jomvu within Mombasa county. Despite the numerous amicable attempts and means sought to request the 3<sup>rd</sup> respondent to move from the said land, they were neglected hence necessitating the filing of ELC case No 232 of 2013. Stephen M Mulinge and Benadata Kathini v Dickson M Mutuku & John Karanja Miritu which he annexed and marked as “Smm – 3”.
  8. During the continuation of the original suit, one John Karanja Miritu joined issue with the 3<sup>rd</sup> respondent to claim the land in contention as an alleged purchaser in good faith. He annexed a copy of the summons to enter appearance and marked them Smm - 4. For that reason the petitioners prayed that this honourable court halts the supposed ownership so as not to complicate the issue herein any further, and so as the issue of double allocation can be resolved. He deponed that he stands to suffer irreparable damage if the wrongful ownership of the said land is not stopped by an order of the court.
  9. He averred that the court be pleased to grant an order of permanent injunction restraining the respondents herein jointly and severally, their agents, servants, assignees and/or employees to prevent, prohibit, inhibits and restrains them from entering, trespassing into or continuing to trespass into alienating, disposing of, constructing, developing and/ or in any way interfering with the land measuring approximately 0.418 ha contained in plot No LR No MV/VI/121 situated within Aldina area in Jomvu within Mombasa county. He concluded that it is in the interest of justice that this petition is allowed as prayed.

### **III. The Respondents’ Case**

#### **The replying affidavit by the respondents**

10. On April 6, 2022, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed their 11<sup>th</sup> paragraphed replying affidavit sworn by Dickson Muoki Mutuku and dated April 6, 2022. He deponed that he was the 3<sup>rd</sup> respondent and he has authority of the other respondents to swear the affidavit on their behalf. He stated that he had read the constitutional petition, the same had also been explained to him by his counsel on record and he understood the same. He deponed that the petition as taken out, drawn and filed is misconceived,



frivolous, vexatious and otherwise an abuse of the court process. He averred that the same was intended to hoodwink the court to grant the unwarranted prayers. The petitioners constitutional right to property or any other right had not been infringed at all. Through a civil suit number 232 of 2013 in the High Court Mombasa the petitioner filed it against the respondent and the 4<sup>th</sup> respondents for declaration that they were the owners of the land the subject of this petition that was plot No MN/VI/121 measuring 0.418 ha at Aldina area in Jomvu within Mombasa.

11. He informed court that the civil case of ELC case No 232 of 2013, was fully heard before Omollo J with 1<sup>st</sup> and 2<sup>nd</sup> respondent being key witnesses and the same was found to have no merits and it was dismissed (annexed judgment marked ‘Dmm – 1’) The petitioners who are husband and wife were dissatisfied with the judgment of Omollo J and appealed to the Court of Appeal *vide* Civil Appeal No 136 of 2018 which appeal was dismissed with costs (annexed is the judgment marked ‘Dmm – 2’).
12. It is evident from the foregoing, that the petitioners did exercise their right to sue for their property they were given the opportunity to be heard by courts of competent jurisdiction and their pleas dismissed. He deponed that he had been advised by his advocate on record which advise he verily belief to be true that where there is clear provision of statute a party cannot resort to the Constitution for constitutional relief. The petitioner did not exercise their right to sue *vide* the Civil Procedure and its for them to invoke the Constitution.

#### **VI.Submissions**

13. On May 11, 2022 in the presence of all the parties in court, it was agreed by consensus that upon the filing of all the responses the court proceeds on to render its judgement on the filed pleadings. It is for that reason that a judgement date was fixed accordingly. However, the respondent still decided to file and serve some brief written submissions.

#### **The Written Submissions by the Respondent.**

14. On August 19, 2022, the learned counsel for the respondent the law firm of Messrs B. W Kenzi & Company Advocates filed their written submissions dated August 1, 2022. Mr Kenzi advocate submitted by upraising the court on the replying affidavit to the main petition filed by the respondents holding and stressing on the fact that the petitioners herein had already exercised their fundamental rights to property through a suit – ELC (Mombasa) No 232 of 2013 having sued the 3<sup>rd</sup> and 4<sup>th</sup> respondents herein but whereby the said case was dismissed. He stated that though the petitioners had now added the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the petition essentially to confuse the court. Indeed, he averred that these two had been witnesses in the above ELC suit.
15. The counsel informed court that being aggrieved by the judgement of the ELC, the petitioners, as plaintiffs then preferred an appeal before the Court of Appeal – civil appeal No 136 of 2018. He asserted that the appeal was heard and dismissed. In view of this, the learned counsel submitted that the petitioners had breached the doctrine of “*res judicata*” which offends the provision of section 7 of the Civil Procedure Act, cap 21. To buttress his point he relied on the decision of “Pangae Holdings LLC Ano v Hacienda Development Limited & 2 others (2020)” whereby the court held *inter alia*:- “parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in the subsequent suit”.
16. The learned counsel further argued that the petitioners herein were not entitled to the relief sought as they had a recourse to have filed a suit in the ordinary manner and which they had already done as stated above. He held that the petitioners followed the procedure as laid down under the Civil Procedure and filed a suit which was heard and determined. They also preferred an appeal which was heard and a



judgement delivered thereof. Therefore, he contended that they could not be seeking the same orders and remedies from this petition. On this issue he cited the case of “*Speaker of the National Assembly v James Njuguna Karume* (1992) KLR.

17. In conclusion he urged court to dismiss the petition with costs.

#### **V. Analysis and Determination:**

18. I have carefully considered all the filed pleadings pertaining to the petition dated November 13, 2019, the supporting and replying affidavits by both the petitioners and the respondents. In order to arrive at an informed, just, fair and equitable judgement the honorable court has framed the following four (4) salient issues for its determination. These are: -

- a. Whether the petition meets the fundamental threshold of a constitutional petition set up.
- b. Whether this petition dated November 13, 2012 offended the doctrine of “res judicata”?
- c. Whether the parties are entitled to the reliefs sought.
- d. Who will bear the costs of the petition.

#### **Issue No. a. Whether the Petition meets the fundamental threshold of a Constitutional Petition set up.**

19. Under this sub – heading, the honorable court discerns that the constitutional basis of the instant petition are well founded under paragraphs 4 to 15 of the petition which include:-

- a. Article 20 of the *Constitution* which provides the application of the bill of rights.
- b. Article 22 of *Constitution* of Kenya declaring the right upon any person or authorized representative to commence proceedings for declaration and compensation for violation of rights and fundamental freedom.
- c. Article 23 of the *Constitution* of Kenya giving High Court jurisdiction to deal with such matters and out timing the nature of relief that can be granted.
- d. Article 40 (1) and (3) of the *Constitution* of Kenya declares the right to acquire and own property of any descriptions in any part of Kenya and protection from state deprivation unless procedurally done and due compensation was made.
- e. Article 47 of *Constitution* of Kenya on fair administrative action which provides for written reasons to be served upon a person whose right has been or is likely to be adversely affected by acts of the government.
- f. Article 50 of the *Constitution* on fair hearing.
- g. Article 165(3) (d) and 5 as read with article 162 (2) (b) of the *Constitution* of Kenya giving this court jurisdiction to determine the questions whether a right of fundamental freedom in the bill of rights has been denied, violated, infringed or threatened inland matters

20. As a matter of course, the *Constitution* of Kenya under article 259 (1) provides a guide on how it should be interpreted as such:-

This *Constitution* shall be interpreted in a manner that:-

- a. Promotes its purposes, values and principles;



- b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c. Permits the development of the law; and
- d. Contributes to good governance.....”

This court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided.

Further, it is important to fathom that the Constitution is “a living instrument having a soul and consciousness of its own” . It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

21. Based on the principles set out in the edit of The Court of Appeal case of “the Mumo Matemu v Trusted Society of Human Rights Alliance & another (2013) eKLR” provided the standards of proof in the constitutional petitions as founded in the case of “Anarita Karimi Njeru v Republic [1980] eKLR 154” where the court is satisfied that the petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

“Constitutional violations must be pleaded with a reasonable degree of precision.....”

Further, in the “Thorp v Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:

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

22. In application of these set out principles for filing a constitutional petition to this case, the honorable court is fully satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein have dutifully complied and fully met the threshold of reasonable precision from the face value of the filed pleadings for instituting this petition against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> respondents herein for the remedies and prayers sought.

**Issue No. b). Whether the Petition dated 13<sup>th</sup> November 2019 offended the doctrine of “Res Judicata”**

23. It is not disputed that ELC case No 232B of 2013 in the Environment and Land Court of Mombasa was heard before Omollo J on merits and a judgment rendered and which being aggrieved by this decision preferring an appeal at the Court of Appeal - Civil Appeal No 136 of 2018 all related to the land which is the subject matter in the present petition. The Environment and Land Court judgment delivered by Omollo, J ( as he then was) on the August 2, 2018 which in part stated that: -

“I am thus unable to make a finding that the plaintiffs are entitled to 0.418 ha of land comprising part of title plot No MN/V/121 as contained in prayer (a) of their plaint. Neither can I issue an order of injunction against the defendants for trespassing on part of the portion measuring 0.418 ha as they are also entitled to their shares. Consequently, no damages accrue since there is no trespass. Since the misfortune of the plaintiffs was occasioned to parties not joined to this suit and in the interest of good neighbourliness, I



order each party to bear their respective costs of the suit. The plaintiffs' suit is thus dismissed for not having been proved with no order as to costs."

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

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

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

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

25. Additionally, the majority judgment of Alnashir Visram JJA concurring with W. Karanja JJA and the dissenting judgment by P. Kiage JJA delivered on March 7, 2019 were exhibited in the replying affidavit of the 3<sup>rd</sup> respondent. The Court of Appeal held that: -

"In light of the foregoing, we do not think that the appellants established that the respondents had trespassed onto their land. Further, Salim's evidence with respect to the original plot which belonged to the deceased displaced the appellants' allegations. To begin with Salim testified that he was the deceased's eldest son; prior to his death he distributed identifiable portions of the original plot amongst his four sons namely, Salim N Kalama, Juma C Kalama, Abdalla C Kalama and Yusuf Kalama. This was reinforced by the testimony of Omar Masud Wanje ("DW - 4") who was present when the deceased allocated the said portions to his sons. Salim stated that it was after the demise of the deceased that the family held a meeting on August 14, 2013 in the presence of elders and confirmed the said distribution.

He was the first to sell his portion measuring 80 feet x 200 feet to Angus and Bernandeta who commenced construction of a permanent house. This piece of evidence was confirmed by the appellants and their witnesses who admitted that the said Angus was in occupation of a



portion which was adjacent to their parcel. Salim went on to corroborate the 1<sup>st</sup> respondent's evidence that Angus and Bernandeta sold their portion and the house to him.

In addition, the 2<sup>nd</sup> respondent evidence was to the effect that he purchased his portion measuring 110 feet x 200 feet from Abdalla and Yusuf, the deceased's sons. This was also confirmed by Salim who was a witness to the said agreement. Moreover, when the trial court went for a site visit, Abdalla, Yusuf and Juma were present and as per the record, they admitted to selling portions of the original plot to the appellants and the 2<sup>nd</sup> respondent. Consequently, this meant that the parties herein were entitled to portions of the original plot.

Accordingly, we, like the trial court, find that as it stood, the evidence adduced by the appellants did not establish their claims on a balance of probabilities. Our position is fortified by the sentiments of Lord Denning J in *Miller v Minister Of Pensions 2* [1947] AII ER 373:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

Based on the foregoing, we concur with the following finding of the trial court:

“In the sale agreements to the defendants, the sizes of the sold plot is given unlike the plaintiffs' agreement. Since the persons who sold were all sons of the late mzee Jela, I will go by the evidence of DW 1 and DW 5 that their father gave each of them a share of the disputed plot. The sizes distributed as given by defence witnesses is slightly contradictive in width. DW 1 stated he was given 88 by 200 and in his statement to the police he said Swedi got 83 by 200. DW 4 & DW 5 maintained Salim was given 88 by 200 while Juma, Abdalla & Yusuf each got 55 by 200.

The burden was however heavier on the plaintiffs to prove the size of the land sold to them. Having conceded that measurements were not done before the sale, this court can only reach a conclusion that they are only entitled to the shares of the person who sold to them i.e Kalama Juma Charo which is estimated to be 55 feet by 200 feet. If they paid more based on what they were shown, their claim for compensation can only lie as against Kalama Juma Charo and not to claim the portions other people who bought from the sons that were equally entitled to sell their shares.

I am thus unable to make a finding that the plaintiffs are entitled to 0.418 ha of land comprising part of title plot No MN/V/121 as contained in prayer (a) of their plaint. Neither can I issue an order of injunction against the defendants for trespassing on part of the portion measuring 0.418 ha as they are also entitled to their shares. Consequently, no damages accrues since there is no trespass. Since the misfortune of the plaintiffs was occasioned to parties not joined to this suit and in the interest of good neighbourliness, I order each party to bear their respective costs of the suit. The plaintiffs' suit is thus dismissed for not having been proved with no order as to costs.”



Accordingly, the appeal herein lacks merit and is hereby dismissed with costs to the respondents.”

26. In order for the court to determine whether or not a matter is *res judicata* it is in my view incumbent upon the court before which the issue of *res judicata* is raised to peruse the decision and/or the pleadings in the earlier suit to satisfy itself who the parties in the earlier suit were; what issues were canvassed and what decision was reached. I cannot see on what other basis; the court would be in a position to pronounce itself on the issue whether or not the current suit would be said to be *res judicata*.
27. The Supreme Court in the case of “[Kenya Commercial Bank Limited v Muiri Coffee Estates Limited & another](#) (2016) eKLR while considering the application of *res judicata* doctrine at paragraph 54 of their judgment observed as follows:-

“(54) (54) The doctrine of *res judicata* in effect allows a litigant only one bite of the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further relief not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy on the adjudication process. The doctrine prevents a multiplicity of suits which would ordinarily clog the courts, apart from occasioning unnecessary cost to the parties; it ensures the litigation comes to an end, and the verdict duly translates into fruits for one party, conclusively”.

28. At paragraph 58 of the judgment the Supreme Court further stated as follows:-

“(58) Hence, whenever the question of *res judicata* is raised a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issue determined in the previous case. The court should ascertain whether the parties are the same, or are litigating under the same title, and whether the previous case was determined by a court of competent jurisdiction”

29. I have consequently perused and considered the judgment of the ELC case No 232B of 2013 and have noted that amongst the issues the court set out for determination were as follows :-

- a. What was the size of land sold to the plaintiffs?
- b. From the answer to (i), are the defendants entitled to the portions they are claiming or are they trespassers?
- c. Has there been proof of encroachment and or trespass on the plaintiffs’ portion?
- d. Who should bear the costs of the suit?

30. On the question of whether the defendants are entitled to the portions they are claiming or are they trespassing, the judge concluded as follows:-

“Neither can I issue an order of injunction against the defendants for trespassing on part of the portion measuring 0.418 ha as they are also entitled to their shares. Consequently, no damages accrues since there is no trespass. Since the misfortune of the plaintiffs was occasioned to parties not joined to this suit and in the interest of good neighbourliness, I



order each party to bear their respective costs of the suit. The plaintiffs' suit is thus dismissed for not having been proved with no order as to costs.”

31. In the case of “*Grays Jepkemoi Kiplagat v Zakayo Chepkonga Cheruiyot* ( supra) this court stated thus:-

“ it is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints”

32. In the present petition the petitioners merely set out articles of the Constitution that they allege the respondents have violated. The petitioners are stated to be the legal proprietors of unadjudicated portion of land measuring 0.418ha (suit parcel) from plot No MN/VI/121 situated at Aldina area in Jomvu within Mombasa county. They had purchased the same from Mzee Jela Mudzombo (deceased) *vide* a sale agreement dated August 14, 2012 at a consideration of Kenya shillings six hundred thousand (Kshs 600,000). Thereafter, they erected beacons and commenced developing the suit parcel. On or about October 6, 2013 they discovered that the respondents had encroached on sections of the suit parcel, removed beacons, and fenced off the said sections.

33. The petitioners tried without any success to get the respondents to stop the trespass and even went as far as lodging a complaint with the police. Eventually, they filed the above-mentioned suit contending that the respondents had no right over the suit parcel and that their conduct had occasioned them loss. The Court of Appeal in its judgment reproduced the defence and it is evident the defendants were staking claim of ownership to the suit premises and denied they were trespassers on the land.

34. Indeed, the defendants claimed to have enjoyed quiet possession of the suit land and had by virtue of that become legal owners by virtue of prescription. I am in the premises satisfied that the petitioners were indeed parties as plaintiffs and as appellants in the Environment and Land Court suit and the Court of Appeal in the respective cases in the two courts. The respondents were the defendants and the respondents in the Environment and Land Court and in the Court of Appeal cases respectively.

35. In the Court of Appeal case of “*John Florence Maritime Service Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* (2015) eKLR the Court of Appeal held that a court in determining what questions of law and fact were determined in the earlier suit was entitled to look at the record of the previous suit. The court stated thus: -

“The JR was tried before a competent court and judgment delivered. *Halsbury's Laws* 9<sup>th</sup> edition, volume 16 para 1527- 1529) stated that in deciding what questions of law and fact were determined in the earlier judgment the court is entitled to look at the judge's reasons for his decisions, and his notes of the evidence and is not restricted to the record. As correctly submitted by counsels for the respondents, nothing would therefore prevent a court from accessing its own records in previous proceeding—“.

36. In the petition before the court the petitioners as observed were parties in the suit before the Environment and Land Court and the Court of Appeal. They had the opportunity to participate and they did. They raised issues of the allocation of the suit land, their long period of occupation and their claim of legal ownership by reason of prescription. These issues were appropriately considered both at the Environment and Land Court and before the appellate court and were finally adjudicated. These



issues were directly in issue in the earlier suit and are directly and substantially in issue in the present petition.

37. The petition cannot be determined without considering who was validly allocated the suit premises and whether the respondents are lawful occupiers and/ or are trespassers on the suit land. These issues have been determined previously by a competent court and this court cannot properly adjudicate the same issues a second time. The petitioners ought not to be allowed to re-open the same case again on what they allege are a violation of the Constitution. The Constitution is being used as a camouflage to seek to reopen the litigation.
38. In the case of “*John Florence Maritime Limited case (supra)*” the Court of Appeal in deciding whether *res judicata* was applicable in constitutional petitions and/or whether the doctrine ought to be invoked only by way of a formal application held thus:-
  - (i) The doctrine of *res judicata* is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.
  - (ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application, it can be raised through pleadings as well as by way of preliminary objection.
39. Although the petitioners have clothed this matter as raising constitutional issues under the bill of rights, it has all the hallmarks of a land suit being disguised as such. The matter is not helped by the fact that there has been a prolonged litigation involving the petitioners and the respondent respecting the land that is at the centre of the dispute. The litigation has been conclusively determined and the execution of the resultant decree is indeed what provoked the filing of the instant petition.
40. The petitioners are in a cul-de-sac and I see the filing of a constitution petition as an attempt to reopen the litigation between themselves and the respondents through the backdoor and in the process to have a second bite of the cherry. The court cannot condone that and cannot allow litigation to be mutated and to go on endlessly. There has to be an end to litigation and parties ought not to be permitted to “panel beat” their cases by merely introducing new parties and or by introducing what may otherwise be described as innovative causes of action as was the case of “*E.T v Attorney General & another* (2012) eKLR.
41. Having established that this matter is *res judicata* I shall not touch the other issues raised in the petition as they were issues that were already determined in competent courts. I must note that the petitioners included new parties in the matter, that does not change that matters touching the suit property had already been dealt with and judgements delivered in that regard.

#### **Issue No. c). Who will bear the Costs of the Petition**

42. The issue of costs is at the discretion of the court. Costs means any award that is made to a party after any legal process or litigation. Costs follow the events where this means the results of the said legal process or litigation thereof.
43. In the instant case, the Constitution petition has failed to succeed for the elaborate and legal reasonings adduced by this court hereof. For that reason therefore, the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein should be made to bear the costs of the filed petition against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents herein.



## **VI. Conclusion & Disposition.**

44. In the long run, having intensively and thoroughly deliberated on all the framed issues herein, this honorable court arrives at the finding that this matter offends the doctrine of “*res judicata*”. Thus, the court proceeds to grant the judgement as follows:-
- a. That judgement be and is hereby entered in favour of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents herein.
  - b. That the Constitution petition filed and dated November 13, 2019 by the 1<sup>st</sup> & 2<sup>nd</sup> petitioners herein be and is hereby struck out for lack of merit.
  - c. That costs to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein to be awarded to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents herein.

It is ordered accordingly.

**JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA ON THIS 5<sup>TH</sup> OCTOBER DAY OF 2022**

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

**ENVIRONMENT & LAND COURT AT**

**MOMBASA**

**In the presence of:-**

- a. M/s. Yumna & Mr. Omar, the Court Assistant
- b. M/s. Mukaya Advocate for the 1st and 2nd Petitioners.
- c. Mr. B. W. Kenzi Advocate for the 1st, 2nd, 3rd and 4th Respondents.

**LUSTICE L.L. NAIKUNI (JUDGE)**

