



REPUBLIC OF KENYA



**KENYA LAW**  
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**African Centre for Corrective and Preventive Action & 11 others v Delmonte Kenya Limited  
& 7 others; Kenya National Human Rights Commission & 2 others (Interested Parties)  
(Constitutional Petition E002 of 2023) [2025] KEHC 1602 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1602 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CONSTITUTIONAL PETITION E002 OF 2023**

**FN MUCHEMI, J**

**FEBRUARY 6, 2025**

**IN THE MATTER OF THE RIGHT TO INFORMATION AND THE RIGHT TO EFFECTIVE  
REMEDY AFFORDED BY ARTICLES 19, 20, 21, 22, 23, 24, 25, 26, 27(1), 28, 29, 42,  
69, 70, 262, 263 AND 264 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF VIOLATION, INFRINGEMENT OF AND/OR THREAT  
TO THE RIGHT TO LIFE; THE PROHIBITION OF TORTURE, INHUMAN AND  
DEGRADING TREATMENT; THE RIGHT TO SECURITY OF THE PERSON; THE  
PROTECTION OF THE LAW; THE RIGHT TO EQUALITY BEFORE THE LAW**

**AND**

**IN THE MATTER OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**AND**

**IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS**

**AND**

**IN THE MATTER OF THE ACCESS TO INFORMATION ACT, NO. 31 OF 2016**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT NO. 11A OF 2011**

**AND**

**IN THE MATTER OF THE OFFICE OF THE  
DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013**



**BETWEEN**

**AFRICAN CENTRE FOR CORRECTIVE AND PREVENTIVE  
ACTION ..... 1<sup>ST</sup> PETITIONER**  
**KAGAMA ..... 2<sup>ND</sup> PETITIONER**  
**PATRICK ESHBAN GITURA ..... 3<sup>RD</sup> PETITIONER**  
**CHARLES NDEGWA WANJIRU ..... 4<sup>TH</sup> PETITIONER**  
**DANIEL MWANGI KAMAU ..... 5<sup>TH</sup> PETITIONER**  
**CECILIA WAITHERA ..... 6<sup>TH</sup> PETITIONER**  
**MERCY NJOKI KARIUKI ..... 7<sup>TH</sup> PETITIONER**  
**STEPHENE KAMANDE ..... 8<sup>TH</sup> PETITIONER**  
**JOHN KANYIRI MUCHIRI ..... 9<sup>TH</sup> PETITIONER**  
**PIUS KIARIE MUIRURI ..... 10<sup>TH</sup> PETITIONER**  
**ERASTUS NJOROGE NYAMBURA ..... 11<sup>TH</sup> PETITIONER**  
**SAMUEL MWAURA KARIUKI ..... 12<sup>TH</sup> PETITIONER**

**AND**

**DELMONTE KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**  
**FRESH DELMONTE PRODUCE ..... 2<sup>ND</sup> RESPONDENT**  
**THE CABINET SECRETARY MINISTRY OF INTERIOR SECURITY AND CO-  
ORDINATION OF NATIONAL GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**  
**INSPECTOR GENERAL OF THE NATIONAL POLICE  
SERVICE ..... 4<sup>TH</sup> RESPONDENT**  
**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 5<sup>TH</sup> RESPONDENT**  
**INDEPENDENT POLICING OVERSIGHT AUTHORITY ..... 6<sup>TH</sup> RESPONDENT**  
**DIRECTOR OF PUBLIC PROSECUTIONS ..... 7<sup>TH</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 8<sup>TH</sup> RESPONDENT**

**AND**

**THE KENYA NATIONAL HUMAN RIGHTS COMMISSION ... INTERESTED  
PARTY**  
**COMMISSION ON ADMINISTRATIVE JUSTICE ..... INTERESTED PARTY**  
**KENYA HUMAN RIGHTS COMMISSION ..... INTERESTED PARTY**



## RULING

### Brief Facts

1. The four (4) applications for determination were filed by different parties and seek for several orders herein.
2. The first application dated 6<sup>th</sup> February 2024 filed by the 1<sup>st</sup> respondent seeks for orders to strike out the petition dated 30/12/2023 on grounds that it does not meet the standards of a constitutional petition as set out in this case of *Mumo Matemtu VS Trustees of Human Rights Alliance (2013) eKLR* and further that this court lacks jurisdiction. Alternatively, the 1<sup>st</sup> respondent seeks to be struck out from the same petition for failure by the Petitioner to seek leave to serve the 1<sup>st</sup> petition who is a foreign company.
3. The second application dated 7<sup>th</sup> February 2024 filed by the 2<sup>nd</sup> respondent seeks for orders to strike out the petition dated 30<sup>th</sup> December 2023 for being incompetent and for failure by the petitioners to apply for leave to serve the 2<sup>nd</sup> respondent who is a foreign company registered in George Town, Cayman Islands.
4. The 3<sup>rd</sup> application by the 3<sup>rd</sup> Intended Interested Party seeks for orders of joinder in the petition and leave to be allowed to submit any relevant information or evidence.
5. The 4<sup>th</sup> application dated 22<sup>nd</sup> April 2024 by the 3<sup>rd</sup> to 12<sup>th</sup> petitioners seeks for leave to amend the petition dated 30<sup>th</sup> December 2023.
6. The petitioners filed a replying affidavit dated 14<sup>th</sup> March 2024 in opposition to the applications dated 6<sup>th</sup> and 7<sup>th</sup> February 2024. In opposition to the application dated 8<sup>th</sup> February 2024, the 1<sup>st</sup> respondent filed grounds of opposition and a replying affidavit dated 27<sup>th</sup> and 29<sup>th</sup> February 2024 respectively. In opposition to the application dated 22<sup>nd</sup> April 2024, the 1<sup>st</sup> respondent filed grounds of opposition and replying affidavit dated 23<sup>rd</sup> May 2024, the 2<sup>nd</sup> respondent filed grounds of opposition dated 27<sup>th</sup> May 2024 and the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 8<sup>th</sup> respondents filed a notice of preliminary objection dated 28<sup>th</sup> May 2024.

### The 1<sup>st</sup> Respondent's/Applicant's Case on the application dated 6<sup>th</sup> February 2024.

7. The 1<sup>st</sup> respondent states that the petition does not meet the standard for specificity that is required of a constitutional petition as set out by the Court of Appeal in *Mumo Matemtu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR*. Due to the un specificity, the 1<sup>st</sup> respondent argues that they are unable to properly defend petition as the petition does not particularise the details and manner of infringement of the petitioners' rights by the respondents and in particular the 1<sup>st</sup> respondent. Further, the petition outlines various provisions of *the Constitution*, the *Access to Information Act*, the *National Police Service Act*, the Universal Declaration of Human Rights and the African Charter on Human and peoples' Rights without indicating how these laws have been violated and by whom. Thus, the 1<sup>st</sup> respondent argues that the petition makes vague allegations against all the respondents jointly making it impossible to know which allegations specifically concern them and what they are required to respond.
8. The 1<sup>st</sup> respondent further argues that the petition has raised numerous unrelated issues including access to information, freedom from torture, cruel and inhuman treatment, the right to a clean and healthy environment, the right to fair administrative action and the violation of Article 2 on the



supremacy of the Constitution and it is not feasible for all those issues to be determined in one petition with 8 respondents where the petitioners have failed to particularise which respondent is responsible for each issue.

9. The 1<sup>st</sup> respondent states that this court lacks jurisdiction to adjudicate the allegations of violation of the right to a clean and healthy environment as that is a dispute relating to the environment which has to be heard and determined by the Environment and Land Court in accordance with Article 162(3) of the Constitution as read with Section 13(2) of the Environment and Land Court Act.
10. The 1<sup>st</sup> respondent argues that the petitioners' complaints can be enforced through mechanisms provided by the respective statutes such as the National Environment Management Authority which is mandated to exercise general supervision and co-ordination over all matters relating to the environment, the Access to Information Act provides a mechanism for the commission on Administrative Justice to review decisions by a public entity or private body in relation to a request for access to information and the allegations of torture, assault and murder which are criminal issues should be determined under the ordinary criminal law and thus it is unnecessary to invoke the provisions of the Constitution. Thus the petitioners having failed to make use of statutory bodies mandated to deal with the issues raised in the petition is contrary to the doctrine of exhaustion.

#### **The 2<sup>nd</sup> Respondent's/Applicant's Case on the application dated 7<sup>th</sup> February 2024.**

11. The 2<sup>nd</sup> respondent states that petition ought to be struck out as it is incompetent, bad in law and unsustainable since it does not disclose or particularise any constitutional violations against it. The 2<sup>nd</sup> respondent is a company incorporated in George Town, Cayman Islands with no registered office or place of business in the Republic of Kenya and has been improperly enjoined as a party in these proceedings.
12. The 2<sup>nd</sup> respondent avers that the petition dated 30<sup>th</sup> December 2023 was served upon them by the petitioners without applying for the requisite leave for assumption of jurisdiction by the High Court over them, which is a foreign corporation.
13. The 2<sup>nd</sup> respondent states that the petition does not disclose any constitutional violations committed by them. Further, the 2<sup>nd</sup> respondent avers that there is a real danger of them, a foreign corporation domiciled and resident outside the jurisdiction being forced to defend at a great expense, a futile set of proceedings in a court that lacks the requisite jurisdiction over it.

#### **The 3<sup>rd</sup> – 12<sup>th</sup> Petitioners' Case on the applications dated 6<sup>th</sup> and 7<sup>th</sup> February 2024.**

14. The petitioners state that the allegations by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the petition does not disclose the constitutional rights violated by themselves is false as in June 2023, the Guardian newspaper, a leading British daily newspaper in conjunction with the Bureau of Investigative Journalism, a non profit news organisation based in London that was founded in 2010 to pursue public interest investigations, published the results of a joint investigation titled "Guards at Del Monte pineapple farm in Kenya accused of killings." The said report stated among other things that the security guards at Del Monte's pineapple farm in Kenya had been accused of brutally assaulting and killing people suspected of trespassing on its land.
15. In response to the said news reports, the petitioners aver that the 1<sup>st</sup> and 2<sup>nd</sup> respondents issued statements indicating that they had instituted a full and urgent investigation into the said allegations. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the said investigations would also involve a concurrent human rights impact assessment study supported by an independent review by a specialist human rights consultancy. The petitioners further state that from follow up articles published by the Guardian



newspaper and the Bureau of Investigative Journalism disclosed that the aforesaid specialist human rights consultancy commissioned by Del Monte is a firm known as Partner Africa which had in fact carried out an audit of Del Monte's compliance with Kenyan and international human rights requirements and reached the conclusion that major human rights violations were being committed at the pineapple farm of the 1<sup>st</sup> respondent where there have been numerous deaths and violence.

16. Pursuant to the material findings by Partner Africa in its report, the petitioners state that they requested Partner Africa to provide them with a copy of the report pursuant to Article 35 of the Constitution of Kenya. Further, the petitioners state that pursuant to Rule 3(6) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have a duty to assist the court by providing a copy of the Partner Africa report rather than filing a mischievous application seeking to have the petition struck out on the grounds that it does not disclose or particularize any constitutional violations by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
17. The petitioners aver that the constitutional violations carried out by the 1<sup>st</sup> respondents' employees are overseen by the company's board of directors as indicated in the Del Monte's annual reports. Thus, it was on that basis that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were enjoined as parties to these proceedings and the petitioners argue that the attempt to have their names struck off from the petition is thus without basis and mischievous. The petitioners further state that the 2<sup>nd</sup> respondent duly assumed service and authorized the General Counsel and Corporate Secretary, Effie D. Silva, to swear affidavits on behalf of the 2<sup>nd</sup> respondent in the instant petition.
18. The petitioners aver that if the 2<sup>nd</sup> respondent has been improperly enjoined, the remedy contemplated by Rule 5(d) and (e) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 is not to strike out the petition but to amend the same. The petitioners argue that the prayer by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to have the petition struck out on the grounds that the petition does not disclose or particularise any constitutional violations by the 2<sup>nd</sup> respondent is purely intended to defeat substantive justice to their detriment.
19. Further, the prayer by the 2<sup>nd</sup> respondent to have the petition struck out on grounds that the petitioners did not seek leave before serving the 2<sup>nd</sup> respondent in a foreign jurisdiction is against the sound provisions of Rule 14(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules which provide that the petitioner shall serve the respondent with the petition documents and relevant annexures within 15 days of filing or such time as the court may direct.

#### **The Petitioners' Case on the application dated 22<sup>nd</sup> April 2024.**

20. The petitioners reiterate what they deponed in their Replying Affidavit dated 11<sup>th</sup> March 2024 and aver that the proposed amendments are intended to bring before the court the real matters in controversy between the parties so that the same are determined on their true and substantive merits. Further, the proposed amendments are necessitated by information relevant for the fair and just determination of the real questions in controversy in the instant suit some of which came to the petitioners' knowledge subsequent to the filing of the instant petition.
21. The petitioners aver that the issues raised in both the petition and the proposed amended petition raise serious issues regarding violation of human rights which have been in the public domain for some time.
22. The petitioners state that the allegations set out in the media reports, the Partner Africa Report and in the draft amended petition are backed by first hand accounts by the gross human rights violations set out in the petition. Further the petitioners argue that the filing of the instant application has been



delayed by efforts of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents as in the months of February, March and April 2024, the 1<sup>st</sup> and 2<sup>nd</sup> respondents undertook a fact finding exercise in neighbourhoods most affected by the human rights abuses that form the basis of the instant petition. On 4<sup>th</sup> April 2024, the police undertook a raid at the venue of one of the verification exercises at Punda Village in Kimorori-Wempa Location within Maragua sub county and arrested over 50 clerks, victims and others participating in the exercise who were then taken to Makuyu Police Station. All the arrested individuals were later released without any charges or explanation for their arrest which the petitioners argue is harassment by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.

23. The petitioners state that pursuant to Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice Procedure Rules 2013 leave to amend a petition may be granted at any stage thus the respondents will suffer no prejudice if the amendment is allowed as they are yet to file their substantive responses.
24. The petitioners argue that the proposed amendments arise out of the same facts or substantially the same facts in respect of which relief is claimed by them.

### **The 1<sup>st</sup> Respondent's Case**

25. The 1<sup>st</sup> respondent states that save for the description of the parties, the petitioners have deleted the entire petition dated 30<sup>th</sup> December 2023 and are proposing to introduce a new petition entirely. Further the petitioners have sought to introduce 2,261 new petitioners to the petition by way of an amendment yet none of the claims made by the 2,200 petitioners that are to be introduced by way of amendment had been made in the petition dated 30<sup>th</sup> December 2023.
26. The 1<sup>st</sup> respondent states that there is excessive duplication of the proposed petitioners with some of the proposed petitioners listed up to four times as separate claimants. Thus the 1<sup>st</sup> respondent argues that due to the repetition of the same proposed petitioners as different claimants on numerous occasions, the entire class of proposed petitioners has to be scrutinised carefully before any proposed petitioner is allowed to join the instant proceedings.
27. The 1<sup>st</sup> respondent argues that it has not violated the fundamental rights and freedoms of the proposed petitioners as alleged as the only proposed petitioners that have given particulars of their claims as against them are Robert Ndungu Gatimu, Erastus Wainaina, Alice Nduta, Samuel Katinde, Loice Wanja Gichuhi and Joel Nyoike Thuo. The 1<sup>st</sup> respondent states that the other petitioners are relying on newspaper reports by the Guardian newspaper to support their allegations of breach of fundamental rights and freedoms. Furthermore, newspaper reports do not constitute evidence upon which a court of law should solely rely on to make a determination.
28. The 1<sup>st</sup> respondent argues that although Robert Ndungu Gatimu has sworn an affidavit, making a claim on his behalf of his son, David Karanja Ndungu who was allegedly killed on the 1<sup>st</sup> respondent's farm on 14<sup>th</sup> October 2022, he has not produced a grant of probate or grant of letters of administration to show that he is the legal representative of David Karanja Ndungu. Similarly, Erastus Mwangi Wainaina has not produced a grant of probate or grant of letters of administration to show that he is the legal representative of his son Stanley Wainaina Mwangi although he has stated that he is making a claim on behalf of his son. Furthermore, the claim relates to an alleged incident in 2007 which is 16 years ago and is therefore time barred. One Samuel Mutesya Katindie has also not produced a grant of probate or grant of letters of administration to show that he is the legal representative of his son Peter Mutuku Mutisya who was allegedly found dead on the 1<sup>st</sup> respondent's farm. The 1<sup>st</sup> respondent avers that any claim for alleged wrongful death can be made separately and does not need to be elevated to a constitutional issue.



29. The 1<sup>st</sup> respondent states that save for her narration, no evidence has been adduced in support of Alice Nduta Karanja's allegation of rape. The said deponent stated that she had reported the matter to Ngatiri Police Station and investigations pending. The 1<sup>st</sup> respondent argues that any claim that she has against them can be made in separate proceedings and is not a constitutional issue.
30. The 1<sup>st</sup> respondent argues that Loice Wanja Gichuhi is making a claim on behalf of her husband, Peter Ngei Muia who was killed on the 1<sup>st</sup> respondent's farm on 24<sup>th</sup> July 2012 but she has not produced a marriage certificate to show that she was married to Peter Ngei Muia nor did she produce a grant of probate or grant of letters of administration to show that she is the legal representative of Peter Ngei Muia. Furthermore, the claim relates to an incident in 2012 which is 12 years ago and thus time barred. Similarly, Joel Nyoike Thuo is making a claim on behalf of his son Stephene Thuo Nyoike but he has not produced a grant of probate or grant of letters of administration to show that he is the legal representative of Peter Mutuku Mutisya.
31. The 1<sup>st</sup> respondent states that save for the mentioned claims, the petitioners have not given particulars of the claims being made by the 2261 petitioners that intend to join the instant proceedings. Thus the 1<sup>st</sup> respondent argues that it is not possible to confirm whether the proposed petitioners' claims have common questions of fact or law.
32. The 1<sup>st</sup> respondent states that it is not true that they are occupying 14,063.02789 acres illegally as alleged by the petitioners. The 1<sup>st</sup> respondent states that they are the registered proprietor of LR. No. 12157/2, 12157/4, 12157/5, 12157/9, 12157/10, 12158/3, 12158/4 and 13289 in Murang'a County and LR No. 12203/1 and 12203/2 in Kiambu County all totalling to 8,380.977 hectares. Further, the 1<sup>st</sup> respondent argues that any claim for use and occupation of land or alleged violation of environmental rights can only be adjudicated by the Environment and Land Court.
33. The 1<sup>st</sup> respondent states that they will be prejudiced if the petitioners are allowed to amend the petition as they will be forced to defend 2,261 separate claims with different facts and questions of law within one case. Further, with respect to some of the claims, the joinder of the proposed petitioners will deprive the 1<sup>st</sup> respondent of a defence of limitation. The 1<sup>st</sup> respondent further states that the proposed petitioners have not filed particulars of their claims against them which makes it impossible for the 1<sup>st</sup> respondent to know the case being made against them in the draft amended petition. The 1<sup>st</sup> respondent argues that the proposed amendments to the petition change the claims made in the present proceedings into claims of a substantially different character instead of clarifying the lack of particulars in the petition dated 30<sup>th</sup> December 2023.
34. The 1<sup>st</sup> respondent states that the proposed amendments seek to elevate disputes which ought to be dealt with under ordinary civil law into constitutional matters contrary to the principle in *Sylvana Mpabwanayo Ntaryamira vs Allen Waiyaki Gichuhi & Another* [2016] eKLR.
35. The 1<sup>st</sup> respondent further states that the proposed petitioners have failed to make use of statutory bodies mandated to deal with the issues raised in the draft amended petition which is contrary to the doctrine of exhaustion.

### **The 2<sup>nd</sup> Respondent's Case.**

36. The 2<sup>nd</sup> respondent states that the application seeks to amend the petition by seeking to reformulate the entire basis of its case and the relief sought against it.
37. The 2<sup>nd</sup> respondent further states that it has challenged the jurisdiction of this Honourable Court to entertain the petition as against it on the ground that it is a foreign entity not properly brought before



the court. The 2<sup>nd</sup> respondent argues that a challenge to a court's jurisdiction is a threshold issue and has to be determined in limine. Consequently, any issues relating to proposed amendments to the petition, so far as they concern the 2<sup>nd</sup> respondent cannot be considered by this Honourable Court prior to a determination being made on the fundamental question of its jurisdiction over it. The 2<sup>nd</sup> respondent avers that such amendments as are sought in the petition even if allowed, cannot confer jurisdiction upon a court that had no jurisdiction to entertain the petition in the first place.

#### **The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Respondents' Case.**

38. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> respondents rely on the cases of Owners of Motor Vessel 'Lilian S' vs Caltex Oil (Kenya) Limited [1989] KLR 1 and In the Matter of the Interim Independent Electoral Commission (2011) eKLR and argue that the application dated 22<sup>nd</sup> April 2024 cannot be dispensed with until the court determines the applications dated 5<sup>th</sup> and 6<sup>th</sup> February 2024 raising jurisdictional issues.

#### **The Intended 3<sup>rd</sup> Interested Party's Case on the application dated 8<sup>th</sup> February 2024.**

39. The intended 3<sup>rd</sup> interested party is a not for profit organization duly registered in the Republic of Kenya since 1994 and is dedicated to the implementation of the Kenya Constitution including protection of fundamental rights and freedoms and has relevant expertise in constitutional law and human rights law. The intended 3<sup>rd</sup> interested party avers that it works with thirty Human Rights Networks (HURINETs) and other grassroots community organizations including the 1<sup>st</sup> and 2<sup>nd</sup> petitioners and supports them in research and necessary enforcement of human rights violations.
40. The intended 3<sup>rd</sup> interested party states that it has conducted significant research and documented human rights violations against the 1<sup>st</sup> and 2<sup>nd</sup> respondents as well as other multi-national business entities operating in Kenya.
41. The intended 3<sup>rd</sup> interested party states that the petition raises fundamental questions of systemic gross human rights violations by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and it will be in the best interests of justice that they be joined to the instant matter.

#### **The 1<sup>st</sup> Respondent's Case**

42. The 1<sup>st</sup> respondent states that there is no basis for joining the intended 3<sup>rd</sup> interested party as the intended 3<sup>rd</sup> interested party has failed to meet the threshold set in Francis K Muruatetu & Another vs Republic & 5 Others [2016] eKLR. The intended 3<sup>rd</sup> interested party has failed to prove that they have a stake in the proceedings and that they will be affected by the decision of the court when it is made.
43. The 1<sup>st</sup> respondent further states that the research referred to has no relevance to the matters in issue and the report contains unsubstantiated allegations and cannot be the basis for joinder. Further, the 1<sup>st</sup> respondent states that the report is based on alleged claims of labour rights violations which do not form part of the issues raised in the petition.
44. The 1<sup>st</sup> respondent further avers that the research findings are evidence and one does not need to be joined to testify. Thus, the 1<sup>st</sup> respondent argues that it will be in the greater interests of justice and the rule of law that only the necessary parties are admitted to the proceedings.
45. Parties put in written submissions.



## The Petitioners' Submissions.

46. The petitioners rely on Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules 2013 and the cases of Institute for Social Accountability & Another vs Parliament of Kenya & 3 Others [2014] eKLR; Elijah Kipngeno arap Bii vs Kenya Commercial Bank Limited [2013] eKLR and Maina vs National Assembly & 4 Others; Gachagua, EGH the Deputy President of the Republic of Kenya & Another (Interested Parties) (Constitutional Petition E014 of 2024) [2024] KEHC 12296 (KLR) (11 October 2024) (Ruling) and submits that amendment of constitutional petitions may be permitted by the court at any stage. The court will allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits provided there has been no undue delay, no new or inconsistent cause of action is introduced and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.
47. The petitioners further submit that the degree or percentage of amendment as argued by the respondents is not a determining factor on whether to allow an amendment but rather whether the amendments allow the honourable court to determine the true, substantive merits of the case. The petitioners argue that justice lies in allowing the amended petition as the respondents cannot be allowed to raise issues of particularity on the un-amended petition and when amendments are made to resolve the abnormalities, they object to the said amendment in an attempt to evade responsibility and deny justice to the petitioners and the class of persons they represent.
48. The petitioners rely on Order 5 Rule 21 of the Civil Procedure Rules and submits that the 2<sup>nd</sup> respondent is a necessary and proper party to the suit herein. The petitioners argue that the constitutional violations that triggered the instant petition have been carried out by the 1<sup>st</sup> respondent's employees who, as the extract from Del Monte's annual report indicates, are overseen by the 2<sup>nd</sup> respondent's board of directors. Thus, the petitioner argues that it was on that basis that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were enjoined as parties to the instant proceedings and the attempt to have their names struck off from the petition is without basis and mischievous.
49. The petitioners rely on the cases of Meme vs Republic [2004] 1 EA 124 and Okpabi and Others vs Royal Dutch Shell Plc & Another [2021] UKSC 3 and submit that the joinder of the 2<sup>nd</sup> respondent in the proceedings is necessary as its presence will result in the complete settlement of all questions involved in the proceedings, the protection of the rights of the petitioners and to prevent proliferated litigation. Further, the petitioners rely on the case of Rose Wangui Mambo & 2 Others vs Limuru Country Club & 17 Others (no citation given) and submit that any person may be joined as a respondent so long as there was an allegation that the person had violated or threatened to violate the rights of the party suing. Thus, the petitioners argue that the 2<sup>nd</sup> respondent has violated their rights and the class of persons they represent and is therefore properly joined.
50. The petitioners rely on the cases of Motaung vs Samasource Kenya EPZ Limited t/s Sama & 2 Others (Petition E071 of 2022) [2023] KEELRC 320 (KLR) and submit that the issue of proper service can only be raised at a stage where there are settled pleadings before the court for determination and the determination of such matters by the court would be injurious to the respondent where proper service has been effected. However in the present case the petitioners submit that the 2<sup>nd</sup> respondent duly assumed service and authorized Effie D. Silva, the General Counsel and Corporate Secretary to swear affidavits on its behalf.



51. The petitioners further submit that the procedure to be followed in petitions involving foreign based entities are well set out under Rule 14(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.
52. The petitioners rely on the case of Raytheon Aircraft Credit Corporation vs Air Al-Faraj Ltd [2005] eKLR and submit that the procedure for challenging the jurisdiction of a court where a foreign defendant is served without leave was to enter conditional appearance and thereafter if necessary, which is not the case here, move the court to set aside the process. Thus, the petitioners argue that no prejudice shall be visited upon the 2<sup>nd</sup> respondent where the petition is allowed and thereafter service of the amended petition is effected upon it.
53. The petitioners rely on the case of Donovan Earl Hamilton vs Ian Hayles Claim No. 2009 HCV 04623 and submit that striking out pleadings or a party in a constitutional petition should be done in the clearest of cases which is not the case herein.

#### **The 1<sup>st</sup> Respondent's Submissions.**

54. The 1<sup>st</sup> respondent relies on the case of Eastern Bakery vs Catellino [1958] EA 461 and submits that the application for amendment ought to be dismissed as allowing it will cause an injustice to the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent argues that it will amount to sanctioning an abuse of the court process by the petitioners. Further it will allow the petitioners to elevate ordinary civil claims which should be determined in accordance with the Civil Procedure Act and Rules to constitutional matters and it will force the 1<sup>st</sup> respondent to defend 2,261 claims with different facts and different questions of law in one case. Furthermore, the 1<sup>st</sup> respondent argues that out of the 2,261 claimants, only 6 have given particulars of their claims and it therefore has no notice of the claims it is required to answer.
55. The 1<sup>st</sup> respondent further relies on the case of The Kenya Section of the International Commission of Jurists vs The Attorney General & 2 Others [2012] eKLR and submits that the application for amendment amounts to an abuse of the court process as the petitioners are attempting to use the court process to introduce an entirely new claim and to circumvent its application to strike out dated 6<sup>th</sup> February 2024. Upon examining the draft amended petition, the 1<sup>st</sup> respondent argues that save for the description of the parties, the petitioners have deleted the entire petition dated 30<sup>th</sup> December 2023 and are proposing to introduce a new petition entirely. Furthermore, the petitioners have introduced 2,261 new petitioners by way of an amendment yet none of the claims made by the said petitioners have been made in the petition dated 30<sup>th</sup> December 2023.
56. The 1<sup>st</sup> respondent argues that it is an abuse of the court process for the petitioners to stop the hearing of their application dated 6<sup>th</sup> February 2024 to strike out their petition on the basis that they intend to address the issues raised in the application to strike out only to then seek leave to file an entirely new claim in the guise of amending the petition dated 30<sup>th</sup> December 2023.
57. The 1<sup>st</sup> respondent relies on the cases of Roma Ventures Trading Company Limited & 17 Others vs County Government of Nandi & 2 Others [2019] eKLR and Sylvana Mpabwanayo Ntaryamira vs Allen Waiyaki Gichuhi & Another [2016] eKLR and submits that disputes that ought to be dealt with under ordinary civil law ought not to be elevated to constitutional matters. The 1<sup>st</sup> respondent argues that from the analysis of the six claims by the six petitioners, the claims are for wrongful death which are claims that can be made in ordinary civil proceedings either under the Law Reform Act or the Fatal Accidents Act.



58. Relying on the case of Geothermal Development Company Limited vs Attorney General & 3 Others [2013] eKLR, the 1<sup>st</sup> respondent argues that the petitioners' failure to give particulars of the claims made by the 2,261 intended petitioners is a breach of the 1<sup>st</sup> respondent's right to due process. Furthermore, save for the six that have particularised their claims, the other intended petitioners are relying on newspaper reports by the Guardian newspaper to support their allegations of breach of fundamental rights and freedoms. The 1<sup>st</sup> respondent relies on the case of Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR and submits that newspaper reports are hearsay evidence of no probative value.
59. The 1<sup>st</sup> respondent argues that in light of the lack of particulars by the intended petitioners, neither the court nor themselves are able to consider the claims the petitioners intend to make to examine whether those claims are related, bear common facts and matters of law and should be considered in one case. Furthermore, the 1<sup>st</sup> respondent argues that what can be discerned by the six petitioners who have given particulars is that their claims relate to separate claims with different facts and questions of law arising in respect of each claim.
60. The 1<sup>st</sup> respondent submits that the petitioners seek to delete all of the paragraphs of the petition dated 30<sup>th</sup> December 2023 and replace them with an entirely new petition that the petitioners are trying to change their action into one of a substantially different character. The 1<sup>st</sup> respondent argues that the new action as set out in the draft amended petition is a class action with 2,261 claimants, which was not the case with the petition dated 30<sup>th</sup> December 2023. None of the claims made by the over 2,200 petitioners that are to be introduced by way of amendment had been made in the petition dated 30<sup>th</sup> December 2023.
61. The 1<sup>st</sup> respondent argues that the effect of the proposed amendments would be to completely change the petitioner's cause of action as set out in the petition dated 30<sup>th</sup> December 2023 into a different petition with different petitioners. Relying on the case of Joseph Ochieng & 2 Others trading as Aquiline Agencies vs First National Bank of Chicago [1995] eKLR, the 1<sup>st</sup> respondent argues that the claims as set out in the draft amended petition would, if allowed, substantially change the character of the proceedings.
62. The 1<sup>st</sup> respondent relies on the cases of Dhanesvar Mehta vs Manilal Shah [1965] EA 321 and British India General Insurance Co. Ltd vs G. M. Parmar and Co. (EACA) [1966] EA 172 and submits that the proposed amendments if allowed, would lead to it suffering substantial prejudice that cannot be compensated by an award of costs. The 1<sup>st</sup> respondent argues that the claims particularised by Erastus Mwangi and Loice Wanja relate to alleged incidents that took place over 16 and 12 years ago respectively. The aforesaid claims which assert claims in tort, are evidently time barred under Section 4(2) of the *Limitation of Actions Act*, thus if the amendments are allowed, the 1<sup>st</sup> respondent submits that it will be deprived of the right to plead limitation causing it substantial prejudice.
63. The 1<sup>st</sup> respondent further submits that it has noted excessive duplication of the intended petitioners listed up to four times as separate claimants.
64. The 1<sup>st</sup> respondent relies on the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR and submits that the instant court has no jurisdiction to deal with claims of unlawful occupation of land and pollution of the environment as alleged by the petitioners. Such issues can only be dealt with by the Environment and Land Court in accordance with Article 162(3) of *the Constitution* as read with Section 13(2) of the *Environment and Land Court Act*.



## The 2<sup>nd</sup> Respondent's Submissions.

65. The 2<sup>nd</sup> respondent relies on Order 5 Rules 21, 22 and 25 of the Civil Procedure Rules and the cases of Misnak International [UK] Limited vs 4MB Mining Limited c/o Ministry of Mining, Juba Republic of South Sudan & 3 Others [2019] eKLR; Civil Appeal No. 188 of 2018 [Mombasa]; Raytheon Aircraft Credit Corporation & Another vs Air Al Faraj Limited [2005] eKLR; Law Society of Kenya vs Martin Day & Others [2015] eKLR and Bildad Kanuri Kagai & Another vs Idemia (formerly OT Morpho & 2 Others Nairobi Constitutional Petition No. 481 of 2017 [2019] eKLR and submits that the manner in which jurisdiction is assumed by a court over a party outside the jurisdiction of the court is by leave being granted for service of process outside the court's jurisdiction.
66. The 2<sup>nd</sup> respondent submits that having demonstrated that the court lacks jurisdiction over it, there is no basis for continuation of proceedings against it. Relying on the cases of Owners of the Motor Vessel Lillian 'S' vs Caltex Oil (Kenya) Ltd [1989] KLR 1; Roy Shipping SA & Others vs Dodoma Fishing Co Ltd [1995-98] 2 EA 288 (CAK); E. Torgbor vs Ladislaus Odongo Ojuok [2015] eKLR; Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others [2013] eKLR; Megvel Cartons Limited vs Diesel Care Limited & 2 Others [2023] KESC 24 (KLR) and Anthony Miano & Others vs Attorney General & 2 Others [2021] eKLR and submits that once raised, a question of jurisdiction should be determined in limine and once it is established that a court has no jurisdiction, the court is obliged to down its tools in respect of the matter before it.
67. The 2<sup>nd</sup> respondent submits that it acknowledges that *the Constitution* of Kenya [Protection of Rights and Fundamental Freedoms] Practice and procedure Rules, 2013 [the Mutunga Rules] are applicable to the instant proceedings, it must be appreciated that the Mutunga Rules have no provisions for service of process on a party outside the Kenyan jurisdiction. To support its contentions, the 2<sup>nd</sup> respondent relies on the cases of Kitty Njiru vs Nature & Style Fun Day Events & 2 Others [2020] eKLR; Karl Wehner Claasen vs Commissioner of Lands & 4 Others [2019] eKLR and Meme vs Republic [2014] 1 EA 124; [2004] 1 KLR 637 and submits that there is ample jurisprudence allowing importation of the Civil Procedure Rules to fill any lacuna in the Mutunga Rules. Thus, the 2<sup>nd</sup> respondent argues that the requirement to obtain leave prior to effecting service upon a party outside the jurisdiction of this court as stipulated under Order 5 Rules 21, 22 and 25 of the Civil Procedure Rules are applicable in the instant proceedings.
68. The 2<sup>nd</sup> respondent relies on the case of Samuel Kamau Macharia & Another vs KCB & Others (2012) eKLR and Orange Democratic Movement vs Yusus Ali Mohammed & 5 Others [2018] eKLR and submits that jurisdiction flows only from *the Constitution* or legislation and therefore amendments of pleadings as proposed in the petition cannot confer jurisdiction to this Honourable Court.
69. The main issues for determination are:-
- a. Whether the proposed amendments to the petition dated 30<sup>th</sup> December 2023 ought to be allowed as prayed.
  - b. Whether the court has jurisdiction to determine the petition as against the 2<sup>nd</sup> respondent.
  - c. Whether the court has jurisdiction to hear and determine the petition dated 30<sup>th</sup> December 2023. (if yes)
  - d. Whether the petition discloses with specificity any constitutional violations against the respondents.
  - e. Whether the 3<sup>rd</sup> intended interested party ought to be enjoined in the proceedings.



## The Law

### Whether the proposed amendments to the petition dated 30<sup>th</sup> December 2023 ought to be allowed as prayed.

70. The general power to amend pleadings draws from Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 which provides:-

A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court.

71. Although parties to a suit have a right to amend their pleadings at any stage of the proceedings albeit that right is not absolute, for it is dependent upon the discretion of the court.

72. The Court of Appeal outlined the principles in amendment of pleadings in the case of *Central Kenya Limited vs Trust Bank Limited & 5 Others* [2002] eKLR whilst referring to commentaries on the Indian Civil procedure Code by Chittaley and Rao as follows:-

That a party is allowed to make such amendments as may be necessary for determining the real question controversy or to avoid a multiplicity of suits provided that there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

73. These principles have been elaborated in Mulla the Code of Civil Procedure, 18<sup>th</sup> Ed Vol 2 pages 1751 -1752 and cited in the case of *Coffee Board of Kenya vs Thiks Coffee Mills Limited & 2 Others* (2014) eKLR where it stated as follows:-

- a. Amendments should be allowed which are necessary for determination of the real controversies in the suit;
- b. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
- c. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporate by means of amendments;
- d. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;
- e. Amendments of a claim or relief barred by time should not be allowed;
- f. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
- g. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties;
- h. The delay in filing the petitions for amendment should be properly compensated by costs;
- i. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.



74. Applying the above principles to the current case, the petitioners wish to amend their petition so as to introduce over 2,000 petitioners and state that the proposed amendments are necessary for the court to determine the true and substantive merits of the case. The respondents have opposed the application on the grounds that the application if allowed will change the character of the case between the parties and that the proposed amendments are time barred under Section 4(2) of the Limitation of Action Act which will be prejudicial to them.
75. I have perused the proposed amended petition dated 22<sup>nd</sup> March 2024 and noted that the petition seeks to introduce over 2,000 petitioners. On closer scrutiny of the petitioners, I have noted that some of the petitioners have been replicated several times for instance the 9<sup>th</sup> petitioner, John Kanyiri Muchirir who is also the 299<sup>th</sup>, 389<sup>th</sup> and 2224<sup>th</sup> petitioner, among other petitioners. Furthermore, although the petitioners have sought to add over 2,000 petitioners, none of the claims by the said petitioners had been made in the petition dated 30<sup>th</sup> December 2023. Additionally, only six petitioners out of the 2,261 petitioners have given the particulars of their claims as against the respondents namely Robert Ndungu Gatimu, Erastus Wainaina, Alice Nduta, Samuel Katinde, Loice Wanja Gichuhi and Joel Nyoike Thuo.
76. The said petitioners particularly Robert Ndungu Gatimu, Erastus Mwangi Wainaina and Loice Wanja Gichuhi have made claims relating to wrongful death which causes of action arose on 14<sup>th</sup> October 2022, the year 2007 and 24<sup>th</sup> July 2012 respectively. It is evident that the said causes of action are over 16 years and 12 years ago which are time barred. Thus, allowing the amendment will deprive the respondents particularly the 1<sup>st</sup> respondent of a defence of limitation. Furthermore, since the petitioners have not outlined the case by the 2,261 petitioners with specificity against the 1<sup>st</sup> & 2<sup>nd</sup> respondents, it will make it difficult for the said respondents to know the case being made against them. In any event, one cannot ascertain the numerous different petitioners as they have not laid out their claims with specificity. Although the petitioners indicate that they are relying on newspaper reports by the Guardian newspaper to support their allegations of breach of fundamental rights and freedoms, the petitioners have not attached tangible evidence which they seek to rely on. Furthermore, the source of evidence the petitioners seek to rely on is questionable as to whether it amounts to evidence and further the source is generalized and very vague. This is evident in the prayers by the petitioners seeking for an order compelling the 1<sup>st</sup> respondent to produce before the court complaints that have been lodged against them and a copy of the Partner Africa report. In my considered view, the said orders sought by the petitioners amount to a fishing expedition.
77. On closer scrutiny of the proposed amended petition, I have noted that the proposed amendments change the claims of a substantially character instead of clarifying the lack of particulars in the petition dated 30<sup>th</sup> December 2023. The proposed amendments have sought to introduce claims by the six petitioners for wrongful death and personal injuries which at the very least do not form constitutional right violations but fall under civil claims. It is my considered view that the proposed amendments will alter the cause of action on the basis of which the original list was raised, the proposed amendments amount to a claim or relief barred by time and will cause prejudice to the respondents which cannot be compensated by way of damages. Accordingly, it is my view that the proposed amendments should not be allowed. In this regard, the application dated 22<sup>nd</sup> April 2024 lacks merit and ought to be dismissed.

**Whether the court has jurisdiction to determine the petition as against the 2<sup>nd</sup> respondent.**

78. The 2<sup>nd</sup> respondent argues that it is a foreign company incorporated in George Town, Cayman Islands with no registered office or place of business in the Republic of Kenya. The 2<sup>nd</sup> respondent further argues that the petition dated 30<sup>th</sup> December 2023 was served upon them by the petitioners without applying for the requisite leave for assumption of jurisdiction by the High Court over them.



79. The petitioners argue that Order 5 Rule 21-27 of the Civil Procedure Rules regarding service is inapplicable as the suit herein is a constitutional petition. The petitioners state that the applicable provision is Rule 14(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules which provide that the petitioner shall serve the respondent with the petition documents and relevant annexures within 15 days of filing or such time as the court may direct.
80. In *Kitty Njiru vs Nature & Style Fun Day Events & Tatiana Isabel Whitup; Rebecca Muriuki t/a Kahaari* (proposed third party) (Constitutional Petition 146 of 2018) [2020] KEHC 2051 (KLR) (Civ) (29 October 2020) the court held:-

From the authorities relied upon by the petitioner and the provisions of *the Constitution* as well as the Mutunga Rules referred herein above, I find that there is ample jurisprudence allowing importation of the Civil Procedure Rules to fill any lacuna in the Mutunga Rules. I find the provisions of Civil Procedure Rules are applicable to constitutional petitions where such provisions give court inherent power to make such orders as may be necessary for ends of justice. Rule 3(8) of the Mutunga Rules provides that nothing in the rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court. This court finds that the litigants have the right to use the Civil Procedure Rules to fill any lacuna in the Mutunga Rules to seek leave to issue third party notice and to seek third party directions from the court.

81. Similarly in *Abdisalam Hassan Ismail & 2 Others vs Kenya Railways Corporation & 3 Others* [2015] eKLR the court held that:-

I reject the petitioner's submission that the application is incompetent for having been brought under the provisions of the *Civil Procedure Act*. I hold the view that technicalities of procedure should not be entertained in matters of constitutional rights. I put reliance to the case of *Vallerie Namtilu Wafula & Another vs Kenya National Union of Teachers (KNUT) & 2 Others* eKLR where it was held as follows:-

“It is the second respondent's contention that in petitions of this nature the Civil Procedure Rules have no place and therefore any application expressed to be brought under the latter is incompetent. First and foremost it must be noted that under Article 22(3), the Chief Justice is enjoined to make rules inter alia providing for the court proceedings which shall satisfy the criteria that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Although the said rules are yet to be promulgated (the rules have since been promulgated herein referred to as Mutunga Rules), the spirit of the foregoing provision as read together with the provisions of Article 159(2)(d) is clear that technicalities of procedure, more particularly in application brought for the enforcement of the Bill of Rights, should not be entertained. Even prior to the promulgation of the current constitution the relevance of the Civil Procedure Rules was considered in *Meme vs Republic* [2014] 1 EA 124: [2004] 1 KLR 637, in which Rawal J.(as she then was), Njagi J. & Ojwang' AJ (as he then was) held that at a very basic level the Civil Procedure Rules in its exercise of powers under *the Constitution* of Kenya (Protection of Fundamental Rights & Freedoms of the Individual) Practice and Procedure Rules and by virtue of Order



1 Rule 10(2). This decision should put the second respondent's position on the applicability of Civil Procedure Rules to constitutional petitions to rest.

82. Under Article 159(2)(d) and (e) of *the Constitution*; Rule 5(a) and Rule 8 of the Mutunga Rules, this court is enjoined to administer justice without undue regard to procedural technicalities and protect and promote the purpose and principles of *the Constitution*.

83. Rule 5(a) of the Mutunga Rules provides that for the purposes of furthering the overriding objective under Rule 3 of the Mutunga Rules, the court is required to handle all matters presented before it to achieve just determination of the proceedings. Further Rule 3(8) of the Mutunga Rules crowns it all by stating that nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Accordingly, it is my considered view that the provisions of the *Civil Procedure Act* and Rules can be relied upon in regard to service upon a party outside the court's jurisdiction.

84. Order 5 Rule 27 of the Civil Procedure Rules provides for service where a defendant resides out of Kenya. It provides:-

Where leave to serve a summons or notice of summons out of Kenya has been granted under Rule 21, and the defendant is a Commonwealth citizen as defined in subsections (1) and (2) of Section 95 of *the Constitution* or resides in any of the countries for the time being mentioned in subsection (3) of that section, the summons shall be served in such manner as the Court may direct.

85. The Court of Appeal in *Misnak International (UK) Limited vs 4MB Mining Limited c/o Ministry of Mining, Juba Republic of South Sudan & 3 Others* [2019] eKLR; Civil Appeal No. 188 of 2018 (Mombasa) on discussing the necessity of the leave of the court to effect service on a person in a foreign jurisdiction, held as follows:-

Additionally, summons to enter appearance also plays another pivotal role when it comes to a defendant who is outside the court's jurisdiction. The supplemental but equally important role is that it empowers the court in question to assume jurisdiction over such a party. See Order 5 Rules 21 & 22 of the Civil Procedure Rules and this court's decision in *W.K. M.W.K (Both suing as the administrators of the Estate of Dr. W.K) & Another vs British Airways Travel Insurance & Another* [2017] eKLR.

The manner in which such jurisdiction is assumed by the court is that firstly, the plaintiff has to seek leave of the court to serve such summons outside the court's jurisdiction. The purposes of seeking leave is to enable the court to weigh the reasons adduced by the plaintiff and determine whether a proper case has been made out for service of summons outside its jurisdiction...

Secondly, upon such leave being granted, the summons has to be served upon such a defendant. It is only upon such service of summons that a court assumes jurisdiction over a foreign defendant and not a moment sooner...

In our view, at the heart of this matter is whether the High Court assumed jurisdiction over the appellant as discussed herein above....

It did not matter that the learned Judge deemed that the application was urgent. The learned Judge was required to first assume jurisdiction over the appellant and there was no short cut to that. In our view, the learned Judge by directing service of the application before determining the issue placed the cart before the horse. In the end, we find that at the time the



preliminary objection was heard and a decision rendered, the High Court had not assumed jurisdiction over the appellant. Thus, there cannot be any question that the appellant was not amenable to the jurisdiction of the High Court and the preliminary objection should have been allowed on this ground alone.

86. The Court of Appeal in *Raytheon Aircraft Credit Corporation & Another vs Air Al-Faraj Ltd* [2005] 2 KLR 47, stated as follows:-

The High Court will not assume jurisdiction in relation to any matter arising from the contract unless the contract is of the nature specified in Order V Rule 21(e) of the Civil Procedure Rules, that is inter alia, the contract is made in Kenya or if it is governed by the laws of Kenya or if a breach of contract is committed in Kenya. The High Court assumes jurisdiction over persons outside Kenya by giving leave on application by a plaintiff to serve summons or notice of summons, as the case may be, outside the country under Order V Rules 23 and after such summons are served in accordance with the machinery stipulated therein.....The record does not show nor is it contended that the respondent moved the High Court for leave to serve the first appellant outside the jurisdiction and that such leave was given.....Thus, there cannot be any question that Raytheon was not amenable to the jurisdiction of the High Court and the objection to jurisdiction should have been allowed on this ground alone.

87. In *Law Society of Kenya vs Martin Day & 3 Others Civil Suit No. 457 of 2013*, Aburili J held:-

It is not sufficient for a plaintiff to institute a suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that summons must be served in the manner provided for in the rules to enable the defendants who have no registered office or business in Kenya submit to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked.

88. The petitioners in the instant case admitted that they did not seek leave of the court to serve the 2<sup>nd</sup> respondent out of the jurisdiction. It is not contested that the 2<sup>nd</sup> respondent is a foreign company. Furthermore, it is immaterial that the 2<sup>nd</sup> respondent appointed advocates to represent them in the matter. The purpose of the court before granting leave for service of summons outside jurisdiction is to satisfy itself that there is a case worth entertaining and to assess the weight of such case before it is served on a party outside local jurisdiction. In the absence of such leave having been obtained, it follows that this court lacks jurisdiction to entertain this case as against the 2<sup>nd</sup> respondent.

**Whether the court has jurisdiction to hear and determine the petition dated 30<sup>th</sup> December 2023 as regards the subject of violation of environmental rights.**

89. The law on the question of jurisdiction was enunciated in the case of *Owners of the Motor Vessel "Lilian S" vs Caltex Kenya Limited* [1989] KLR 1 where the court held:-

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to



exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

90. Jurisdiction is a very fundamental issue that it can be raised at any time including on appeal. This principle was stated by the Court of Appeal in *Kenya Ports Authority vs Modern Holding [EA] Limited* [2017] eKLR as follows:-

We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even *viva voce* and indeed, even by the court itself provided that where the court raises it *suo motu* parties are to be accorded the opportunity to be heard.

91. On the source of jurisdiction, it was held in the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others* (2012) eKLR that:-

A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

92. The 1<sup>st</sup> respondent argues that the court has no jurisdiction to adjudicate the allegations of violation of the right to a clean and healthy environment as it is a dispute relating to the environment which jurisdiction falls under the Environment and Land Court in accordance with Article 162(3) of *the Constitution* as read with Section 13(2) of the *Environment and Land Court Act*. Furthermore, the 1<sup>st</sup> respondent argues that the petitioners have not made use of statutory bodies mandated to deal with the issues in the petition in particular the National Environment Management Authority (NEMA) which is mandated to exercise general supervision and coordination over all matters relating to the environment including monitoring and assessing activities, in order to ensure that the environment is not degraded by such activities. Parties who are aggrieved in matters regarding degradation of the environment are required to file their cases in the ELC court.

93. It is imperative to note that the petitioners relied on the Supreme Court of Kenya Petition No.019 of 2023 as consolidated with Petition No. E021 of 2023 Export Processing Zone Authority and 10 Others VS National Environment Management Authority & 3 Others. These petitions were filed in the ELC Court Mombasa where the petitioners' claim for constitutional remedies for violation of rights was successful. The respondent appealed in the Court of Appeal Mombasa who upheld the decision of the ELC court before the matter proceeded to the Supreme Court. The claim was based on violation of constitutional rights of the petitioners in regard to the environment citing Article 42, 69 and 70 of *the Constitution*. Section 13(3) of the ELC Act specifically grants the ELC court the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat of violation of fundamental freedoms relating to a clean and healthy environment. The issue of jurisdiction was affirmed by both the Court of Appeal and the Supreme Court.

94. I have perused the petition dated 30<sup>th</sup> December 2023 paragraph 85 to 93 and 100 to 102 whereas the petitioners state that the respondents' acts have violated the right to a clean and healthy environment pursuant to Article 42 of *the Constitution*. The petitioners have not demonstrated that they ever approached the relevant dispute resolution bodies for remedy before filing the petition. The allegations of violation of the right to a clean and healthy environment is a dispute relating to the environment which ought to be heard by the Environment and Land Court in accordance with Article 162(3) of *the Constitution* as read with Section 13(2) of the Environment and Land Court.



95. In conclusion, I find the applications dated 6<sup>th</sup> February 2024 and 7<sup>th</sup> February 2024 by the 1<sup>st</sup> and 2<sup>nd</sup> respondent successful and allow them in the following terms: -
- a. That the petition dated 30<sup>th</sup> December 2023 is incompetent and is hereby struck out.
  - b. The application dated 22<sup>nd</sup> April 2024 seeking for orders to amend the petition is hereby dismissed for lack of merit.
  - c. That even if the petition dated 30<sup>th</sup> December was found to have merit, this court lacks jurisdiction to hear and determine it.
96. This being a public interest matter, I hereby order that each party meets its own costs.
97. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6<sup>TH</sup> DAY OF FEBRUARY 2025.**

**F. MUCHEMI**  
**JUDGE**

