REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 2 OF 2019

NJIRU MICHENI NTHIGA (SUING AS A LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE DECEASED LEONARD R.I. NTHIGA).....PLAINTIFF

VERSUS

THE GOVERNOR, THARAKA NITHI COUNTY GOVERNMENT .....1ST DEFENDANT

COUNTY GOVERNMENT OF THARAKA NITHI.....2ND DEFENDANT

THE MEMBER OF COUNTY ASSEMBLY, MAGUMONI WARD.....3RD DEFENDANT

THE CHIEF OFFICER, ROADS AND INFRASTRUCTURE THARAKA NITHI COUNTY.....4TH DEFENDANT

THE CHIEF OFFICER, LANDS, PHYSICAL PLANNING AND URBAN DEVELOPMENT THARAKA NITHI COUNTY.....5TH DEFENDANT

WESTOMAXX INVESTMENT LTD.....6TH DEFENDANT

JUDGMENT

1. The plaintiff in this case sues as the Legal Representative and Adminator of the Estate of Leonard R. I. Nthiga, deceased. In the plaint the plaintiff seeks the following orders:

a) Special damages as pleaded in paragraph 12 (v), (vi) and (vii) of the plaint.

b) General damages as pleaded in paragraph 12 (i), (ii), (iii) and (iv) of the plaint.

c) The defendants (1-6) jointly and/or severally be compelled to restore LR. Magumoni/Thuita/779 in its original status as appearing on the Registry Index Map (R.I.M) of Magumoni/Thuita registration section, Sheet No. 12 and further the defendants (1-6) be issued with permanent orders of injunction restraining them from ever trespassing unto the plaintiff's deceased father's LR. Magumoni/Thuita/779 and/or in the alternative and without prejudice to the foregoing the defendants (1-6) jointly and/or severally be compelled by this honourable court to compensate the plaintiff with a reasonable compensation of the said land parcel and all the developments that were erected thereon prior to the illegal demolitions. (valuation report to be filed).

d) Costs of the suit.

e) Any other and better relief appropriate in the circumstances.

2. The particulars of loss and/or damages in paragraph 12 of the plaint are:

i) General damages for trespass of the defendants on LR. MAGUMONI/THUITA/779.

ii) Compensation of the demolished buildings on LR. MAGUMONI/THUITA/779 by defendants (valuation report to be filed).

iii) General damages for loss of use and future earnings on the said premises.

iv) General damages for use and goodwill on the said parcel of land premises.

3. The Particulars of special damages in the plaint are:

v) Cost of the Valuation Report – Kshs.62,500/=

vi) Advocates fees for demand letter and service thereof – Kshs.9,000/=

vii) Advocates fees to obtain letters of Administration – Kshs.35,000/=

Total - Kshs.106,500/=

4. PW1, Njiru Micheni Nthiga, told the court that he was a retired public officer who did some business and some farming to keep himself busy. He said that he had brought this suit to court as the representative of the estate of Leonard R. I. Thiga, his father. He told the court that he had authority of the court vide Chuka CMCC Succession Cause No. 215 of 2019. He was categorical that the apposite court order allowed him to singularly file a compensatory suit on behalf of the estate of his father. He produced the order as part of his exhibits.

5. I find it necessary to produce in full the order PW1 claims to have given him singular authority to file this suit.

IN CHAMBERS ON 15TH FEBRUARY, 2019 BEFORE HONOURABLE J. M. NJOROGE –CHIEF MAGISTRATE/DISTRICT REGISTRAR – CHUKA LAW COURTS

Upon perusing the Applicant's application dated 14th February, 2019 brought under the provisions of Rule 49 and 73 of the Probate and Administration Rules Cap 160 Laws of Kenya, and all other enabling provisions of the law, and filed by M/s Waklaw Advocates for the Applicant,

IT IS HEREBY ORDERED.

ORDER

1. That the Applicant's application dated 14th February, 2019 be and is hereby certified urgent.

2. That the Applicant herein be and is hereby added as a co-administrator in the instant Succession Cause.

3. That the Applicant herein be and is hereby issued with Limited Grant of Letters of Administration, for the sole purpose(s) of instituting a compensatory suit against the County Government of Tharaka Nithi and who unlawfully demolished the deceased's rental premises built on the deceased's Land Registration Number Magumoni/Thuita/779.

Dated at Chuka this 15th day of February, 2019

J. M. NJOROGE,

CHIEF MAGISTRATE/DISTRICT REGISTRAR,

CHUKA LAW COURTS.

Given under my hand and the seal of this Honourable Court this 20th day of February, 2019.

J. M. NJOROGE,

CHIEF MAGISTRATE/DISTRICT REGISTRAR,

CHUKA LAW COURTS.

6. PW1 told the court that the title to his deceased father's land was issued in 1987. He continued that as it was not within the market area, it did not attract rates and rent payable to the county government. He went on to say that the property had a building which was used for commercial purposes put up by his deceased father around **1998 and 1999**. He said that it had shops in the front and rear rooms at the back.

7. PW1 told the court that the County Government of Tharaka Nithi, through its officials, had on **9th February, 2019** destroyed their property without any authority even after the building on their property had stood there for over **20 years.**

8. PW1 proffered that prior to the impugned demolition, there were rumours that the County Government was planning road construction and intended to trespass on the suit land. PW1 is laconic that the suit property was not compulsorily acquired as if the County Government of

Tharaka Nithi wanted to compulsorily acquire the suit land, they should have approached the National Land Commission, the constitutionally authorized body to undertake the necessary legal process.

9. PW1 told the court that concurrently with the filing of this suit, he had filed a valuation report and photographs showing the impugned demolition.

10. PW1 presented the documents contained in his list of documents as his exhibits in this suit. They were marked as plaintiffs exhibits numbers 1 to 11 as follows:

(i) Copy of death certificate of his deceased father, Leonard R. I. Nthiga.

(ii) Copy of order issued on 20th February, 2019 in Chuka CM's Succession Cause No. 215 of 2018.

(iii) Copy of Title Deed in respect of LR. MAGUMONI/THUITA/779.

(iv) Copy of Certificate of official Search in respect of L.R. Magumoni/Thuita /779.

(v) Copy of Registry Index Map (RIM) sheet No. 12 of Magumoni/Thuita Registration Section.

(vi) Copy of Approved building plan in respect of demolished premises.

(vii) Copy of demand letter dated 6th November, 2018 addressed to the 3rd defendant and copied to the 1st defendant.

(viii) Copy of the letter by the plaintiff addressed to the 1st defendant dated 1st February, 2019.

(ix) Photograph of the suit premises before and after demolition.

(x) Valuers Valuation Report.

11. PW1 told the court that the family of his deceased father had immensely suffered emotional pain and ridicule and sought relief for this suffering. He also asked the court to grant the orders he sought in this suit so that this would set a precedent so that residents of Tharaka Nithi did not suffer the kind of injustice inflicted upon his family. He also sought costs.

12. During his cross-examination by advocate Munyori for the defendants, PW1 told the court that the estate of his father had 2 administrators, the other one being Njagi Nathaniel Nthiga, his brother. He explained that all his siblings had signed authority for him to file a suit concerning his father's estate in Chuka CM's Court Succession No. 215 of 2019. He had applied to be enjoined in the suit and the court specifically allowed him to file this suit.

13. PW1 was categorical that although the County Government owned Kibugua Market, it did not own adjoining freehold properties. Regarding approval of the demolished property, it was the usual practice for building plans for properties under County Councils to be approved by District Public Health Officers only.

14. PW1 told the court, under cross-examination, that in 2015 an issue regarding the apposite road of access arose but the County Surveyor found there was no encroachment by the deceased father of PW1 but their neighbour had encroached upon the road of access by two feet and this issue was resolved and the road of access reverted to its original size.

15. PW1, also during cross-examination, admitted that there was a general notice dated **16th January, 2019** about removal of structures at Kibugua Market. He however said that his father's land was not within Kibugua Market. He was also unequivocal that this notice was not an enforcement notice in terms of the Physical Planning Act. For this reason, he could not appeal to the liaison committee.

16. During re-examination by advocate Kirimi Muturi, his counsel, PW1 was unequivocal that the notice dated **16th January, 2019** was not served upon him. He also told the court that while some parts of their property were left standing, the impugned demolition had rendered the whole construction/property unusable.

17. PW1 told the court that before the property in dispute was demolished his advocate had written a letter dated **23.1.2019** advising the County Government to withdraw their letter. The letter was warning various people who owned land where markings had been made by the County Government, that their properties would be demolished. He was adamant that the general letter by the County Government was not an enforcement notice. For this reason, PW1 and his family could not appeal to the liaison committee.

18. PW1, during cross examination told the court that the valuation report concerning damage done to the suit property cost **Kshs.62,500/=.** He admitted that he had not filed a receipt concerning this cost. He also said that he had not filed a receipt concerning the advocates fees for a demand letter which was said to be Kshs.9,000/=. He also admitted that he had not filed receipts concerning the obtaining of letters of administration which cost he indicated to be Kshs.35,000/=.

19. DW1, Ashford Mutembei Mwiandi, told the court that he worked as a surveyor with Tharaka Nithi County Government and had worked as a surveyor for **12 years.**

He produced the documents listed in the 1st, 2nd, 4th, 5th and 6th list of documents dated **19th November, 2020** as their exhibits in this suit. The documents were marked as DW1 exhibits numbers 1 to 7 as follows:

(i) The development plan of Kibugua Market.

(ii) The amended copy of Thuita Registration Section (Kibugua, Meru District, Eastern Province) prepared by the Land Adjudication and Survey of Kenya in 1969.

(iii) A certificate of official search in respect of Magumoni/Thuita/779.

(iv) Public Notice issued to the 2nd Respondent and to all registered proprietors of plots, Market stalls and parcels of land within Kibugua Urban Centre on **5th November, 2014**.

(v) An enforcement notice issued by the 2nd respondent to the plaintiff and the registered proprietors on **16th January, 2019.**

(vi) A letter written to the MCA Magumoni Ward by the Chairman, Kibugua Market Committee.

(vii) Minutes of a meeting held on 14th November, 2018 by the Kibugua Market Committee.

20. DW1 told the court that document exhibit 1 was the development plan for Kibugua Market, parcel No. Magumoni/Thuita/562 which shows the position of the various plots and how the roads were aligned.

21. DW1 told the court that document exhibit 2 was the Registry Index Map (RIM) for Magumoni/Thuita/Sheet No. 12. It contains parcel No. Magumoni/Thuita/562. He told the court that the plaintiff's parcel of Land No. Magumoni/Thuita/779 was adjacent to parcel No. Magumoni/Thuita/562. He explained that the parcels where the new tarmack was to pass around were parcel Numbers, 562, 1898, 2111, 2112, 2168, 2163, 2164, 1801, 1900, 3832, 2704, 2703, 2702, 120, 14561, 1455, 1454, 2956, 1361, 787, 782, 780, 779, 1417, 986, 987, 2109, 2110, 988, 1277, 1278, 989, 990 and 991. He proffered that all these parcels were next to the new intended tarmac road and that most of them were affected.

22. DW1 told the court that Plot No. 1417 was opposite No. 779 and that between the 2 plots there was a road leading to the Main Tarmac Road. He told the court that constructions on both plots encroached upon the road reserve. He told the court that the width of the road was 9 metres (30feet).

23. DW1 explained that exhibit document 1 was an official search for parcel No. **Magumoni/Thuita/779**, the plaintiff's land. He also explained that document exhibit 4 was a letter written by the County Government addressed to all plot owners of plots around Kibugua Market including PW1 telling the owners that constructions coming in the way of the proposed tarmack road needed to be removed failing which they would be demolished. Document exhibit 5 was addressed to all plots, stalls and land owners around Kibugua Market giving them 14 days' notice to remove structures which were on the road reserve.

24. DW1 told the court that document exhibit No. 6 was an undated letter addressed to the member of County Assembly (MCA) of Magumoni Ward, written by the Market Committee concerning the tarmacking of Kibugua Market in which they supported the development. DW1 explained that document exhibit No. 7 was the minutes of a meeting held by the Kibugua Market Committee on 18.11.2018. He told the court that the committee had agreed on the roads to be tarmacked and mandated the surveyor to mark all affected places.

25. During cross-examination DW1 told the court that his responsibility as a County Surveyor was to deal with public lands which he said entailed roads, schools, springs and all that appertained to public lands. He was unequival that he was giving evidence for all the defendants in this suit and was suitably conversant with all issues concerning this suit.

26. Questioned about his document exhibit 1, DW1 admitted that it was not indicated when it was prepared and that it had no indication regarding who had authored it. He said that it had been prepared by the County Council, the precursor of the County Government, but he was not in a position to say when it was prepared. He admitted that it was done by the County Council and not by the Director of Physical Planning.

27. When confronted with the issue that the plan showed open markets at its two ends, DW1 told the court that there was only one open market on the ground. The court noted that he was being evasive.

28. DW1 told the court that he did not know much about compulsory acquisition. He told the court that when he marked the places which were to be demolished, he did not consult the National Land Commission, the Rural Roads Authority or other government bodies. He was laconic that he did not seek their advice. DW1 was unequivocal that all rural roads belonged to the County Government.

29. DW1, also during cross-examination told the court that construction of the new tarmack road entailed expansion of the existing road from 3 metres to 9 metres. He told the court that all land owners had agreed to the expansion.

30. DW1 was unequivocal that no personal notice was served upon the plaintiff before the tarmack road was constructed. He said that notices were pasted all over and as the plaintiff was a member of the public he did not see any need for personal service.

31. Regarding his evidence that the County Government had been granted authority by the Market Committee to do the concerned demolitions, DW1 told the court that the Market Committee had been formed by the Residents of Kibugua Market. He told the court that the

committee advised the County Government on encroachment and demolitions. At first he told the court that he did not think that the committee had legal personality and that its members were the right people to give recommendations on demolitions. Soon thereafter he changed tack and said that the Market Committee had legal capacity to make recommendations for demolitions under Market by-laws which he did not produce or specify.

32. Towards the end of his cross-examination DW1 agreed that as per the Registry Index Map (RIM) the road between parcel No. Magumoni/Thuita/1477 and parcel No. Magumoni/Thuita/779 was 3 metres in width. He was however adamant that extension of the road by 6 metres did not amount to forceful compulsory acquisition or trespass. According to him the County Government "merely opened up the road."

33. The parties filed written submissions.

34. The plaintiff's written submissions are pasted in full herebelow without any alterations whatsoever:

PLAINTIFF'S FINAL SUBMISSIONS

My Lord, herein are submissions for the Plaintiff on his suit against the Defendants herein dated and filed on the 27th February,2019.

This suit arose out of the defendants', whose main principal is the 2nd Defendant, acts of demolishing and/or destroying the Plaintiff's property on **LR. MAGUMONI/THUITA/779**.

1.BRIEF BACKGROUND FACTS

a) That land parcel **LR. MAGUMONI/THUITA/779** (freehold) is the absolute property of and forms part of the Estate of the late **LEONARD R. I. NTHIGA** (DECEASED) and whose legal representative is the Plaintiff here suing in the same capacity.

b) That the parcel of land was lawfully acquired vide a Land Certificate issued on 3rd July,1987.

c) That the proprietor has undertaken extensive and costly developments constituted of business premises on the said property effective from the year 1988 when the approval for the developments thereof was given.

2. THE SUIT

The Plaintiff has sued the defendants jointly and severally after agents of the 2nd defendant, the main principal, while purportedly making extensions to a road passing by the Plaintiff's property extensively either demolished and/or destroyed the suit property. These illegal acts were committed on the 9th February, 2019 and the facts thereof are clearly detailed in the Plaintiff's Application instituting this suit.

The Plaintiff prays for judgment against the Defendants for:-

a) Special Damages as pleaded in paragraph 12 (v), (vi) and (vii) of the Plaint;

b) General Damages as pleaded in paragraph 12 (i), (ii), (iii) and (iv) of the Plaint;

c) The Defendants be compelled to restore **LR. MAGUMONI/THUITA/779** into its original status as appearing on the registry Index Map (R.I.M) of Magumoni/Thuita registration Section, Sheet No. 12 and, further, the Defendants be issued with permanent orders of Injunction restraining them from ever trespassing into the plaintiff's LR. MAGUMONI/THUITA/779 and/or, in the alternative , and without prejudice to the foregoing, the defendants be compelled by an order of this Honorable Court to compensate the Plaintiff with a reasonable compensation for the said parcel of land and all the developments that were erected thereon prior to the illegal demolitions as per the valuation report accompanying the Application herein

d) Costs of the suit;

e) Any other and better relief appropriate in the circumstances.

My Lord, the Plaintiff's case is elaborately expounded in the plaint and the Plaintiff's Statement. The Plaintiff has produced relevant documents to support his case and claim against the defendants and which form the Plaintiff's List of Documents to be relied upon. The said documents were produced in Court by the Plaintiff while testifying in Court. We humbly invite this Honorable to look at those documents which shall reliably guide and inform Your Lordship while rendering your judgment.

3. ISSUES FOR DETERMINATION

1. Whether the developments on **LR. MAGUMONI/THUITA/779** were established on Road Reserve.

2. Whether the Defendants demolished the Plaintiff's building.

3. Whether the acts of the demolitions committed by the Defendants against the Plaintiff's **LR. MAGUMONI/THUITA/779** were

lawful/**Whether the demolition was under taken in accordance with the law.**

4. The question of Notices and Due process.

5. Whether the plaintiff suffered loss and damages occasioned by the acts of the defendants.

6. Whether the Plaintiff is entitled to claim from the Defendants.

7. The Quantum of damages/loss claimed by the Plaintiff against the Defendants.

4. THE FACTS, WITNESS TESTIMONIES AND THE LAW

My Lord, we hereby submit with reference to the testimonial evidence of both the Plaintiff and Defence witnesses as was adduced in court before Your Lordship on 9/11/2020 (By the Plaintiff's witness) and on 23/11/2020 (By the Defence witness).

As aforementioned, the land parcel **LR. MAGUMONI/THUITA/779** is registered on freehold tenure. This uncontested status subsists to date in favor of the plaintiff. The development built thereon was constructed in 1989 upon an approval of the Building Plan in 1988.

It is instructive that **LR. MAGUMONI/THUITA/779** is approximately 100 metres from Kibugua Market which constitutes LR. No. MAGUMONI/THUITA/562. Both parcels of land appear on the Registry Index Map (R.I.M.) for Thuita Registration Section Sheet No.12 which was presented in Court by both the Plaintiff's and defence witnesses.

Demolition of the building developed on **LR. MAGUMONI/THUITA/779** by Tharaka Nithi County Government was done for purported contravention of some provisions of the Physical Planning Act (PPA) No. 6 0f 1996. This position is fatally flawed on the following grounds:-

(i) The owner/developer could not have disobeyed a law that was not in place in 1988/1989. It is trite that the Law does not operate retrospectively/retroactively. The Physical Planning Act, Cap. 286 Laws of Kenya was passed in 1996 and became operational in 1998 whereas the development on the suit property was undertaken in 1988.

(ii) Section 38 of the PPA is clear that the statute is only applicable to developments that were to take place AFTER its (PPA's) commencement.

(iii) Section 54 (1) of the Physical Planning Act (PPA) provides thus:- **"Any approval for Development granted under any building by-laws, given under the provision of any written law, in force immediately prior to the commencement of this Act, shall be deemed to be a development permission granted under this Act".**

The plaintiff has tendered such approval in evidence as part of his list of documents to be relied on. We pray that this Honorable Court considers the same.

We hereby humbly submit that all developments that took place and/or were approved before the commencement of the PPA are protected by section 54 of the statute (PPA).

5. QUESTION OF A ROAD RESERVE

The developments on **LR. MAGUMONI/THUITA/779** are not on a road reserve. The defence witness, one **ASHFORD MUTEMBEI MWIANDI,** did concur with the plaintiff that the road reserve between the adjacent **LR. MAGUMONI/THUITA/1417** and **LR. MAGUMONI/THUITA/779** as per the R.I.M, Sheet No. 12 is 3 (three) metres in width. Yet the defendants demolished the Plaintiff's developments to create a 9 (nine) meter wide road. It is the Defendants that unlawfully trespassed and encroached into the realms of the Plaintiff's property on **LR. MAGUMONI/THUITA/779** in blatant violation of due process.

The Defence witness was at pains to explain to this Honorable court how the extra 6 (six) metres for the expansion were obtained. The said witness confirmed that the defendants neither consulted nor received the advise of appropriate authorities and especially that of the National Land Commission (NLC) as is required of by law before their forceful acquisition of the plaintiff's land without their consent. It is only the National Land Commission (NLC) who are authorized to perform acts of compulsory acquisition for public utility.

My Lord, at the time of his testifying the Plaintiff witness clearly demonstrated to the Honorable Court the fact that **LR. MAGUMONI/THUITA/779,** by virtue of its being a freehold title was NOT allocated by the defunct Meru County Council. The Defence witness recognized the authenticity of the title to the said property and which was affirmed by a copy of Official Search that was duly produced in Court.

It is instructive that in his statement that he relied on during the time of testifying, at paragraph 15, the defence witness conceded, on cross examination, that he does not know when the structure/building on **LR. MAGUMONI/THUITA/779** was constructed**.**

That what was tendered in evidence by the defence as **KIBUGUA DEVELOPMENT PLAN** is a mere **market lay out** which is devoid of essential credibility and, curiously, the same is not dated and the author is not indicated. It is our submission that such a Development Plan is supposed to be done by the Director, Physical planning and is required to be approved by the Cabinet Minister to give it lease effect. These requirements have not been satisfied and, consequently that purported "Kibugua Development Plan" can not be relied on for any lawful

action.

The process of the expansion of the road adjoining **LR. MAGUMONI/THUITA/779** from the provided three (3) metres to nine (9) metres by trespassing and encroaching into the realms of **LR. MAGUMONI/THUITA/779** without the consent of the absolute proprietor or any lawful authority such as a court order is arbitrary and, in effect amounts to forceful acquisition done with sheer impunity. The statement of the defence witness clearly indicates the Defendants' actions of demolition were prompted upon the advise of an illegal entity, a committee constituted of market stakeholders whom, in our view, lacked capacity and could have been driven by or open to malice and conflicting and/or vested interests. There were no reports on any investigation allegedly undertaken by the County Government to inform their unlawful acts. There is a clear manifestation of a violation of the provisions of Article 40 (as read with Article 64) of the Constitution of Kenya, 2010 and part viii of the Land Act,2012.

6. THE QUESTION OF NOTICES TO THE PLAINTIFF

My Lord, the Defendants, while carrying out their illegal demolitions of the buildings developed on **LR. MAGUMONI/THUITA/779** acted in blatant and sheer violation of the very basic tenets of the Rules of Natural Justice.

The affected party, the plaintiff herein, was never at any time whatsoever served with the requisite notices by the County Government of Tharaka Nithi before demolitions were undertaken. The illegal demolitions of the Plaintiff's developments on **LR. MAGUMONI/THUITA/779** were done without NOTICE by the defendants. There is no evidence to demonstrate that any lawful notice was ever served upon the Plaintiff before demolishing as is required of the by the law. This was also confirmed by the Defence witness during cross examination. The Notice anticipated by the Physical Planning Act (PPA) is provided under section 38 of the statute and Legal Notice No. 141- The Physical Planning (ENFORCEMENT NOTICES) Regulation, 1998, prescribed as Form P.P.A.7. The Plaintiff **was never** issued with an **Enforcement Notice.**

Section 38 of the Physical Planning Act states as follows:-

> ***"38 (1) when it comes to the Notice of a Local Authority that the development of land has been or ……the Local Authority may serve any Enforcement Notice on the owner, occupier or developer of the land".***
>
> ***Section 38 (2) stipulates that an enforcement Notice shall specify the development alleged to have been carried out without development permission……..."*** *This was never ensured nor done by the defendants.*

*Further, My Lord, the Defendants are in gross contravention of the provisions of Section 23 (2) of The Survey Act, Cap.299 Laws of Kenya which provides thus:- " "**Before so entering upon any land, the Director or other surveyor or person duly authorized shall, whenever practicable, give reasonable notice to the owner or occupier of the land of his intention to enter thereon, and shall, on so entering, produce written evidence of his authority to any person reasonably requiring the same**." These requirements were never upheld by the defendants.*

It is our humble submission that the Defendant was in no way whatsoever entitled to move into, encroach and/or trespass into and carry the demolitions on the suit property without ***Notice*** or ***Court Order***. We hereof rely on the case of ***Christopher Ndarathi Murungaru…VS... Kenya Anti-Corruption & Hon Attorney General [2006],*** where it was held that:- ***"the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public".***

We further submit that the court should find that the Defendant did not observe or follow due process in carrying out the demolition. To this effect Article 27(1) and (2) of the Constitution which provides that:- ***"every person is equal before the law and has the right to equal protection and benefit of the law"*** is very candid**.**

The credibility of the surveyor who carried out the purported surveys leading to the illegal demolitions, which surveyor testified for the Defendants is significantly questionable. The witness/"surveyor" on cross examination said that what he holds is a Diploma in Geographical Information Systems. We submit there is no such qualification for surveying. What may be available is a course in Geospatial Information Science.

The purported surveyor lacked essential surveying skills and works undertaken by him are voidable and lack essential efficacy.

My Lord, there is no doubt that **LR. MAGUMONI/THUITA/779** is the sole and absolute property of the Plaintiffs.

It also not contested that the County Government of Tharaka Nithi, constituted of the Defendants herein, demolished and/or destroyed the plaintiff's developments on **LR. NO. MAGUMONI/THUITA/779.**

It is also a fact that the Plaintiff suffered loss and damages occasioned by the acts of the Defendants.

The said demolitions were both unprocedural, illegal and arbitrary. The pictorial evidence is clear enough to demonstrate the extent of the destructions occasioned by the Defendants.

7. VALUATION OF THE SUIT PROPERTY

My Lord, the plaintiff has tendered a detailed Valuation Report by TULIFLOCKS LIMITED

dated 23rd February,2019 indicating the property was inspected for valuation on the 16th January,2019. This document was properly tendered in evidence by the plaintiff, the person who had received it, at the time of his testifying. The valuation report was duly produced in court by the person who had received as is provided for under the Evidence Act. The Report, which was neither opposed, objected to nor contested by the defendants provides the market value of the property at KSh.15,437,000/= (Fifteen million, four hundred and thirty seven). This value is reasonable.

Further the Plaintiff has provided sufficient evidence including statements, oral testimonies and annexed pictorials to demonstrate the justification of their claim against the defendants. For the determination of compensation for damages,

> Section12 Of the Evidence Act, Cap. 80 provides thus: "Facts affecting quantum of damages In suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant".

8. RELIEFS SOUGHT

The plaintiff prays for the following reliefs:-

1. Compensation for the full market value of the property as per the Valuation Report which is KSh.15,437,000/= (Kenya Shillings Fifteen Million, four Hundred and thirty seven Thousand)

2. Compensation for loss of income @KSh.36,000/= per month effective from 9th February,2019 to date plus accruing interest thereof.

3. Special Damages as pleaded in paragraph 12 (v), (vi) and (vii) of the Plaint;

4. General Damages as pleaded in paragraph 12 (i), (ii), (iii) and (iv) of the Plaint;

5. Costs of the suit.

With regard to the measure of damages we rely on the *locus classicus* on award of damages ***Livingstone….Vs….Rawyards Coal Co*, (1880) 5 App Cases 25,** where the court defined the measure of damages as ***"that sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."*** In this respect **t**he Plaintiff has duly quantified, elaborately demonstrated and proven his claim for damages through evidence produced before this Honorable court. It is instructive that the Defendants undertook and proceeded with the demolitions in the most arbitrary manner which entitles the Plaintiff to exemplary and/or aggravated damages.

My Lord, Article 40 of the Constitution provides for the right to property and the only instances that the State is permitted to deprive an individual of his property is during compulsory acquisition as provided for under ***Article 40(3)(a)*** of the Constitution. The County Government of Tharaka Nithi unlawfully denied and/or deprived the Plaintiff of these rights. Further, the Plaintiff had the legitimate expectation that the State would allow him a quiet possession of the suit property. He also had the legitimate expectation that in the case of demolition, due process would be followed which was not the case herein. For this we rely on the case of ***Attorney General v Ryath (1980),*** where it was held that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends the principles of natural justice is outside the jurisdiction of the decision making body.

My Lord, the Plaintiff has proved his case on a balance of probabilities and prays that this Honorable Court do enter judgment in his favour as prayed for in the suit herein against the defendants.

We humbly submit and pray.

DATED at CHUKA this .....11th ..... day of .....December,..... 2020

WAKLAW ADVOCATES

FOR THE PLAINTIFF

35. In their submissions that parties have attempted to narrate the oral evidence given by their witnesses. This court clarifies that it has only relied on its version of the oral evidence proffered by the parties. Of course, parties cannot introduce or contrive new evidence in their submissions.

36. The 1st, 2nd, 4th, 5th and 6th defendants written submissions are pasted in full herebelow without any alterations whatsoever:

1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS' SUBMISSIONS

Part 1 – Introduction

1. Before this Honourable Court is the Plaintiff's Amended Plaint dated **28th March, 2019**, in which he seeks the following prayers:-

a. **Special damages as pleaded on paragraph 12 (v) (vi) and (vii) above.**

b. **General damages as pleaded on paragraph 12 (i), (ii), (iii) and (iv) above.**

c. **The Defendants (1-6) jointly and/ or severally be compelled to restore LR. Magumoni/ Thuita/ 779 in its original status as appearing on the Registry Index Map (RIM) of Magumoni/ Thuita Registration Section, Sheet No. 12 and further the Defendants (1-6) be issued with permanent orders of injunction restraining them from ever trespassing unto the Plaintiff's deceased father LR. No. Magumoni/ Thuita/ 779 and/ or in the alternative and without prejudice to the foregoing the Defendants (1-6) jointly and/ or severally be compelled by this Honorable Court to compensate the Plaintiff with a reasonable compensation of the said land parcel and all the developments that were erected thereon prior to the illegal demolitions (Valuation Report to be filed.**

d. **Costs of the suit.**

e. **Any other and better relief appropriate in the circumstances.**

2. The 1st, 2nd, 4th, 5th and 6th Defendants hereinafter referred to as the aforementioned Defendants filed their joint Statement of Defence on **20th December, 2019**. Together with it, they filed:-

a. the witness statement of Mr. Ashford Mutembei;

b. a list and bundle of documents.

3. At the trial, the Plaintiff testified on his own behalf whilst Mr. Mutembei testified on behalf of the aforesaid Defendants.

4. On **23rd November, 2020**, this Honourable Court gave directions as regards the filing of submissions. It is pursuant to those submissions that the aforesaid Defendants file these submissions.

Part 2 – Evidence

5. As stated above, the Plaintiff testified on his own behalf. He relied on his witness statement dated **27th February, 2019**. **It is worthy of note that the Plaintiff did not produce any document in evidence i.e. none was produced as an exhibit**. As we shall show below, this was a fatal omission as held by the Court of Appeal in **Kenneth Nyaga Mwige –v- Austin Kiguta & 2 others [2015] eKLR.**

6. In cross examination, the Plaintiff stated that:-

a. he was an administrator of the estate of his late father;

b. there were **two** administrators; himself and one, Njagi Nathaniel;

c. he did **not** annex an authority to file the suit or plead or testify in this suit on behalf of his co administrator;

d. the suit property belonged to his late father;

e. the certificate of title was issued to his late father on **3rd July, 1987**;

f. the suit was allegedly a commercial plot;

g. contrary to his assertion, as contained in the Valuation Report, that there were **8 houses**, he stated that there were **13 houses**;

h. contrary to his assertion, as contained in the Valuation Report, that there were **3 shops**, he stated that there were **2 shops**;

i. there was **no** change of user from agricultural user to commercial user;

j. the Development Plans were approved by the District Health Officer on **9th December, 1988**; there was **no** other approval from any other Government Agencies which was exhibited;

k. there were **no** building plans which had been attached;

l. the officials from the 2nd Defendant **first** contacted his late father in connection with the suit property in **2015** i.e. **2nd July, 2015**;

m. the suit property was **first** earmarked for demolition in 2015 when his father alive; please see paragraph 3 of a copy of a letter dated **1st February, 2019**, addressed to the 1st Defendant by the Plaintiff;

n. following the said earmarking, his late father wrote to the County Surveyor and the said issue was allegedly resolved;

o. his late father did **not** file any suit in **2015** or soon thereafter to avert the intended demolition;

p. only a part of the building standing on the suit property was demolished;

q. only **1 shop** and **7 rooms** were demolished;

r. he did **not** have any evidence of the value of the demolished part;

s. he did **not** have a receipt for the costs of the valuation report filed i.e. **Kshs. 62, 500/-** as stated in paragraph 12 (v) of the Amended Plaint;

t. he did **not** have a receipt for the costs of the advocates fees for demand letter and service thereof i.e. **Kshs. 9, 000/-** as stated in paragraph 12 (vi) of the Amended Plaint;

u. he did **not** have a receipt for the costs of the advocates fees to obtain limited letters of administration i.e. **Kshs. 35, 000/-** as stated in paragraph 12 (vii) of the Amended Plaint;

v. the road had already been tarmacked and was being used by the public as a road since **2019**;

w. he had **not** surveyed the plot to confirm the correct size and acreage;

x. he had **not** filed any Surveyor's Report;

y. as per **paragraph 4** of the said letter dated **1st February, 2019**, addressed to the 1st Defendant by the Plaintiff, it was a **boundary dispute**; in part, it reads as follows:-

Owing to the large number of complainants against the Surveyor's erroneous re - establishment of property boundaries within and around Kibugua Market, the County Surveyor invited concerned persons for a meeting by letter Ref. TNC/ CS.OG/ Vol. 1/ 28 of 24th June, 2015 (Appendix 4). The above cited meeting was held on 2nd July, 2015. After the meeting, the County Surveyor and his team accompanied by the affected land owners with their surveyors/ witnesses, re - established boundaries as indicated in the RIM.

z. **paragraph 12 (c)** of the same letter reads as follows:-

In view of the above facts and circumstances, I humbly make the following observations:-

(a) …..

(b) ……

(c) settlement of boundary disputes is the exclusive responsibility of the Land Registrar as stipulated in the Land Registration Act. The Land Registrar is mandated by law to appoint a Surveyor in handling such disputes. The County Surveyor is therefore neither legally mandated nor competent to deal with or determine boundaries on freehold land.

aa. the County Surveyor invited persons for a meeting before the demolition;

bb. he allegedly did not receive any of the notices served on all the other affected residents of Kibugua Market;

cc. he did **not** challenge the notice in accordance with the Physical Planning Act as he did not deem it necessary.

7. At the trial, **Mr. Ashford Mutembei** testified on behalf of the aforementioned Defendants. In brief, his evidence was that:-

a. he works for the 2nd Defendant as its County Surveyor; he has worked as a Surveyor for **12 years**;

b. he has been serving as the County Surveyor since **2016**;

c. he has the authority of the aforementioned Defendants to make this statement;

d. the truth about the events of **9th February, 2019**, is as told by the aforesaid Defendants herein and by him in his replying affidavit sworn on **19th December, 2019**;

e. the 2nd Defendant participated, between **2014** and **2019**, in the process of ensuring that those who in Kibugua Market had encroached the road reserves and built houses removed them;

f. the suit concerns the process of enforcing the Physical Planning Act to Kibugua Market on **9th February, 2019**, as a result of the said consultative process;

g. the Plaintiff is an owner of property known as *Magumoni/Thuita/779* who chose to erect a building partly on his land and partly on the adjoining road reserve and that the 2nd Defendant demolished the latter on **9th February, 2019**, in exercise of its powers under the Physical Planning Act;

h. the aforementioned Defendants have **not** entered the Plaintiff's said property or damaged his building standing on it;

i. the process complained of entailed removing illegal structures on the road reserves after the 2nd Defendant issued an enforcement notice on all proprietors of Kibugua Market on **16th January, 2019**;

j. that process commenced in **late 2014**, when some residents and proprietors of properties in Kibugua market brought to the 2nd Defendant's attention the facts that in that market there were many people who had encroached on road reserves in the market and its surrounding area; in the aforementioned Defendants' bundle of documents, they have included all the relevant documents touching that process; **please see Dexh. 1, 2 and 4;**

k. when the process began, some of the proprietors of shops in Kibugua Market had constructed illegal buildings on road reserves;

l. he did not know when the offensive construction took place, but, as a surveyor, he confirmed in 2017, that indeed some proprietors had encroached on the road reserve and these included the Plaintiff;

m. upon receiving the report, the 2nd Defendant investigated the complaints concerning encroachment and found them valid;

n. at the time the complaints were received, the 3rd Defendant was serving the 2nd Defendant as the County Surveyor and Mr. Mutembei was working under him;

o. in 2017, Mr. Mutembei and members of his staff surveyed the Kibugua Market and established that indeed, the Plaintiff and other persons had encroached on road reserves; included in the aforementioned Defendants' bundle of documents are copies of Kibugua Market Development Plan, and a map prepared by the Land Adjudication Department and Survey of Kenya in 1969;

p. when he surveyed the Kibugua Market, he indicated, in red, the way in which road reserves had been encroached upon;

q. indeed, the Plaintiff and other proprietors encroached on the road reserves in Kibugua Market and put up structures which they had let to tenants;

r. since **November 2014**, the 2nd Defendant has worked with owners of properties in Kibugua Market who have formed a committee which handles matters concerned with encroachment;

s. the committee has 15 members whose names are given in the Plaintiff's letter addressed to the Member of the County Assembly of the area; **please see Dexh. 6;**

t. on **10th October, 2019**, a baraza convened by the said committee affirmed its support for the enforcement of the Physical Planning Act; included in the aforesaid Defendants' bundle of documents are copies of its minutes and a letter addressed to the member of the County Assembly of Magumoni Ward; **please see Dexh. 6 and 7;**

u. between **October and November 2018**, officers from my office visited every proprietor in Kibugua Market and pointed out, where encroachment had happened, and the extent of that encroachment on the road reserve;

v. every proprietor of the shops in the market was shown what structures were to be demolished; included in the aforementioned Defendants' bundle of documents is a copy of an official search in respect of the suit property; **please see Dexh. 3;**

w. the Plaintiff did **not** remove the illegal structures on the land adjoining his plot;

x. as stated above, on **16th January, 2019**, the 2nd Defendant served on all proprietors' enforcement notices; **please see Dexh. 5;**

y. some proprietors, including the Plaintiff, refused to comply with the enforcement notice, thereby leaving the 2nd Defendant with no option but to demolish the structures constructed on the road reserve.

Part 3 – The Law

8. The aforementioned Defendants submit that it is settled law that a party is bound by its pleadings. As demonstrated in by t**he Court of Appeal in Independent Electoral and Boundaries Commission & Another –v- Stephen Mutinda Mule & 3 Others [2014] eKLR, considered with approval two foreign cases on the issue of parties being bound by their pleadings as follows:-**

"… the decision of the Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD –Vs- NYASULU [1998] MWSC 3, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled "The present Importance of Pleadings." The same was published in [1960] Current Legal Problems, at P174 whereof the author had stated-

'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings … for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.'

A copy of that authority is attached to these submissions.

9. The aforementioned Defendants further submit that the court itself is as bound by the pleadings of the parties as they are themselves and it is **not** the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. **It is undisputed that through the Plaintiff's own pleadings, as enumerated above, the Plaintiff has all along maintained that the dispute before this court is a boundary dispute**. The question that one ought to ask is whether the court has jurisdiction to hear the dispute before it?

10. The aforementioned Defendants answer this question in the **negative**. We submit that in **Onesmus Kamau Mungai –v- Phares Mwangi Kamau & 2 Others [2019] eKLR**, this Honourable Court declined to make such orders in a suit where it found that it lacks jurisdiction to determine a boundary dispute. In part, the law is stated as follows,

The main issue herein is whether the Court has jurisdiction to determine this matter given that it is a boundary dispute.

This Court has carefully considered the rival written submissions and the pleadings in general. The Court has also considered Section 18 (2) of the Land Registration Act which provides:-

"The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this Section".

The above provisions are coached in mandatory terms and as was held in the case of Ratilal Ghela Shah & 2 Others…Vs… Menkar Ltd (2018) eKLR,

"It means that any issue relating to a dispute as to boundaries are within the Land Registrar's mandate."

The Court will also concur with the findings in the case of Willis Ocholla…Vs…Mary Ndege (20160 eKLR, where the Court held that:-

"In terms of Section 18 (2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so and comes to court without first seeking redress from the Land Registry, the court being a court of law has to remind such a party that he/ she has moved the court prematurely. That the provisions of Section 18 (2) of the Land Registration Act shows clearly that the court is without jurisdiction on boundary dispute of registered land until after the Land Registrar's determination of the same has been rendered."

Equally in this matter, the Court finds that since the parties herein had invited the District Surveyor over confirmation of this boundaries once dissatisfied with the Surveyors Report, they ought to have escalated the matter to the Land Registrar and not to rush to court.

The Court of Appeal had this to say in the case of Geoffrey Muthinja Kabiru & 2 Others….Vs….Samuel Munga Henry & 1756 Others (2015)eKLR, where it stated that:-

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

This Court therefore finds that the Plaintiff jumped the gun and failed to adhere to the procedure provided by the Statute on how to address any grievances related to boundary dispute. The Court finds that it is divested by jurisdiction by virtue of the provisions of Section 18(2) of the Land Registration Act.

A copy of that decision is attached to these submissions.

11. Section 38 of the Physical Planning Act provides as follows:-

38. Enforcement notice

(1) When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice to restore the land to its original condition before the development took place, or for securing compliance with those conditions, as the case may be, and in particular such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Unless an appeal has been lodged under subsection (4) an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice he may within the period specified in the notice appeal to the relevant liaison committee under section 13.

(5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under section 15.

(6) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.

(7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of an appeal made under subsection (4), (5) or (6).

12. It is apparent that the Plaintiff jumped the gun, so to speak, by filing this suit prematurely before filing an appeal at the Liaison committee, a second appeal to the National Liaison Committee and a third appeal to this Honorable Court if aggrieved by those decisions. He did not do so. This suit was prematurely filed. We urge the court to find and hold as such. The aforementioned Defendants urge this Honourable Court to dismiss this suit with costs.

13. It is worthy of note that, after the trial of the suit, the Plaintiff did **not** apply for a site visit. As can be seen from the court's record, there were **two** contrasting views on the status of the suit property. It was upon the Plaintiff to make that application for a site visit. This Honourable Court in **Beatrice Ngonyo Ndungu & another v Samuel K. Kanyoro & 2 Others [2017] eKLR**, had this to say of the object of site visits by the court,

10. From time to time it becomes necessary for the court to visit a site with a view to helping it reach a just decision in a matter. It must however be remembered that all decisions of the court are based on an interpretation of facts and the law. Facts are to be presented before the court as evidence whether oral or written. Evidence is the sole route through which parties introduce their version of facts before the court. In an adversarial system the burden of proof is always on he who alleges and the court never goes out to seek facts on its own. It is always incumbent on parties to adduce sufficient evidence to prove the facts which they assert. On the other hand the law can be cited by parties in pleadings or submissions. The court can access the law on its own. Needless to state, parties are free to urge the court to interpret the law one way or the other.

11. If the court visits a site, it can only be for purposes of receiving evidence which will assist it make a just decision. So long as a site visit is incapable of yielding any evidence or for that matter any admissible evidence then the judge will be no better than a tourist satisfying curiosities and taking photographs during the site visit. A court in session must perform judicial functions and must resist distractions that take it away from its mission. The dispute herein is whether the property known as plot No. 100 Business Jewathu site is the same one also known as Njoro Township Block 1/1144 or whether they represent two different parcels on the ground. A visit to the site by a judge who is not a survey expert and who is not armed with survey equipment wouldn't yield anything. An expert report by a surveyor compiled with the aid of survey equipment would certainly be more useful. (Emphasis added).

A copy of that decision is attached to these submissions.

In the case before the court, no Surveyor's Report was filed by the Plaintiff who alleged that there was encroachment on his late father's property.

14. The aforementioned Defendants submit that the Plaintiff has ignored the rule of joint responsibility of administrators and purported to file this suit himself. The law, as stated in **Willis Ochieng Odhiambo –v- Kenya Tourist Development Corporation, Kisumu High Court Civil Case No. 51 of 2007**, is that where there are **two or more administrators**, they must take decisions which are unanimous or supported by the majority. In **Republic –v- Disciplinary Tribunal of the Law Society of Kenya ex-parte John Wacira Wambugu and 2 Others [2016] eKLR**, this Honourable Court had this to say of the joint duty of the administrator as follows,

> The legal position of joint administrators was dealt with in **Willis Ochieng Odhiambo vs. Kenya Tourist Development Corporation & Another Kisumu HCCC No. 51 of 2007**, where the Court while citing with approval **Lewin on Trusts, 16th Edn. at 181**; **Williams & Mortimer: Executors, Administrators & Probate and Bullen & Leake & Jacobs: Precedents of Pleadings, 13th Ed. at 373** held that ***in the case of co-trustees of a private trust, the office is a joint one and that where the administration of the trust is vested in co-trustees they all form as it were one collective trust and therefore must execute the duties of their offices in their joint capacity. It was further held that although a strict definition of "trustee" does not apply to personal representatives who hold property upon trust for the estate, the legal responsibilities and liabilities of executors and administrators of estates are the same and are treated similarly where matters of procedure are in issue. It is therefore my view and I hold that in such circumstances a compromise of a cause of action must be by the administrators jointly and any purported compromise by only one when the other denies having authorised such compromise cannot stand.***

A copy of that decision is attached to these submissions.

It is undisputed that there are **two** administrators who have been appointed by the Chief Magistrate's Court. One of them has **not** filed any document showing that he has given his authority to have this suit filed. In the absence of such authority, we urge this court to hold that this suit is a non - starter and dismiss it with costs to be paid personally by the Plaintiff. We further submit that the office of administrators is a joint office and one of them cannot purport to file a suit without the other's authority/ consent.

> 15. As stated above, the Plaintiff did **not** produce any documents in evidence. In **Kenneth Nyaga Mwige –v- Austin Kiguta & 2 others [2015] eKLR**, the Court of Appeal said this on the failure to produce documents as exhibits:-

> **16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?**

> **17. The respondents' contention is that the appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and" MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.**

> **18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/ or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.**

> **19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.**

> **20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. *If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.***

> **21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.**

> ***22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.***

> **23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents**

marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondents' case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

Attached to these submissions is a copy of the said decision.

Similarly, we urge this Honorable Court to disregard the documents filed by the Plaintiff and dismiss this suit with costs.

Who should bear the costs of this application?

16. The aforementioned Defendants submit that costs of the suit are awarded at the discretion of the Court or Judge and whilst the court has an absolute and unfettered discretion to award or not award them, that discretion must be exercised judicially. Please see **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others [2014] eKLR.** The Supreme Court further held that the awarding of costs is not to penalize the losing party but is a means for the successful litigant to be recouped for the expenses to which he has been put in fighting an action. A copy of that decision is attached to these submissions.

17. They further submit that other principles to be considered in the awarding of costs are as stated by Justice Odunga in **Republic v Communication Authority of Kenya and another ex – parte Legal Advice Centre aka Kituo Cha Sheria [2015] eKLR** in which he held as follows:-

In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287 and Mulla (12th Edn) P. 150.

A copy of that decision is attached to these submissions.

18. They submit that this suit is brought prematurely by the Plaintiff as he failed to fully consider the suit he intended to file. As seen above, if it is a boundary dispute which he is claiming, he ought to have first brought it to the attention of the Land Registrar under **section 18 (2)** of the Land Registration Act. **Secondly**, and in the alternative, he ought to have appealed under the mechanism under the Physical Planning Act. **Thirdly**, and in the alternative, he ought to have annexed the authority of his co – administrator to file this suit.

19. Both parties were in agreement that the road has already been constructed and is being used as a public road. The prayer seeking to restore the suit property to its original status **cannot**, therefore, be granted. The public benefit overrides the private benefit of the Plaintiff. We have also shown above that the Plaintiff has failed, on a balance of probabilities, to prove his case as required by law. The prayers for general damages and compensation are also for disallowing.

Part 4 – Conclusion

20. For the foregoing reasons, the 1st, 2nd, 4th – 6th Defendants urge this Honourable Court to dismiss the suit with costs.

DATED at NAIROBI this .....25TH ..... day of .....January,..... 2021

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KAMAU KURIA AND COMPANY

ADVOCATES FOR THE 1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS

37. In terms of the mandatory requirements of Order 21 (4) of the Civil Procedure Rules a concise statement of the case is that the 1st, 2nd, 4th, 5th and 6th defendants trespassed upon the Plaintiff's Land Parcel No. Magumoni/Thuita/779 and demolished his family's building and he, therefore, seeks judgment ordering the defendants to pay damages and restore the land to its original status. The defendants deny the plaintiff's claim and say that the plaintiff had encroached upon a road reserve and that what they did was to remove the encroaching structure which they did in accordance with applicable law and for this reason, they pray that the plaintiff's suit be dismissed with costs. The Plaintiff also seeks a permanent injunction restraining the defendants from ever trespassing upon Land Parcel No. Magumoni/Thuita/779.

38. I frame the issues /points for determination as follows:

a) Does this dispute concern a boundary dispute between the plaintiff and the defendants or does it concern trespass upon the plaintiff's land and demolition/destruction of his property?

b) Was the demolition of the plaintiff's property standing on Land Parcel No. Magumoni/Thuita/779 lawful and did the plaintiff suffer damages arising from the actions of the defendants?

c) Who will bear costs of the suit?

39. At the commencement of this suit the plaintiff had filed an application seeking injunctive orders against the defendants. On 28th February, 2019, the plaintiff's advocate appeared before the Hon. Justice E.C. Cherono, ELC Judge at Meru. The Honourable Judge certified the application urgent and ordered that the application be served upon the defendants and that interpartes hearing of the application be conducted on **22nd March, 2019** before the ELC Court at Chuka. By **22nd March, 2019**, the defendants had not only finished demolishing the structure on the suit land but had also constructed the proposed tarmack Road. As a result, the plaintiff abandoned his application.

40. On **17th June, 2019**, there was an intimation by the parties that they could explore an out of court settlement. As a result, this court issued the following orders:

(i) As requested by Mr. Munyori, before this court makes a determination on the Preliminary Objection and in view of the intimation by Mr. Munyori that the road in dispute had already been built, Mr. Munyori is granted leave to write to the plaintiff's advocate with a view to seeking an out of court settlement.

(ii) By consent, apposite directions on **10.7.2019 at 10.00am.**

41. On **10th July, 2019**, M/s. Chege holding brief for Mr. Munyori, the defendants' advocate told the court that it was the defendants' intention to seek negotiations which by this time had not been successful. She prayed for **21 days** to give negotiations a chance and stated that the parties were likely to reach an amicable resolution. She prayed for another date when the parties would record a consent in the event that they reached a settlement. The court indulged the parties and gave them the **21 days** that had been requested and directed them to come back to court for directions on **31st July, 2019** to report on developments regarding their negotiations.

42. On **31st July, 2019**, the parties had not reached an out of court settlement and indicated that this suit should be escalated to full hearing. As a result of this development, I delivered a ruling concerning the Preliminary Objection which had been filed by the 1st, 2nd, 4th, 5th and 6th defendants challenging the jurisdiction of this court to handle this suit. The ruling was delivered on 13th November, 2019 but should have been delivered earlier except that this court's long recess that takes place between 1st August and 15th September, intervened. Covid 19 concerns also intervened. As the issue of jurisdiction is a very important one, I herebelow reproduce in full that Ruling. This will cast into their proper perspectives the issues canvassed in this suit.

RULING

1. This ruling concerns a Notice of Preliminary Objection (PO) filed by the 1st, 2nd, 4th, 5th and 6th defendants which states:

NOTICE OF PRELIMINARY OBJECTION

Take notice that at the hearing of the Notice of Motion herein dated 27th February, 2019, the 1st, 2nd, 4th, 5th and 6th defendants shall object to the same and urge this honourable court to strike it out with costs on the grounds that:-

1. This honourable court has no jurisdiction to entertain this suit as its value is Kshs.15,437,000/- by virtue of section 7 of the Magistrate's Court Act, 2015, and the rule in Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others [2017]eKLR.

2. As held in Owners of the Motor Vessel Lillian S –VS- Caltex Oil Kenya Ltd [1989]KLR 1,

Dated at Nairobi this 25th day of May 2019

…….

KAMAU KURIA & COMPANY

ADVOCATES FOR THE 1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS

2. Contemporaneously with the filing of the Preliminary Objection, the 1st, 2nd, 4th, 5th and 6th defendants filed grounds of opposition which state:

GROUNDS OF OPPOSING (sic) THE NOTICE OF MOTION HEREIN DATED 27TH FEBRUARY, 2019.

TAKE NOTICE that at the hearing of the Notice of Motion dated **27th February, 2019,** the 1st, 2nd, 4th, 5th and 6th Defendants shall oppose the same on the following grounds:-

1. this Honourable Court has no jurisdiction to entertain this suit as its value is **Kshs. 15, 437, 000/-** by virtue of Section 7 of the Magistrate's Court Act, 2015, and the rule in **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR**;

2. as held in **Owners of the Motor Vessel Lillian S –v- Caltex Oil Kenya Ltd [1989] KLR 1**, where a court lacks jurisdiction, it must down its tools;

3. the Plaintiff has based his claim on his own wrongs taking the form of constructing a part of his building on a road reserve and also constructing buildings without obtaining the requisite approvals under the repealed Local Government Act and the Physical Planning Act;

4. the Plaintiff has not and cannot establish a prima facie case with a probability of success;

5. the Plaintiff cannot establish a case for the grant of mandatory injunctions as required by **Kamau Mucuha –v- Ripples Ltd [1993] eKLR**;

6. other reasons contained in the Replying affidavit.

DATED at **NAIROBI** this .....25th ..... day of .....May.....2019

_____

KAMAU KURIA & COMPANY

ADVOCATES FOR THE 1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS

3. The plaintiff replied to the Preliminary Objection and the Grounds of Opposition in the following manner:

REPLY TO 1ST, 2ND, 4TH, 5TH AND 6TH RESPONDENTS'/DEFENDANTS' NOTICE OF PRELIMINARY OBJECTION AND GROUNDS OF OPPOSITION FILED ON 25TH MARCH 2019.

TAKE NOTICE that the Counsel for the Applicant/Plaintiff **will reply and/or oppose** to the Preliminary Objections raised by the above named Respondents/Defendants on their pleadings filed on 25th March 2019, on the following grounds:-

1. **THAT** this Honourable Court has Jurisdiction to hear and determine the Applicant's/Plaintiff's Suit and the Jurisdiction thereof is expressly donated by the *Provisions of Article 162 (2) (b) of the Constitution of Kenya, 2010 as read with Section 13 (7) of the Environment and Land Court Act.* This Jurisdiction is inherent upon this Court, and having original Jurisdiction equally as the High Court, has Jurisdiction to hear and determine the Applicant's/Plaintiff's claim of Kshs. 15,437,000.00 plus general damages pleaded thereof and other constitutional declarations and/or reliefs sought thereto as pleaded on paragraph 12 of the Plaint.

This Jurisdiction in respect of this matter is well founded on the anticipated complexities of the issues for determination forming and/or constituting the dispute herein.

2. **THAT** the Applicant's/Plaintiff's deceased father had obtained the requisite approvals from the then District Public Health Officer as it was the procedure then, before commencing construction works on LR. MAGUMONI/THUITA/779 **and which land is not a road reserve nor in the Ndungu report** and the Respondents/Defendants averments to the contrary have no legal basis. ***(The Applicant/Plaintiff will seek leave of the Court to produce the said approvals, during the time of hearing).***

That further, the Physical Planning Act, the Respondents/Defendants are hinging their defence on, was not in force in the year 1988 and when the subject Suit properties were being approved and constructed.

3. **THAT** the Applicant/Plaintiff has ably demonstrated a *prima facie* case with high chances and/or probability of success and it is in the interest of Justice that the same do proceed to full hearing and the Respondents/Defendants be condemned for applying *draconian* litigation and/or improper practices of raising **"preliminary points of Law"** on matters that **are not demurrable** as required in Law.

4. **THAT** the Authorities cited by the Respondents/Defendants, particularly that of E.L.C Case No. 868 of 2012, Ruling delivered on 25th April 2018 by JUSTICE A. OMBWAYO and the celebrated one of MUKISA BISCUITS versus WEST END (1969) EA 696 and which JUSTICE M. K. IBRAHIM revisited on his Judgment delivered on 13th June 2007, in his Eldoret Misc. Civil Application No. 97 of 2003 **speaks volumes** that the Applicant's/Plaintiff's Suit is meritorious and deserves to proceed to full hearing and on its own merits and the Preliminary Objections raised do not deserve to see the light of the day. The Preliminary Objections raised by the Respondents/Defendants are of nature of the technicalities being barred in administration of substantive Justice under the express *Provisions of Article 159 2 (d) of the Constitution of Kenya, 2010.*

5. We shall rely on the above cited Authorities together with that of Justice L. N. WAITHAKA, Judgment delivered on 21st February 2014 in Nakuru Civil Case No. 489 of 2013 between SAMUEL WAWERU versus GEOFFREY MUHORO MWANGI, to demonstrate that the Respondent's/Defendant's Preliminary Objections do not deserve to see the light of the day and consequence thereof is for their dismissal for confusing issues and otherwise for being an abuse of the due Court Process.

We so pray your Lordship.

DATED at CHUKA this …28th …. day of ……March,…… 2019

……..……..

M/S WAKLAW ADVOCATES,

ADVOCATES FOR THE APPLICANT/PLAINTIFF

4. The 3rd defendant wanted to be removed from the suit and filed an affidavit sworn on **16th July, 2019** which states as follows:-

I, JUSTIN KITHINJI S. NDERI a resident Kibugua Market in Tharaka Nithi County within the Republic of Kenya and of Post Office Box 10, Magumoni do solemnly make oath and state as follows:-

3RD DEFENDANT'S AFFIDVIT

1. That I am an adult male of sound mind and disposition, a citizen of the Republic of Kenya, the 3rd defendant herein well versed with the facts of this case and hence competent to make the following declarations under oath.

2. That the plaintiff herein made a complaint for malicious damage of property against me and other people working with the Tharaka Nithi County Executive at Chuka Police Station vide OB. 47/11/2/2019 in February, 2019.

3. That the criminal complaint against me and the others relates to and is founded on the events that precipitated the present civil suit.

4. That I was summoned sometimes in June, 2019 by the OCS and the DCIO Chuka Police Station and a statement with regard to the criminal complaint was taken.

5. That t the time of recording the statement I was informed that the complaint had resuscitated the complaint which he had seemingly lost interest in and other people including police officers and officers from the County Planning Offices had also recorded statements.

6. That after the last court attendance on the 10th July, 2019 the court having directed that we furnish it with particulars of the criminal complaint against me I visited the office of the DCIO Chuka who furnished me with details of the same but directed that the actual documents would be delivered to court subject to a court order.

7. That I am now aware that the investigation file was forwarded to the office of Director of Public Prosecution (ODPP) in Nairobi on the 17th June, 2019 vide letter Ref. DCI/CRI/6/7/Vol. IV/44.

8. That the office of the DCIO Chuka Police Station is awaiting the go-ahead from the ODPP to arrest any culpable individuals including me if there is probable cause to prosecute for malicious damage of property.

9. That it is factual that the complainant's visit to the Chuka Police Station after the court had advised on the Alternative Dispute Resolution (ADR) caused the investigation file to be forwarded to the ODPP for advice on prosecution.

10. That it is clear that the complainant's fresh impetus to follow upon the criminal aspects of this case at a time when ADR is being explored is a well calculated move to influence any form of settlement and also amounts to abuse of court process.

11. That while nothing in law bars parallel criminal and civil proceedings, the use of one process to cause interference with the other or influence the outcome of the other amounts to abuse of court process that this court should not countenance.

12. That as was recorded in my statement with the DCIO, I was not within the confines of Tharaka Nithi County when demolitions, which were allegedly done under the supervisions of Police officers and with lawful notice were carried out.

13. That I make this affidavit in support of my application to have my name expunged from the named defendants in the present civil case that relates to the issues of compulsory acquisition of private land, repossession of public land and compensation matters that a private citizen is not ordinarily answerable to leave alone a member of a County Assembly.

14. That whatever is deposed to herein is true to the best of my knowledge, information and belief.

5. The 3rd Defendant's counsel submitted an affidavit to support his assertions that he was not properly sued in this matter.

6. The 3rd defendant was removed from the suit. This means that the term "defendants" in this Judgment after removal of the 3rd defendant refers to the 1st, 2nd, 4th, 5th and 6th defendants.

REPLY TO THE 3RD DEFENDANT'S SUBMISSIONS ON WHETHER THE 3RD DEFENDANT IS PROPERLY SUED, IN THE INSTANT SUIT.

Your Lordship, the Plaintiff's Counsel will reply to and/or oppose the 3rd Defendant's Submissions filed on 24th April 2019, that the 3rd Defendant is not properly sued in the Instant Suit, on the following grounds:-

1. The 3rd Defendant **has not filed any substantive motion and/or defence** to have the 3rd Defendant expunged from the proceedings as required in law.

2. The 3rd Defendant's Submissions are in nature of technicalities barred in administration of substantive Justice as envisaged *under Article 159 2 (d) of the Kenya Constitution, 2010*.

3. The 3rd Defendant has **rightly admitted on his paragraph 4 of the submissions filed on 24th April 2019 that this Honourable Court has Jurisdiction to hear and determine the Instant Suit,** and cannot backtrack and declare that he is wrongly sued in the Instant Suit. They should only have addressed themselves on the issue of whether they are properly sued if they believe they should not be a party in the Suit.

4. That the 3rd Defendant has not filed any Defence to the Plaintiff's Claim to demonstrate that he is not liable to the Plaintiff's Claim and in absence of such, they have no substratum and cannot stand under the very strong waves of the Law.

5. That the 3rd Defendant is properly sued in the Instant Suit, **courtesy to the *Provisions of Order 1 Rules 3, 4 (b) and 5 of the Civil procedure Rules, Cap 21 Laws of Kenya*** and the Defendant's Submissions to the contrary ought to fall under their own sword.

6. That further, the 3rd Defendant is properly sued in the Instant suit for reasons demonstrated below:-

i. That in October 2018, the 3rd Defendant held a baraza at Kibugua market and where the subject Suit land is situated and at which he persuaded the attendants to "RESOLVE" to surrender land for road expansion "without compensation".

ii. That on 7th December 2018, the Plaintiff met the 3rd Defendant at his private office (JUKIS Surveyor's office) Chuka Town and acknowledged the Plaintiff's letter dated 6th November 2018 and promised the Plaintiff that freehold Land Parcels particularly that of the Plaintiff's deceased father won't be affected by compulsory acquisition without compensation.

iii. That the 3rd Defendant personally directed and/or supervised Mutembei Surveyor of County Government to mark for demolition the Plaintiff's deceased's father LR. MAGUMONI/THUITA/779.

7. That other acts/omissions of the 3rd Defendant to warrant him being sued to be stated and argued during the time of hearing.

DATED at CHUKA this …17th …. day of ……May,…… 2019

……..…..

M/S WAKLAW ADVOCATES,

ADVOCATES FOR THE APPLICANT/PLAINTIFF

7. The Preliminary Objection filed by the 1st, 2nd, 4th, 5th and 6th defendants was canvassed through written submissions.

8. The 1st, 2nd, 4th, 5th and 6th defendants filed written submissions in the following manner:

1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS' SUBMISSIONS ON THEIR NOTICE OF PRELIMINARY OBJECTION DATED 25TH MARCH, 2019

PART A – THE 1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS' SUBMISSIONS

Part 1 – Introduction

1. These submissions are in **two** parts. **Part A** contains the 1st, 2nd, 4th, 5th and 6th Defendants' submissions on their Preliminary Objection whilst **Part B** contains a response to the Plaintiff's Reply to the said Preliminary Objection.

2. Before this Honorable Court is the 1st, 2nd, 4th, 5th and 6th Defendants ***(hereinafter, they are referred to as the Applicants)*** Notice of Preliminary Objection dated **25th March, 2019**, to both the pending application dated **27th February, 2019**, and the suit. The said Notice of Preliminary Objection reads as follows:-

TAKE NOTICE that at the hearing of the Notice of Motion herein dated 27th February, 2019, the 1st, 2nd, 4th, 5th and 6th Defendants shall object to the same and urge this Honourable Court to strike it out with costs on the grounds that:-

1. this Honourable Court has no jurisdiction to entertain this suit as its value is Kshs. 15, 437, 000/- by virtue of Section 7 of

the Magistrate's Court Act, 2015, and the rule in Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR.

2. **as held in Owners of the Motor Vessel Lillian S –v- Caltex Oil Kenya Ltd [1989] KLR 1, where a court lacks jurisdiction, it must down its tools.**

3. On **25th March, 2019**, this Honorable Court gave directions as regards the disposal of that application. These were that:-

a. **the Preliminary Objection dated 25th March, 2019, be heard first and the Plaintiff is granted 7 days to respond;**

b. **oral application by the Plaintiff to exclude the name of the 3rd Defendant, the MCA for Magumoni Ward, in the suit is allowed;**

c. **the Plaintiff to serve the 3rd Defendant with the orders issued by the court today;**

d. **all parties, including the 3rd Defendant, to come to court for directions on 8th April, 2019.**

4. These are the Applicants' submissions.

5. The Applicants wish to also rely on their Grounds of Opposition dated **25th March, 2019**, and their list of authorities dated **25th March, 2019**.

Part 2 – The facts of the case

6. The Applicants accept, for the purposes of their objections, that all the facts stated by the Plaintiff are correct.

7. The brief facts of the case, as can be seen from both the Plaint dated **27th February, 2019**, and Amended Plaint dated **28th March, 2019**, are that:-

a. the Plaintiff is the legal representative of the late Leonard R. I Nthiga who is the registered proprietor of the suit property, Meru/ Magumoni/ Thuita/ 779; he died on **25th November, 2017**; the deceased was registered as such on **3rd July, 1987**; the acreage of the suit property is **0.037 Ha**;

b. the Plaintiff was issued with a limited grant of letters of administration for the purposes of this suit on **15th February, 2019**; **it is worthy of note that he filed that Cause in the Chief Magistrates Court ostensibly because the value of the deceased's properties was not more that Kshs. 20 Million as provided for in the Magistrate's Court Act, 2015**;

c. the Plaintiff has attached a copy of an approval allegedly granted by the District Health Officer, Meru, on **9th December, 1988**, for a proposed business premises on the suit property for the deceased; **this then begs the question, why was the approval not sought from the Meru County Council which was the relevant organ to approve buildings/ construction plans at the time; the Applicants submit that, on the face of it, this was an illegal approval made by an illegal body;**

d. as can be seen from the photographs attached to his bundle of pleadings, neither the deceased nor the Plaintiff built a hospital/ clinic on the suit property if the approval given by District Health Officer, Meru, on **9th December, 1988**, is valid;

e. according to a Valuation Report contained in the Plaintiff's bundle, which has been prepared by Ms. Tuliflocks Ltd, the valuation of the suit property confirms that it is worth **Kshs. 15, 437, 000/-**; **page 6** of that Report reads as follows:-

VALUATION

Having regard to the foregoing particulars and the prevailing economic circumstances, we are of the considered opinion that the value of the unencumbered freehold interests I Magumoni/ Thuita/ 779 as at date of inspection is as follows:-

OUR OPINION ON THE CURRENT MARKET VALUE

Kshs. 15, 437, 000/-

READ:- FIFTEEN MILLION, FOUR HUNDRED AND THIRTY SEVEN ONLY.

f. he filed this suit on **27th February, 2019.**

Part 3 – The Law

The Preliminary Objection

8. The Applicants submit that that the leading authority on the nature of a preliminary objection is found in **Mukisa Biscuits –v- West End [1969] EA 696**. In that case, the East African Court of Appeal held that a preliminary objection raises a pure question of law. Law JA stated the law as follows:-

> **So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.**

Hon Justice Newbold stated as follows,

> **A preliminary objection is in the nature of what used to be a demurr.** ***It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.***

Please see authority number 9 contained in the Applicants' list of authorities dated 25th March, 2019, at pages 55 to 63 of that bundle.

9. In **John Mundia Njoroge and 9 Others –v- Cecilia Muthoni Njoroge and Another [2016] eKLR**, this Honorable Court outlined the grounds which could form the basis of a preliminary objection,

In my view, a preliminary objection can be raised on any of the following grounds:-

> **a.** ***Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;***
>
> **b.** ***Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;***
>
> **c.** ***Insufficient specificity in a pleading;***
>
> **d.** ***Legal insufficiency of a pleading (demurrer);***
>
> **e.** ***Lack of capacity to sue, non-joinder of a necessary party or mis-joinder of a cause of action; and***
>
> **f.** ***Pendency of a prior action or agreement for alternative dispute resolution.***

A copy of that authority is attached to these submissions.

10. The Respondents further submit that in **Omondi–v- National Bank of Kenya Ltd and Others [2001] 1 EA 177**, the High Court held as follows,

> **Bearing that definition in mind, I agree with counsels for the Defendants that both the objection as to the legal competence of the Plaintiffs to sue and pleas of *res judicata* are pure points of law which if determined in their favour would conclude the litigation and they are accordingly well taken as preliminary objections. … And I hasten to add that in determining both points, the court is perfectly at liberty to look at the pleadings and other relevant matter in its records. It is not necessary to file affidavit evidence in those matters as contended by counsel for the Plaintiff.**

Please see authority number 10 contained in the Applicants' list of authorities dated 25th March, 2019.

11. The Applicants submit that litigants, like the Plaintiff herein, who approach this Honorable Court must be clear which jurisdiction, he/ she intends to invoke as the court will down its tools as soon as it discovers that it lacks jurisdiction to hear the dispute before it. Please see **Owners of the Motor Vessel Lillian S v Caltex Kenya [1989] KLR 1**. In that case, Hon. Justice Nyarangi said this of jurisdiction and the consequence of a court holding that it lacks jurisdiction:-

> ***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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.***

Please see authority number 7 in the same bundle of authorities dated 25th March, 2019.

12. In the case before the court, the Applicants submit that as they shall demonstrate below, this Honorable Court lacks jurisdiction to hear the suit herein.

The Jurisdiction of the Magistrate's Court

13. Section 7 of the Magistrates Court Act, 2015, provides as follows:-

> **7. (1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the**

value of the subject matter does not exceed—

(a) twenty million shillings, where the court is presided over by a chief magistrate;

(b) fifteen million shillings, where the court is presided over by a senior principal magistrate;

(c) ten million shillings, where the court is presided over by a principal magistrate;

(d) seven million shillings, where the court is presided over by a senior resident magistrate; or

(e) five million shillings, where the court is presided over by a resident magistrate.

(2) The Chief Justice may from time to time, by notice in the Gazette, revise the pecuniary limits of jurisdiction set out in subsection (1), taking into account inflation and change in prevailing economic conditions.

(3) A magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law —

(a) land held under customary tenure;

(b) marriage, divorce, maintenance or dowry;

(c) seduction or pregnancy of an unmarried woman or girl;

(d) enticement of, or adultery with a married person;

(e) matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and

(f) intestate succession and administration of intestate estates, so far as they are not governed by any written law.

The Applicants submit that as the valuation report filed by the Plaintiff shows, the value of the suit property is **Kshs. 15, 437, 000/-.** This suit, as is demonstrated from the above quoted section, should have been filed before the Chief Magistrate's Court at Chuka which has jurisdiction to hear and determine suits of a civil nature which does not exceed **Kshs. 20 Million**. We urge this Honorable Court to allow the objection and strike out both the application and suit with costs to the Applicants.

14. Section 9 of the same Act reads as follows:-

9. A magistrate's court shall —

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, chores in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.

(b) in the exercise of the jurisdiction conferred upon it under section 29 of the Industrial Court Act,2011 and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations.

It is thus clear that the Chief Magistrates Court, Chuka, has the jurisdiction to determine the claim before this court. However, the Plaintiff chose to file his claim before this Honorable Court which, as stated above, lacks jurisdiction to entertain it. The Applicants, therefore urge this Honorable Court to strike out the suit with costs.

15. In **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR**, the law was stated as follows as regards the jurisdiction of the Magistrates Court at paragraphs 65 and 71:-

65. In our view, conferring jurisdiction on magistrates courts to hear and determine does not diminish the specialization of

the specialized courts considering that appeals from the magistrates? courts over those matters lie with the specialized courts. As urged by Mr. Kanjama, under the doctrine of judicial precedent, the decisions of the specialized courts would bind the magistrates? courts and the specialized courts would therefore undoubtedly imprint the "specialized jurisprudence" on the magistrate's courts.

…..

…….

71. By parity of reasoning, although under Article 162 (2) of the Constitution Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrates courts to hear and determine disputes stipulated under Article 162 (2) of the Constitution, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases.

Please see authority number 6 in the Applicants' list of authorities dated 25th March, 2019.

16. In **Amos Tirop Matui & another -v- Festus K. Kiprono& 2 others [2018] eKLR,** this Honorable Court held as follows on the jurisdiction of the Magistrates Court over land and environment matters:-

I have considered the submissions of counsels and do find that the value of the suit property is approximately 6.5 Million Shillings and therefore, the Magistrate's Court has pecuniary jurisdiction to entertain the dispute herein under section 7 of the Magistrates' Court Act no 26 of 2015. However, the issue is whether the Magistrate's Court have the jurisdiction to cancel a title or to order for the rectification of the register. Article 162(2)(b) of the Constitution provides that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, section 13 of the Environment and Land Court Act expounds on the jurisdiction of this Court as follows:

"(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d)relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land."

The Environment and Land Court Act grants jurisdiction to the Environment and Land Court under section 13 (7) to do the following, thus: -

"….to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(f) restitution;

(g) declaration; or

(h) Costs."

Section 26 of the Environment and Land Court Act provides for the Sitting of the Court thus; -

(1) The Court shall ensure reasonable and equitable access to its services in all Counties.

(2) A sitting of the Court may be held at such places and at such times, as the Court may deem necessary for the expedient and proper discharge of its functions under this Act.

(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.

(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —

(a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and

(b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

(4) Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court."

Section 9 of the Magistrates' court Act deals with claims in employment, labor relations claims; land and environment cases and provides that a magistrate's court shall in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to; environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (ii) compulsory acquisition of land;(iii) land administration and management; (iv)public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (v) environment and land generally.

Section 80 of the Land Registration Act Cap 12A of the Laws of Kenya provides for rectification of the register by order of Court. The section provides that Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake and that the register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

Section 2 of the Act defines court to mean the Environment and Land Court established by the Environment and Land Court Act, 2011 and other courts having jurisdiction on matters relating to land and therefore the argument by counsel that the law is silent on the powers of the magistrate's court in rectification of the register are without basis as the law is very clear in sections 2 and 80 of the Land Registration Act Cap 12A laws of Kenya that the courts referred to include the other courts with jurisdiction to hear environment and land matters which are the magistrates courts.

In conclusion, I do find that the powers of the magistrate's court in respect of disputes relating to title to land are very wide and extensive. The Magistrates court have jurisdiction to cancel title and rectify a register in compliance with section 80 of the Land Registration Act so long as the value of the subject matter falls within the pecuniary jurisdiction of the court. Ultimately, this matter is transferred to the Chief Magistrates Court Eldoret for hearing and determination.

Please see authority number 13 in the Applicants' list of authorities dated 25th March, 2019.

The Applicants, therefore, urge this Honorable Court to strike out the suit with costs.

PART B – RESPONSE TO THE PLAINTIFF'S SUBMISSIONS

17. In reply to the Plaintiff's submissions, the Applicants reiterate paragraphs 1 to 16 above.

18. It is not in dispute that the suit property is valued at **Kshs. 15, 437, 000/-** as can be seen from the Plaintiff's own pleadings. The Plaintiff submits that due to the fact that he has sought for general damages and other constitutional declarations as per paragraph 12 of the Plaint, then he was entitled to file his claim before this court. This notion is wrong because of **two** reasons. The **first** reason is that parties are bound by their pleadings. Once he avers that the value is **Kshs. 15, 437, 000/-**, he cannot go back on that averment unless through an amendment of his pleadings. He has not done so. **Secondly**, courts do **not** allow parties to speculate on what it will decide because to do so will impede on the course of justice. The Plaintiff has already held that the Applicants have no known defence in law, he has proved his case on a balance of probabilities, judgment has been delivered in his favor and damages have been awarded. We urge this Honorable Court to dismiss this claim and uphold the said preliminary objection raised.

19. In the alternative, Section 8 (1) of the Magistrate's Court Act, 2015, provides as follows:-

8. (1) Subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

We submit that under that Section, the Chief Magistrates Court has power to determine the claim raised by the Plaintiff.

20. Paragraphs 2 and 3 of the Plaintiff's reply to the preliminary objection deals with the merits of his case which we respectfully submit can only be determined after the hearing of the case on merit i.e. ***issues of the requisite approvals obtained, a prima facie case with high chances of success, the merits of his case*** etc.

21. We submit that the authority cited by the Plaintiff is not relevant to the objection before this Honorable Court as the same related to barring an advocate from appearing in a matter for a party. In the Applicants' objection, the issue of the jurisdiction of this Honorable Court has been raised. We submit that since the Plaintiff has not responded to the objection raised, he has conceded that this Honorable Court has **no** jurisdiction to hear and determine the matter.

Part 4 – Conclusion

22. For the foregoing reasons, the Applicants urge this Honorable Court to uphold the Notice of Preliminary Objection and dismiss the suit and the application herein as prayed with costs.

DATED at **NAIROBI** this .....5th ...day of .....April,..... 2019

_____

KAMAU KURIA & COMPANY

ADVOCATES FOR THE 1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS

9. The Applicant/Plaintiff filed written submissions which state as follows:

Applicant's/Plaintiff's written submissions:

APPLICANT'S/PLAINTIFF'S WRITTEN SUBMISSIONS TO REPLY AND/OR OPPOSE THE 1ST, 2ND, 4TH, 5TH AND 6TH RESPONDENTS'/DEFENDANTS' NOTICE OF PRELIMINARY OBJECTION AND GROUNDS OF OPPOSITION FILED ON 25TH MARCH 2019.

May it please your Lordship, these are the humble Submissions for the Applicant/Plaintiff **to reply and/or oppose** to the 1st, 2nd, 4th, 5th and 6th Respondents'/Defendants' Notice of Preliminary Objection and grounds of opposition filed on 25th March 2019.

PLEADINGS.

Your Lordship, the 1st, 2nd, 4th, 5th and 6th Respondents/Defendants filed a Notice of Preliminary Objection and grounds of opposition to the Applicant's/Plaintiff's Suit filed on 27th February 2019 **on the main ground that this Honourable Court has no Jurisdiction to hear and determine the Applicant's/Plaintiff's Suit,** and consequence thereof, the1st, 2nd, 4th, 5th and 6th Respondents/Defendants pray for striking out and/or dismissal of the Plaintiff's Suit for want of Jurisdiction.

The applicant/Plaintiff through his advocate on record **has vehemently opposed** the 1st, 2nd, 4th, 5th and 6th Respondents'/Defendants' Notice of Preliminary Objection and grounds of opposition filed on 25th March 2019, by filing the replies dated 28th March 2019 and which were duly served upon the Advocates for the 1st, 2nd, 4th, 5th and 6th Respondents/Defendants on 2nd April 2019 and an affidavit of service filed on 3rd April 2019.

FACTS AND EVIDENCE.

Your Lordship, when this matter came up for your directions on 8th April 2019, you directed that the Preliminary Objections and replies thereto, be disposed by way of written Submissions.

The 1st, 2nd, 4th, 5th and 6th Respondents/Defendants have filed their Submissions. Your Lordship with your kind permission, may you please allow the Applicant/Plaintiff **briefly poke holes** on the said Submissions, as hereunder:-

i. That the Applicant's/Plaintiff's claim **in this Suit** is well documented on the Plaintiff's Plaint filed on 27th February 2019 and we humbly submit that the anticipated award to be awarded in the Instant Suit **would be in excess of Kshs. 20 Million** and therefore, we submit that this is the proper court to hear and determine the Applicant's/Plaintiff's Claim.

ii. Your Lordship, the issues of whether the Suit property had the requisite approvals from the relevant bodies cannot be canvassed at the interlocutory stage and we submit that the issues can only be canvassed during the main hearing of the Suit and the 1st, 2nd, 4th,

5th and 6th Respondents/Defendants **should not be allowed to use short cuts,** in administration of Justice. As a consequence, by raising a question of fact whereas it's well established that Preliminary Objections **are matters purely hinged on questions of Law** then it goes without saying that this Preliminary Objection must fall on its own sword.

For this, we rely on the case of MUKISA BISCUITS CO. LTD versus WEST END DISTRIBUTORS LTD (1969) EA, and pray that the Preliminary Objection be dismissed with costs against Respondents/Defendants.

THE LAW

Your Lordship, the Jurisdiction of this Honourable Court to hear and determine the Applicant's/Plaintiff's Suit is well founded *under Section 4 of the Environment and Land Court Act **as read with** Section 13 of the said Act and Article 162 (2) (b) of the Constitution of Kenya, 2010.*

The 1st, 2nd, 4th, 5th and 6th Respondents/Defendants **have rightly** admitted the Jurisdiction of this Court in their Submissions on paragraph 9 of their Submissions and which in Principal they have submitted that this Honourable Court has original and Appellate Jurisdiction *under Article 162 (2) (b) of Constitution of Kenya, 2010*.

Your Lordship, we Submit that the Court having original Jurisdiction implies that any party can institute a suit in that Court of any claim and in the event, the Court establishes that the claim is below its Jurisdiction can transfer it to appropriate Court, *under Provisions of Section 18 (1) of the Civil Procedure Act* **and cannot Order** the Suit to be struck out and/or dismissed, for doing the same would be tantamount to offending the express Provisions of *Article 159 2 (a), (b), (d) and (e) of the Kenya Constitution 2010*, and which expressly bars administration of Justice on **technicalities**.

Your Lordship, we shall rely on the authorities cited in our reply filed on 1st April 2019 to oppose the 1st, 2nd, 4th, 5th and 6th Respondents'/Defendants' Preliminary Objections and grounds of opposition filed on 25th March 2019, together with the *Provisions of Section 4 and 13 of the Environment Land Act, Section 18 (1) of the Civil Procedure Act and Article 159 2 (a), (b), (d) and (e) of the Constitution Kenya 2010*.

CONCLUSION.

Your Lordship, we rest our Submissions by submitting further that the Preliminary Objection and grounds of opposition filed on 25th March 2019, do not deserve to see the light of the day, and consequence thereof, is for their dismissal for being a gross abuse of the court process. They are tantamount to inviting this Honourable Court to bar parties from accessing substantive Justice by condemning them unheard.

DATED at CHUKA this ……15th …. day of ……April,…… 2019

……..……..

M/S WAKLAW ADVOCATES,

ADVOCATES FOR THE APPLICANT/PLAINTIFF

10. The 3rd defendant filed written submissions in the following manner:-

3RD DEFENDANT'S SUBMISSIONS ON PRELIMINARY OBJECTION

Introduction

Your Lordship, on behalf of the 3rd defendant we wish to address you on two distinct issues as directed by the Honourable Court.

1. Firstly, we shall endevour to address you on the preliminary objection raised on the 25th March, 2019 which objects to the jurisdiction of this court to hear and determine the plaint as filed.

2. Secondly, it was a direction of this court that we also address you on the issue as whether the 3rd Defendant, the member of the County Assembly for Magumoni Ward is properly suited.

3. We shall proceed to address you chronologically on the two issues in the succeeding paragraphs.

Preliminary Objection

4. **Your Lordship,** we wish to associate ourselves with the submissions of counsel for the 1st, 2nd, 4th, 5th and 6th defendant/defendant to the extent that they submit jurisdiction is everything and a court cannot hear a matter if no constitution or statute has donated jurisdiction to it.

5. Litigants challenge a court's jurisdiction by filing applications in the nature of preliminary objections. Our jurisprudence is replete with case law relating to this issue and we shall base our reliance on the Courts decision in **Oraro v mbaja (2005) eKLR** where Justice Ojwang

J.B (as he then was) cited the Court of Appeal decision in ***Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd*** . [1969] E.A. 696. Of preliminary objections, ***Law, JA*** in that case said (p.700):

> ***"I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a 'preliminary objection' which it was not. So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ."***

And to the same effect Newbold, P stated (p.701):

> ***"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.***

6. It is our submissions that no facts are in dispute in this present case as relates to the raised objection. The matter is therefore, properly filed as a Notice of Preliminary Objection.

7. It is beyond argument that based solely on the pecuniary jurisdiction of Magistrate's Courts as captured in the Magistrate's Court's Act this present matter ought to have and should have been filed in the subordinate Courts. However, there are other limiting concerns.

8. For instance, while the Magistrate's Act donates jurisdiction to the Magistrate's Court to hear and determine matters founded on breach, violation, infringement or threatened breach, violation, infringement of rights and freedoms in the bill of rights and freedoms that jurisdiction under section 8 of the mentioned statute is limited to the hearing and determination of claims originated from article 25 (a) and (b) of the Constitution.

9. The plant is demonstrably founded on alleged violations of article 40, 64 and 199 (10) of the constitution. The plaint which is curiously supported by an amended supplementary verifying affidavit is not a matter that could have been competently filed and entertained by the Magistrate's Courts. As such, it cannot also be transferred into the said subordinate courts.

10. It is our submission that not all matters that raise constitutional issues need to be filed as constitutional petitions. Litigants can file plaints to challenge actions of state officers and state organs that in their estimation and understanding are unlawful and illegal. However, in characterization, what is before you is a constitutional petition clothed as an ordinary civil claim.

11. The upshot, this court has the requisite jurisdiction to hear and determine the suit before it. No man should suffer a wrong without a remedy. *Ubi Jus Ibi Remedium*.

Whether the 3rd defendant is properly sued?

12. **Your Lordship**, I shall proceed and address you on the propriety of suing the 3rd defendant as a person and in his capacity as a member of the County Assembly for Magumoni Ward.

13. No specific allegations have been leveled against the 3rd defendant in the plaint where he is sued in his capacity as the MCA Magumoni Ward. Or why else does his description include his titles? It is pleaded that he took instructions from the Governor and the County Government to violate the plaintiff's rights. He is not alone as a subject of the accusations. The others are officers of the County Government Tharaka Nithi.

14. Further, no particulars of such instructions as insinuated are particularized. It is a hollow comment with no factual basis; it reeks of malice and can only be best categorized as a product of the plaintiff's not so fertile imagination.

15. Paragraph 11 of the plaint in no uncertain terms brings out the question of need for compensation in cases of compulsory acquisition of land by a County Government. In our understanding, compensation and the issue of reclaiming public land improperly used by private citizens forms the substratum issues of the claim.

16. Paragraph 12 of the plaint claims that there were violations of specific constitutional provisions namely article 40, 64 and 199(1). While the first two relate to property and vested rights, article 199 (1) relations to publication of County legislation in the Kenya Gazette, a totally misplaced issue.

17. Be that as it may, it is the state that owes its citizens a duty to promote and preserve human rights and freedoms. Any claims for violation of this constitutional duty or responsibility can only be brought against the state or its organs. The orders that a court faced with such a claim will grant are captured under article 23 of the constitution. It is important to note that the 3rd defendant did not owe the plaintiff any constitutional duty as regards the preservation with his property rights.

18. Ultimately, the orders sought are of a compensatory nature. They are orders for damages and compensation for breach of some human rights. There is also an order for restoration being sought. With all fairness to the plaintiff, these orders cannot vest upon the 3rd defendant

either as an individual or as a member of the County Assembly.

19. **Your Lordship,** a court of record cannot issue orders in vain. You should decline such an invitation. A trial where orders cannot be granted against a party is one that offends the non-derogable right to fair hearing for an accused person and the overriding objectives of the Civil Procedure Code that include, expeditious and cost effective determination of suits.

20. This honourable Court should endevour to mark in bold the line of separation of powers. The executive arm of the County Government does not by any stretch of interpretation include the 3rd defendant either in person or in his capacity as a member of the legislative organ of government. Any attempts to do so would be unlawful.

21. We will urge the Court to expunge from the pleadings and record the name of the 3rd Defendant. We shall also seek costs for the inconvenience caused.

22. That is our humble submissions.

DATED at **NAIROBI** this……15th ……day of April,…..2019

YUNIS OSMAN & MWITI ADVOCATES

FOR THE 3rd DEFENDANT

11. I have considered the pleadings and the submissions proffered by the parties in their diametrically divergent assertions.

12. I have also considered the legal authorities proffered by the parties in support of their assertions. I do not need to regurgitate the principles enunciated by those authorities in view of the fact that they have been elaborated upon in their written submissions which have been reproduced in full in the earlier part of this ruling. All these authorities are good precedents in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances.

13. I agree with the principle, which principle has been strongly prostulated by the 1st, 2nd, 4th, 5th and 6th defendants, contained in the classic case of ***Owners of the Motor Vessel Lilian S [1989] KLR 1*** where Hon. Justice Nyarangi, JA, opined as follows:

> ***"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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

Should this court find that it lacks requisite jurisdiction to hear and determine this suit, it will down its tools immediately without further prompting.

14. I now turn to the grounds contained in the Notice of Preliminary Objection.

15. Ground 1 is to the effect that this court has no jurisdiction to entertain this suit as its value is Kshs.15,437,000/= by virtue of section 7 of the Magistrate's Courts Act. Section 7 of the said Act confers jurisdiction to the various cadres of the magistracy as follows: Chief Magistrate – Kshs. Twenty Million, Senior Principal Magistrate – Kshs. Fifteen Million, Principal Magistrate – Kshs. Ten Million, Senior Resident Magistrate – Kshs. Seven Million **AND** Resident Magistrate – Kshs. Five Million. Nowhere does the said section oust the jurisdiction of the ELC from hearing land cases which can be heard by magistrates seized with the apposite pecuniary jurisdiction.

16. Article 165(3) a of the Constitution reads as follows:

> "***Subject to clause (5) the High Court shall have***:
>
> ***(a) unlimited Original jurisdiction in criminal and civil matters;***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office other than a tribunal appointed under Article 144;***
>
> ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –***
>
> ***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***
>
> ***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***
>
> ***(iii) any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the***

constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation."

Article 162 of the Constitution grants the ELC equality of status with the High Court. By dint of this equality of status, the ELC Court has unlimited original jurisdiction in Civil disputes germane to land and the environment.

17. Section 13(1) of the Environment and Land Court Act reads as follows

"(1)The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land."

18. Beyond peradventure, I find that this court has jurisdiction to hear and determine this suit. Where necessary, the ELC Court can transfer a suit to a subordinate court or withdraw a suit from a subordinate court and hear and determine it as allowed by section 18 of the Civil Procedure Act.

19. For the aforesaid reasons, Ground 1 in the Preliminary Objection is hereby dismissed. For the same reason, Ground 2 is similarly dismissed.

20. Grounds 3, 4 and 5 are argumentative and do not constitute pure points of law. Accordingly, they are hereby dismissed.

21. Ground 6 is nebulous in that the affidavit in question raises issues which need canvassing in the main suit.

22. In the circumstances, this Notice of Preliminary Objection is hereby dismissed.

23. Costs concerning this Preliminary Objection are awarded to the plaintiff.

Delivered in open Court at Chuka this **13th day of November, 2019** in the presence of:

CA: Ndegwa

Kirimi Muturi for the Plaintiff

Munyori for 1st, 2nd, 4th, 5th and 6th defendants

P. M. NJOROGE,

JUDGE.

43. Before delivering its ruling on the Preliminary Objection, the court removed the 3rd defendant from this suit vide a ruling delivered on **31st July, 2019.** Reference to the defendants in this Judgment hereafter is reference to the 1st, 2nd, 4th, 5th and 6th defendants.

44. The court then escalated the suit to full hearing. The evidence proffered by the parties has already been produced in an earlier part of this judgment.

45. I will here deal with the issue concerning if or if not the present suit constitutes a boundary dispute. The defendants contend that this case is a boundary dispute and, therefore, this court should declare that it has no jurisdiction to handle it. Should this court determine that this suit is a boundary dispute, the authorities proffered by the defendants are good authorities for this court to find that the plaintiff has jumped the gun and should have taken the matter to the Land Registrar.

46. On **21st November, 2019**, DW1, the surveyor who gave evidence for all defendants, during cross-examination by the plaintiff's advocate admitted that the rural road in question was 3 metres wide in the Registry Index Map. He also testified that road was extended to 9 metres, 3 times its size. Extending the road 3 metres its official width cannot be a boundary dispute. This veritably makes this case one for trespass. I, therefore, find that this is not a matter that should have gone to the Land Registrar.

47. Section 18(2) of the Land Registration Act states:

18(2): "The court shall not entertain any action or other proceeding relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section." It may be that the road of access has no boundaries of a registered land. This point is, however, moot as it has already been found that this suit concerns trespass to land and is not a boundary dispute.

48. DW1 in his evidence told the court that rural roads were the exclusive responsibility of the County Government. I do not agree. Article 185 of the Constitution allows a County Government through legislation passed by the County Assembly to receive and approve plans and policies for development and management of its infrastructure and institutions. Rural Roads may be part of this infrastructure. Section 5 of the County Government Act at subsection 2 states that a County Government shall be responsible for County Legislation in accordance with Article 185 of the Constitution. What this means is that where its legislation allows it, a County Government can handle matters germane to rural roads. There is a Capital "HOWEVER". County Legislation always remains subservient to National Legislation.

49. Two national pieces of legislation deal with matters concerning roads. These are the Roads Act and the Public Roads of Access Act. The Roads Act defines a road as "a public road as defined under the Public Roads and Roads of Access Act. The Public Roads and Roads of Access Act states that ***"public road"*** means:

a) any road which the public had a right to use immediately before the commencement of this Act.

b) all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East Africa Land Regulations 1897, the Crown Lands Act, 1902, or the Government Land Act (Cap 280) at any time before the commencement of this Act.

c) All roads and thoroughfares hereafter reserved to public use.

50. The apposite land falls under (c) above.

51. Section 9 of the Public Roads and Roads of Access Act requires owners or occupiers of land to make applications to apply to the applicable rural or other roads authority for permission to construct such a road. Section 9 states as follows:

9. Application to construct road of access

(1) Where any owner or occupier of land is in respect of his land so situated in relation to a public road which is passable to vehicular traffic, or to a railway station or halt, that he has not reasonable access to the same, he may make application

to the board of the district in which such land is situate for leave to construct a road or roads (hereinafter called a road of access) over any lands lying between his land and such public road or railway station or halt, and every such application shall be made in duplicate in the form and contain the particulars required by the

First Schedule to this Act:

Provided that, if the applicant is unable to make the sketch plan mentioned in the said Schedule without entering upon the lands over which he proposes that the road of access is to pass, he may apply to the board for leave to enter upon the said lands for the purpose of making the said sketch plan and the board may then make an order entitling the applicant to enter on the said lands.

(2) Any owner or occupier of lands who has constructed a road in circumstances which did not require the making of an application under subsection (1) of this section may make application to the board of the district in which the road is situated for a declaration that the road is a road of access, and for the registration of the road of access as though an order had been made under section 11 of this Act.

(3) Every such application shall be accompanied by such fees as the Minister may prescribe, and the board shall not be obliged to proceed upon any such application except upon payment of such fees."

52. The Plaintiff has submitted that the defendants trespassed upon his property, demolished his building and constructed a tarmack road upon it without his consent and without compensating him. He says that the alleged enforcement notice relied upon by the defendants was not an enforcement notice as envisaged by the Physical Planning Act. He says that he had been enjoined in Chuka CMCC Succession Cause No. 215 of 2018 and was allowed to prosecute this suit. He avers that he has suffered damages and wants the court to award him damages and costs of the suit.

53. There is no question that the County Government of Tharaka Nithi is owner of Land Parcel **No. Magumoni/Thuita/562** which contains Kibugua Market. The County Government is a legal person as contemplated by the Public Roads and Roads of Access Act. It should, therefore, have made an application as contemplated by section 9 of the Public Roads and Roads of Access Act. DW1 is unequivocal that the County Government did not only not lodge the necessary application, it also did not consult the concerned authority. I opine that existing statutory laws exist to be obeyed, observed and implemented. The commencement date for the Public Roads and Roads of Access Act may have been **10th August, 1920 BUT** unlike volcanoes which may be dormant or extinct, statutory laws are at all times living creatures of the law.

54. I find that the primary responsibility for the road that the defendants unlawfully and irregularly expanded vests in the boards established by the Public Roads and Roads of Access Act. This Act establishes an elaborate process to be followed when roads are being constructed. It allows for a hearing where due process is observed. Section 11 of the Public Roads and Roads of Access Act contemplates payment of compensation for growing crops or permanent improvements damaged or destroyed by the intended construction. For avoidance of doubt, it is hereby found that the primary responsibility for Rural Roads vest in the Kenya Rural Roads Authority established by **Section 6** of the Kenya Roads Act. The role of County Governments is primarily a subsidiary one as properly delegated and/or authorized under the Public Roads and Roads of Access Act.

55. I find that the defendants did not observe the due process envisaged by the existing statutory law. Their extension of the apposite road from **3 metres** to **9 metres** was unlawful and was done in fragrant disobedience of existing statutory law.

56. I turn to the issue of if or if not the County Government when it demolished the plaintiff's building was enforcing an enforcement notice or not.

Section 38 of the Physical Planning Act is unequivocal that it deals with a situation where a development is being carried out after the commencement of the Physical Planning Act without the required development permission. The Physical Planning Act commenced on **29th October, 1998**. The plaintiff's building had been put up around **1989**. This evidence has not been challenged by the defendants. The building they demolished had stood on the defendants' land for over **20 years** by the time they demolished it.

57. DW1 told the court that the County Government had been authorized by Kibugua Market Committee to demolish buildings which came in the way of the tarmack road. He could not explain the legal standing of the said Committee. I opine that bureaucrats cannot hide behind nebulous illegal institutions to trample upon the rights of individuals. If this attitude is embraced, there will only be the rule by men and not rule by the law. Even a thousand people, nay, even twenty thousand or even a million, in a baraza cannot authorize a county government or even the central government to move into and occupy a citizen's property without following the applicable due process. Courts of law must arrest such egregious impunity.

58. Public bureaurats should not be allowed to hide behind majoritarian needs and amorphous majoritarian institutions such as the aforementioned Kibugua Market Committee to, in an untrammeled manner, trample upon the rights of citizens. The law and due process must be observed at all times. It is veritably supererogatory and insouciant for the defendants to purport that they were simply fulfilling a public need and had the authority of the members of the public living around Kibugua Market.

59. The exhibits produced by the defendants to support their claim that when they demolished the plaintiff's building, they were enforcing an enforcement notice are:

a) A public notice issued by the 2nd Respondent to all registered proprietors of plots, market stalls and parcels of land within Kibugua Urban Centre on **5th November, 2014.**

b) An alleged enforcement notice issued by the 2nd defendant upon the registered proprietors on **16th January, 2021**.

60. Regarding the public notice issued to proprietors of plots, market stalls and parcels of land within Kibugua Urban Centre on **5th November, 2014**, I note that from the defendants' exhibit No. 2, the development plan of Kibugua Market, Kibugua does not qualify to be called an Urban Centre. It is a market centre. I find that the plaintiff's building which the defendants destroyed was on Land Parcel **No. Magumoni/Thuita/779**. The defendants land which contains Kibugua Market is Land Parcel No. **Magumoni/Thuita/562**. The public notice issued by the defendants, did not, by any stretch of imagination apply to the plaintiff whose building was outside Kibugua Market Centre.

61. The alleged enforcement notice dated **16th January, 2019** is not an enforcement notice as contemplated by section 38 of the Physical Planning Act. It was addressed to all Residents of Kibugua Market. First of all, the plaintiff was not a resident of Kibugua Market as he lived on his land, although it was next to Kibugua Market. Secondly, it does not specify the development alleged to have been carried out without development authority and the conditions which had been infringed. Thirdly it had not specified measures required to be taken within a stipulated time so that the development would be deemed to have secured compliance with the enforcement notice. All in all, I find that the alleged notice was addressed to all Residents of Kibugua Market. It does not qualify to be called an enforcement notice.

62. It is noted that Section **38** of the Physical Planning Act is pellucid that it is applicable to developments being carried out after the commencement of the Act. The plaintiff's building was constructed around **1989** whereas the Physical Planning Act became operational on **29th October, 1998**. The purported Enforcement Notice having been issued many years after the plaintiff's building was constructed is not a proper notice under the Physical Planning Act.

63. In the circumstances, I find that the demolition of the plaintiff's building was not done in the implementation of a proper Enforcement Notice.

64. The defendants in their submissions state that the plaintiff did not produce any documents in evidence. A perusal of the proceedings shows that the plaintiff through PW1 on **9th November, 2020** produced exhibit numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11. Although it would have been desirable for exhibit No.11 (Valuers Valuation Report) to have been tendered by the valuer who made it, the defendants did not oppose its production. Therefore, all exhibits produced by PW1 were admitted in evidence.

65. The defendants have raised the issue that only one of the co-administrators had filed this suit. The plaintiff has shown that a court of law, to wit in **CMCC No. 2 of 2019** at Chuka not only allowed him to be added co-administrator of his father's estate but also unequivocally allowed him to file this suit. This was done with the full knowledge of the co-administrator. I find that constructively the plaintiff was acting with the full authority of the co-administrator.

66. Regarding the assertion that the Building Plan for the demolished building had not been properly approved, the plaintiff testified that during the days of County Councils, building plans were being approved by District Public Health Officers. This evidence was not controverted. In any case, on **17th June, 2019,** Mr. Munyori, the defendants' advocate told the court that he was not challenging the issue of approval of the construction on the plaintiff's land by the defunct County Council. Parties must be bound by their pleadings and averments.

67. I find that the plaintiff did not prove the items of special damages specified in his plaint. I will disallow them. I also find that the plaintiff

did not prove the sum of money he was receiving as rent before his building was demolished. It is, however, not controverted that he was receiving some rent.

68. The defendants claimed that only part of the building was demolished. The plaintiff admitted that some back rooms were left standing. I, however, find that the demolition undertaken by the defendants, even though some parts were left standing, rendered the whole building unusable.

69. The defendants have submitted that since the tarmack road that was the sine qua non to the demolition of the plaintiffs building had been completed, it was not possible to restore the suit property to its original status before demolition of the building standing on the property. I admit that this makes restoration to original status difficult. I, however, note that part of the tarmack stands on the plaintiff's land which he has, therefore, been denied use of. I will take this into account when awarding general damages for use and goodwill of the plaintiff's land denied by the illegal extension of the tarmack road from 3 metres to 9 metres. I deem a sum of **Kshs.3,000,000/=** adequate in respect of this claim.

70. In the circumstances, I enter judgment for the plaintiff against the 1st, 2nd, 4th, 5th and 6th defendants in the following terms:-

a) The sum of **Kshs.15,473,000/=** being compensation for the building demolished by the defendants on **L.R. Magumoni/Thuita/779**.

b) Kshs. **Three Million** Shillings (**Kshs.3,000,000/=)** as general damages for trespass by the defendants on **L.R. Magumoni/Thuita/779**.

c) Kshs.**4,000,000/=** for loss of use and future earnings.

d) Kshs. **Three** Million (**Kshs.3,000,000/=)** being general damages for future use and goodwill of the plaintiff's land illegally and irregularly trespassed upon and expropriated by the defendants through the expanded Tarmack road.

e) The 1st, 2nd, 4th, 5th and 6th defendants are issued with permanent orders of injunction from ever trespassing on LR. Magumoni/Thuita/779.

f) Costs shall follow the event and are awarded to the Plaintiff against the 1st, 2nd, 4th, 5th and 6th defendants.

71. It is so ordered.

DELIVERED IN OPEN COURT AT CHUKA THIS 15TH DAY OF JUNE, 2021 IN THE PRESENCE OF:

CA: Ndegwa

Kirimi Muturi present for Plaintiff

No appearance for the 1st, 2nd, 4th, 5th and 6th defendants

P. M. NJOROGE,

JUDGE.