



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**MILIMANI LAW COURT**

**ELC PETITION NO. 3 OF 2020**

**BURUBURU FARMERS COMPANY LIMITED.....PETITIONER**

**- VERSUS -**

**VINCENT PAUL OMONDI OBONYO**

**DAUDI WAITITU NJOROGE**

**BENSON NG'ANG'A WAWERU**

**DANIEL ODOUR WERE**

**MAURICE OTIENO OBIERO**

**KEVIN SILA OBADO**

**CHARLES NYANDIEKA**

**JAMES MUGENDI NJIRU**

**PATRICK MATHENGE GITHINJI**

**PAUL MBUGUA**

**ADEN ALI**

**JOSEPH MAINA WANGARI**

**T/A BURUBURU YOUTH SELF HELP GROUP ASSOCAITION...1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINIDTRY OF INTERIOR AND COORDINATION OF  
NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

## **INTRODUCTION AND BACKGROUND**

1. The Petitioners herein filed and/ or lodged the subject petition on the **20<sup>th</sup> January 2020**, whereby same has sought for the following Reliefs:
    - i. Declaration that the fundamental rights of the petitioner under article 29 [c] ,Article 39[1] and Article 40 of the constitution, have been violated and infringed upon by the 1<sup>st</sup> Respondent.
    - ii. An order mandatory injunction to compel the 1<sup>st</sup> respondent to immediately vacate or in the alternative, be forcefully evicted by the second third and fourth respondents through the county commissioner/ regional coordinator, Nairobi county, OCPD Kayole, OCS Kayole, DCIO Kayole, from the petitioner's property known as L.R No. Nairobi/Lock102/573 and also demolish and/or remove any structure, whether permanent or temporary built thereon by the first respondents.
    - iii. An order of Mandamus do issue to compel the second, third and fourth respondents and specifically the county commissioner/regional coordinator, Nairobi county, OCPD Kayole, OCS Kayole, DCIO Kayole, to ensure the fundamental rights of the Petitioner under Articles 29 [c],Article 39(1) and Article 40 of the constitution, are not violated and infringed upon by the first respondents.
    - iv. Cost of the petition be born by the first Respondents.
  2. The subject Petition is supported by a Verifying Affidavit sworn by one, **Washington Gathanu Thuthi**, on the 20<sup>th</sup> of January 2020, in which the Deponent has alluded to various issues, in particular that the Petitioner herein is the lawful and registered proprietor of the property otherwise known as **L.R No. Nairobi/Block102/573**, situate within Embakasi subcounty in the city of Nairobi.
  3. On the other hand, the deponent of the affidavit, has also attached various annexures to the supporting affidavit, including a copy of the certificate of lease, registered in the name of the petitioner and which was issued on the **18<sup>th</sup> of March, 2010**. However, the petitioner has not exhibited a copy of the certificate of official search, in respect of the sued property.
  4. It would appear that the subject petition was served upon the Respondents herein, but despite service, only the 2<sup>ND</sup> to 5<sup>TH</sup> Respondents herein, entered appearance and thereafter filed submissions, which I shall revert to presently. However, the 1<sup>ST</sup> Respondent did not enter appearance nor file any Documents at all.
  5. On the **25<sup>th</sup> of November, 2020**, the Petition hearing came up for mention before the Honourable Judge and on which the counsel for the second to fifth respondents appeared and sought for time within which to file their response to the petition. Consequently, the honourable court proceeded to and granted leave in favor of the second to fifth respondents to file their responses within 14 days.
  6. Other than the leave granted to and in favor of the 2<sup>nd</sup> to 5<sup>th</sup> Respondents, to file their response to the petition, the parties were also directed to canvass the petition by way of written submissions and in this regard, the parties were to file and exchange written submissions within 30 days.
- ## **DEPOSITIONS BY THE PARTIES**
- ### **THE PETITIONER'S CASE**
7. According to the petitioner, same is the registered proprietor and/or owner of all that property known as **L.R No. Nairobi/Block102/573**, which is said to have been registered in the name of the Petitioner on the **18<sup>th</sup> of March, 2010**.
  8. The Petitioner further avers that despite being the owner of the sued property, the first respondent herein, has since entered upon and trespassed onto the sued property and taken possession thereof, to the exclusion of the petitioner, who is the lawful and legitimate owner thereof.
  9. Besides the petitioner further avers that the 1<sup>st</sup> Respondent, has since commenced various activities on the suit property, including excavation of the top soil and thus the sued property is on the verge of being wasted, alienated and/or otherwise destroyed.
  10. It is the Petitioner's further contention, that following the trespass by the 1<sup>st</sup> Respondent onto the suit Property, same complained to the 2<sup>nd</sup> to 4<sup>th</sup> Respondent about the offensive activity, but no action has been taken by the 2<sup>nd</sup> to 4<sup>th</sup> Respondent. In this regard the Petitioner thus, contends that the 2<sup>nd</sup> to 4<sup>th</sup> Respondents have therefore condoned the offensive activities by the 1<sup>st</sup> Respondent.
  11. Owing to the activities by the 1<sup>st</sup> Respondent, which have led to the wastage of the suit property, coupled with the failure and/or refusal of the 2<sup>nd</sup> to the 4<sup>th</sup> Respondents, to avert the actions complained of, the Petitioner was thus obliged to and indeed filed/ lodged the subject Petition.
  12. In the premises, the Petitioner now seeks the Reliefs, whose particulars have been alluded to or supplied elsewhere herein before.

## **THE 1<sup>ST</sup> RESPONDENT'S CASE**

13. The 1<sup>st</sup> Respondents hearing, though dully served with the petition, neither entered appearance nor filed any pleadings. In this regard, the first respondent has not opposed the petition.

## **THE 2<sup>ND</sup> to 5<sup>TH</sup> RESPONDENTS CASE**

14. On the **25<sup>th</sup> November 2020**, the advocate for the 2<sup>nd</sup> to 5<sup>th</sup> Respondents sought for and obtained leave of the court to file Responses to the petition. Consequently, the court proceeded to and indeed granted liberty to the 2<sup>nd</sup> to 5<sup>th</sup> Respondents, to file their Response, if any, to the Petition within 14 days.

15. Nevertheless, despite leave being granted to the 2<sup>nd</sup> to 5<sup>th</sup> Respondents to file responses to the petition, none was ever filed nor placed in the court record. In this regard, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents have also not opposed the Petition, by way of any affidavit save for Written Submissions.

## **SUBMISSIONS BY THE PARTIES**

16. Following the directions by the court that the petition herein be disposed of by way of written submissions, the Petitioner proceeded to and filed her written submissions on the **22<sup>nd</sup> December, 2020**, whereby same has highlighted the Reasons for issuance of the orders sought.

17. On the other hand, even though the 2<sup>nd</sup> to 5<sup>th</sup> Respondent, did not file any response to the petition, same have however filed written submissions, which are on Record.

18. According to the 2<sup>nd</sup> to 5<sup>th</sup> Respondents, the petition by the petitioner hearing is lacking the requisite particulars and is otherwise replete with general allegations. In this regard the 2<sup>nd</sup> to 5<sup>th</sup> Respondents avers that the Petition therefore does not Disclose a reasonable cause of action.

19. On account of lack of particulars, the 2<sup>ND</sup> to 5<sup>th</sup> Respondents contend that the subject Petition does not therefore meet the competency threshold .In this regard, the 2<sup>nd</sup> to 5<sup>th</sup> Respondents have sought for the Petition to be Dismissed for being an abuse of the Due process of the Court Process.

## **ISSUES FOR DETERMINATION**

20. Having examined the petition and the verifying affidavit attached thereto, as well as the submissions filed by the Petitioners, on one hand and the written submissions filed by the 2<sup>ND</sup> to 5<sup>th</sup> Respondents, the following issues do arise for determination, namely;

- i. Whether the petition has been pleaded with the requisite specificity and/or particularity or otherwise ,whether the Petition has met the Competency threshold?**
- ii. Whether the dispute hearing is in respect of trespass to land and if so, whether same should be ventilated by way of a constitutional constitution?**
- iii. Whether the petitioner has supplied and/or availed the requisite proof as pertains to the issues raised in the petition**
- iv. Whether the order sought against the 2<sup>nd</sup> to 5<sup>th</sup> Respondents can be granted?**

## **ANALYSIS AND DETERMINATION**

### **ISSUE NUMBER 1**

**Whether the petition has been pleaded with the requisite specificity and/or particularity or otherwise met the Competency threshold.**

21. The petitioner herein has filed the petition but same have not attributed any particulars of breach and / or violation to and /or against the Respondents. In particular, the petitioners have contended that the 1<sup>st</sup> Respondent have trespassed onto and/or upon the sued property belonging to and registered in the name of petitioner.

22. On the other hand, the petitioner has also made allegations against the 2<sup>nd</sup> to 5<sup>th</sup> respondents whereby the same contend that the same 2<sup>nd</sup> to 5<sup>th</sup> respondents, have failed to protect the petitioners right to property, as provided for under Article 40 of the constitution.

23. It is common ground that the petitioner herein is seeking to protect her constitutional rights and freedoms, pursuant to and under the provisions of the Constitution, 2010 and essentially as enshrined in Bill Of Rights.

24. To this end and having mounted a constitutional petition, it behooves the petitioner to comply with the Rules of pleadings as required in

respect of petitions.

25. It is imperative to note, that whoever intends to file and maintain a Constitutional petition is obliged to supply and/or plead the provisions of the constitution, which are alleged to have been violated and infringed upon, the manner in which the provisions have been violated and by whom, same have been violated.

26. In respect of the subject petition, the petitioner has not indicated to the court which provisions of the constitution have been violated and neither has the petitioner availed the particulars, pertaining to the manner in which the article(if any) have been violated.

27. On the other hand, it suffices to note that allegations have also been against the 2<sup>nd</sup> to the 5<sup>th</sup> Respondents and it is contended that the said Respondents, have failed in their duty, to protect the rights of the petitioners. However, yet again no particulars of the failure has been pleaded and/or availed, whatsoever.

28. Be that as it may, it is common ground that Constitutional petitions ought to be pleaded with the requisite particularity and specificity, whereby the petitioner supplies and/or avails to court concise and precise particulars of how the rights have been violated and/or infringed upon. In this regard, the Rules of pleadings, as far as Constitutional petitions are concerned, do not admit of general allegations and/or ambiguous pleadings.

29. In support of the foregoing position, which I must say is now established and well grounded it is sufficient to re-echo the decision in the case of **Anarita Karimi Njeru versus Republic, (1979)eKLR**, where the court observed as follows;

“ The issues in a Constitutional Petition require to be pleaded with clarity and in a concise manner so as to enable the court to appreciate the complaints laid before the court.”

30. On the other hand, the requirement for pleading with specificity and reasonable clarity was also underscored by the Court of Appeal in the decision in the case of **Mumo Matemu versus trusted society of Human rights Alliance and 5 others(2013)eKLR**, where the Honourable Court observed as hereunder;

“It was the averment of learned counsel for the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents that the petition had cited with precision complaints regarding the violation of **Articles 10 and 73 of the Constitution**; that **Article 159 of the Constitution enjoined the courts to administer justice without undue regard to procedural technicalities.**

We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante is to miss the point*”.

*However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to **Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9)**. Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.*

31. In respect of the subject Petition, other than making reference to **Article 29(1) ,and 40 of the constitution 2010**, the petitioner herein has not ventured to supply any particulars and even to clarify how her constitutional rights have been violated and otherwise infringed upon by the respondents.

32. In my humble opinion, the petitioner herein, has only thrown unto the face of the court the subject petition and the general allegations contained herein and same now sits pretty that the court will comb through the generalities that color the petition and somehow come to her aid. Nevertheless, time is nigh for petitioners and their advocates, to take the ratio in the case of **Anarita Karimi Njeru (Supra), seriously.**

33. It is also important that litigants do appreciate the importance of pleadings and the necessary particulars because pleadings help to delineate the issues upon which the intervention of the court is sought. Until and unless the pleadings are well demarcated, a lot of precious judicial time, would be wasted in trying to appreciate and/or rather wise understand what the petitioner’s complaint entails or exactly means.

34. Suffice it to say, that given the state of the pleadings in this particular petition, I am unable to understand what the petitioner is complaining about. In any event, the ambivalence and/or dilemma, is further compounded by the fact that the 1<sup>st</sup> Respondent seems to be registered owner of L.R. No.Nairobi/Block102/138 and hence there is a possibility that the activities complained of, could very well be undertaken in respect of the latter property and not on the petitioner’s property.

35. In a nutshell, the petition herein, whose drafting does not measure up to the requisite threshold (containing the relevant specificity and particularity) is fatally deficient and irredeemably incompetent. Consequently, on this ground alone, I would be constraint to dismiss the petition.

## ISSUE NUMBER 2

### Whether the dispute herein is in respect of trespass to land and if so, whether same should be ventilated by way of a constitutional constitution.

36. I must say that the constitution 2010, is a transformative constitution, and same has expanded the latitude for various claimants and/or citizens, to approach the honourable court and seek redress for various grievances and/or infringements to their constitutional freedoms and fundamental rights.

37. To understand the extent to which the citizenry can now approach the honourable and seek relief and/or intervention, it is important to take note of the provisions of **article 22 of the Constitution, 2010**, which provide us here under;

“[1] Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

- (a) the rights of standing provided for in clause (2) are fully facilitated;
- (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
- (c) no fee may be charged for commencing the proceedings;
- (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
- (e) an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.”

38. The other provision of the constitution that is also relevant and which has similarly expanded, the latitude of approaching the honourable court in matters pertaining enforcement of the Bill of Rights and the fundamental freedoms is **Article 258 of the Constitution**, which provides as here under:

“Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by--

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.”

39. One thing that comes out clearly from the foregoing provisions of the constitution, is that same are invoked in respect in respect of violations, breach, infringement and / or threatened violations of the constitutional rights and fundamental rights stipulated and/or otherwise enumerated in the bill of rights. For clarity same are not invocable towards the protection of private rights and/or disputes, for example where a person claims that someone has trespassed to his/her land.

40. In respect of cases, which touch on or concern private disputes including trespass of land and/or breach of contract, etc. the grievant is obliged to approach the court in the ordinary cause of events, either by complaints or such other prescribed means, for the determination of the dispute, in accordance with the laws of the land, as contained and/or otherwise enumerated in various statutes.

41. I must say that the subject matter, though clothed as a constitutional petition, seems to concern a dispute between two land owners, namely: the owners of LR No. Nairobi/Block 102/573 and L.R. No. Nairobi Block 102/138, who are disputing over trespass, possession and

occupation as pertains to their respective parcels of land.

42. I must also say that even though the petitioners herein have contended that the 1<sup>st</sup> respondent, has trespassed onto the sued property, the petitioner has however not acknowledged that the 1<sup>st</sup> respondent seems to be the owner of LR No. Nairobi Block 102/138 and therefore there appears to be an issue concerning the ground location and/or possession of the two properties.

43. Be that as it may, I must point out that it is the same petitioner herein, who has availed and/or exhibited a copy of the certificate of official search relating to LR No. Nairobi/Block 102/138 and though the purpose for exhibiting same is not clear, the impression created is that the owners of the two parcels of land, are tussling with each other, including on the issue of Boundary, hence the allegations of removal of the Boundary Beacons.

44. I may have disgraced, but the point I am making is that matters that touch on or concern private disputes and/or rights, should be addressed in the ordinary way, for purposes of determination by the courts in the usual manner and not by constitutional petitions. In this regard the issue before hand does not warrant being propagated vide constitutional Petition at all and thus the filing of same as such, amounts to abuse of the Due Process of the court.

45. In support of the foregoing observation, I take guidance from the decision of the decision in the case of **of Kennedy Odoyo Okello versus the District Land Registrar, Migori and two others [2015]eKLR**, where the honourable court observes as here under:

With regard to grounds 9 and 10, there is no basis of alleging that the appellant's constitutional right to property was breached by any of the respondents. It is elementary law that where a property is lawfully charged to a financial institution to secure repayment of a loan, upon default, the charge has a statutory right to sell the charged property to realize the advanced sum. In such circumstances, it amounts to crying wolf for the appellant to allege that his constitutional right to property and those of his family members have been breached.

In our view, the petition did not raise any constitutional issues and whatever complaint the appellant had squarely lay in the domain of private law.

46. In my humble view, the holding by the court of Appeal, in the decision cited in the preceding paragraph, applies with equal force in the instant matter. Clearly, the petitioner has not illuminated any constitutional right to the property that has been violated and/or infringed upon and if so, in what manner?

### **ISSUE NUMBER 3**

#### **Whether the petitioner has supplied and/or availed the requisite proof as pertains to the issues raised in the petition.**

47. The Petitioner herein has alleged that the 1<sup>st</sup> respondent or the members of the 1<sup>st</sup> respondents have since entered upon and/or trespassed onto LR No. Nairobi/Block 102/573 and while thereon same have removed the beacons placed on the sued property and thereafter commenced the process the process of excavating all the soil and murrum from the sued property.

48. While advancing the claim for trespass, the petitioner herein has exhibited a copy of the certificate of lease as well as a certificate of official search, the latter in respect of LR No. Nairobi/Block102/138. However, the reason why the Petitioner has exhibited the certificate of search, is not clearly understandable.

49. Nevertheless, One can easily assume that the certificate of search herein relates to a parcel of land, which is in the neighborhood of the suit property, and that the dispute which includes removal of the beacons, connotes that there is a problem pertaining to and/or concerning the boundaries between the two properties. The foregoing aside, the petitioner herein has contended that the 1<sup>st</sup> Respondent has trespassed onto and/or encroached the sued property. In this regard, one would have expected the petitioner to tender to the court and/or avail evidence, including a surveyor's report to show that the activities complained of are actually being carried out within the sued property and not otherwise.

50. On the other hand, one would also have expected the Petitioner to have lodged a complaint with the Nairobi city county, enforcement department, detailing the unlawful actions and/or activities which are being undertaken on the petitioner's land. I'm afraid no such evidence has been availed to the court.

51. As concerns the photographs that have been tendered, it is not possible to discern where and when same were taken. Besides the source, that is, the person who took same has also not been identified and/ or been disclosed, whatsoever.

52. Other than the foregoing deficiencies, there is no evidence on the photographs to show that same were taken on the suit property. Simply put, the photographs are so plain to the extent that no probative value can attach on the same, for purposes of discharging the burden of proof placed on the Petitioner.

53. Notwithstanding the foregoing, I must also say that the photographs that have been exhibited, are of no legal value at all. For clarity, it is a requirement of the law that whoever seeks to rely on photographic evidence or such evidence processed in an electronic matter, ought to attach and/or avail an electronic certificate in compliance with the provisions of **Sections 106A and 106B of the evidence Act, Chapter 80, Laws of Kenya**.

54. To the extent that no such certificate is available, the photographs, which as I have pointed out are so plain, cannot advance the

petitioner's case anywhere. Suffice it to say, that the Burden of proof, to show that indeed there existed any trespass, laid on the shoulders of the petitioners.

55. Unfortunately, the petitioner has not discharged the burden as required by the provisions of **Sections 107 and 108 of the Evidence Act, Chapter 80 Laws of Kenya** and upon failing to discharge filing of the burden, the only recourse available is to dismiss the petitioner's petition.

#### **ISSUE NUMBER 4**

#### **Whether the order sought against the 2<sup>ND</sup> to 5<sup>TH</sup> respondents can be granted.**

56. The Substance of the petition filed by the petitioner herein, adverts to actions and/or activities, which have been perpetrated by the 1<sup>st</sup> Respondent, whose members are the ones that are said to have trespassed onto the suit property, removed the beacons and commenced excavations of marram there from.

57. As concerns the 2<sup>nd</sup> to 4<sup>th</sup> respondents, no allegations has been made against same, **save** for what is contained in paragraph 14 of the petition, which provides as follows :

**“The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have either failed and refused to ensure that the fundamental rights of the petitioner under the constitution are not infringed by the said Acts of the 1<sup>st</sup> Respondent”**

58. It is common ground that the allegations complained of herein, touches on and/or concerns trespass to the suit land by and/or at the instance of the 1<sup>st</sup> Respondent. Clearly the dispute relates to trespass and such a claim can only be addressed and/or adjudicated upon by the environment and land court and not the Respondents.

59. Similarly, if the dispute touches on and/or concerns the boundary between two or more parcels of land, including removal of boundary beacons, which is part of the complaint raised by the petitioner herein, such as a dispute must be referred to the Land Registrar pursuant to the **Section 18 and 19 of the Land Registration Act 2012**.

60. Yet again, the Respondents herein would not be involved in the determination of such a dispute, to warrant any complaint, being leveled against the said Respondents.

61. In my humble view, the 3<sup>rd</sup> to 5<sup>th</sup> Respondents herein, have been dragged into the subject matter for unexplained reasons. Suffice it to say, that the petitioner herein appears keen to use the court process for ulterior purposes and not in pursuit of justice.

62. Notwithstanding the foregoing, I must also point out that even if the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, had a role to play in respect of the subject dispute ( which I have found in the negative), same would only be involved upon a Report and/or Complaint being made to the said Respondents.

63. However, in respect of the subject matter, no such complaint was ever made and/or reported. In any event, the Petitioner has neither stated as much nor exhibited a copy of the occurrence book number ,speaking to any reportage.

64. In view of the foregoing, it is not possible to understand why the petitioner is seeking for an order of Mandamus against the 2<sup>nd</sup> , 3<sup>rd</sup> and 4<sup>th</sup> Respondents, yet there is no public duty placed upon the shoulders of the said Respondents and which same have failed and/or neglected to perform ,as concerns the subject matter, to warrant a compelling order in the nature of Mandamus.

65. It must be understood, that an order of Mandamus can only issue in exceptional situations and particularly, where a public body, organ and/or agency tasked with the execution/ performance of a public duty has failed to perform such duty. It does not issue just because a petitioner has sought for it, like in the instant situation.

66. In support of this holding, I can do no better than to revisit and reiterate the Decision of the Court of Appeal in the case of **Kenya National Examination Council versus Republic Ex-Parted Geoffrey Gathenji Njoroje and 9 others[1997]eKLR**.

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.

67. In respect of the subject matter, I must say that there is no public duty, which has been pleaded and/or proved, that falls within the mandate and/ or purview of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, which same have failed to undertake to warrant and/ or justify the orders sought.

68. I am afraid the orders of Mandamus cannot issue in *vacuum*. For clarity, there must be reasonable justification and / or proof ,before such kind of an order can be granted and in respect of the subject matter, no such justification has been provided.

#### **FINAL DISPOSITION**

69. I have adverted to various issues raised in a petition herein. Unfortunately, the petitioner has failed in each of the four hurdles that I have addressed and the law is only to be applied on the basis of proof and not sympathy or otherwise.

70. In the premises, the Petition herein, is lacking in Merits and the order that commends itself to me is one for Dismissal of same. Consequently, the Petition herein be and is hereby Dismissed with costs to the 2<sup>nd</sup> to 5<sup>th</sup> Respondents.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER,2021**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE,**

**ENVIROMENT AND LAND COURT,**

**MILIMANI.**

In the presence of;

JUNE NAFULA COURT ASSISTANT.

For the Petitioner.

For the 2<sup>ND</sup> to 5<sup>TH</sup> Respondents