



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CONSTITUTION PETITION CASE NO. 01 OF 2019**

**IN THE MATTER OF ARTICLES 19, 20, 21, 33, 23, 25, 27, 258, 259**

**AND 260 OF THE CONSTITUTION OF KENYA 2010 AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE RIGHT UNDER**

**ARTICLES 40, 60 AND 64 OF THE CONSTITUTION OF KENYA 2010 AND**

**IN THE MATTER OF THE ALLEGED INFRINGEMENT OF THE RIGHT TO FAIR**

**ADMINISTRATION ACTION ENSHRINED IN ARTICLES 10, 25, 47 AND 50 OF**

**THE CONSTITUTION OF KENYA 2010 AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 (PROTECTION**

**OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE**

**FREEDOMS) PRACTICE AND PROCEDURE RULES 13, 19 AND 23 OF 2013 AND**

**IN THE MATTER OF ARTICLES 23, 159, 162 (B) OF THE**

**CONSTITUTION OF KENYA 2010 AND**

**IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012 AND**

**IN THE MATTER OF PHYSICAL PLANNING ACT NO. 6 OF 1996 AND**

**IN THE MATTER OF COUNTY GOVERNMENT ACT 2012 AND**

**IN THE MATTER OF NATIONAL POLICE SERVICE ACT 2011 AND**

**IN THE MATTER OF TITLE KARINGA/NDAGANI3018, THARAKA NITHI COUNTY**

**BETWEEN**

**MUTEGI MUGWETWA.....PETITIONER**

**VERSUS**

**CHIEF OFFICER LANDS, PHYSICAL PLANNING, HOUSING, URBAN**

**DEVELOPMENT, ENVIRONMENT AND NATURAL RESOURCES.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR, COUNTY GOVERNMENT OF THARAKA NITHI.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF THARAKA NITHI.....3<sup>RD</sup> RESPONDENT**

NATIONAL POLICE SERVICE.....4<sup>TH</sup> RESPONDENT

ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

### JUDGMENT

1. This Petition which is dated 5<sup>th</sup> February, 2019 reads as follows:

TO:

**THE ENVIRONMENT AND LAND COURT OF KENYA**

**CHUKA LAW COURTS,**

**CHUKA**

**PETITION**

**THE HUMBLE PETITION OF MUTEGI MUGWETWA, OF P.O. BOX 82-60400 CHUKA, IN THE REPUBLIC OF KENYA, SHOWESTH AS FOLLOWS:**

#### **DESCRIPTION OF THE PARTIES**

1. The Petitioner is a male adult of sound mind, a business man and a citizen of the Republic of Kenya. His address for service for purposes of this suit shall be care of **Murimi Murango & Associates Advocates, Woodlands Business Park, 2<sup>nd</sup> Floor, Kiambere Road Upper Hill, P.O.BOX 73098-00200, Nairobi.**

2. The 1<sup>st</sup> Respondent is the Chief Officer Lands, Physical Planning, Housing, Urban Development, Environment and Natural Resources of Tharaka Nithi County. The 1<sup>st</sup> Respondent's address for service is care of Tharaka Nithi County P.O Box 10-60400, Tharaka Nithi.

3. The 2<sup>nd</sup> Respondent is The Governor of Tharaka Nithi County elected under Article 180 of the Constitution of Kenya, 2010. The 2<sup>nd</sup> Respondent's address for service is care of Tharaka Nithi County P.O Box 10-60400, Tharaka Nithi.

4. The 3<sup>rd</sup> Respondent is the devolved government of Tharaka Nithi County established pursuant to the provisions of Article 176 of the Constitution and the First and Forth Schedules of the Constitution. Its address for service for purpose of this Petition is care of Tharaka Nithi County P.O Box 10-60400, Tharaka Nithi.

5. The 4<sup>th</sup> Respondent is the National Police Service established under Article 243 of the Constitution of Kenya. Their address for service for purpose of this Petition is care of P.O Box 44249-00100, Nairobi.

6. The 5<sup>th</sup> Respondent is the Chief Legal Advisor of the Government. His address for service for purposes of this Petition is care of Attorney General's Chambers, Sheria House, Nairobi.

#### **FACTUAL BACKGROUND:**

7. The Petitioner is the registered owner and occupant of all that parcel of land known as Title Number Karingani/Ndagani/3880 issued on 3<sup>rd</sup> May 1996 by the Land Registrar (hereinafter called "the suit property").

8. The Petitioner states that on or about 23<sup>rd</sup> January 2019, the Respondents, their servants and/or their agents marked the his perimeter wall with a large vertical line and an arrow drawn horizontally.

9. The Petitioner states that he was never called upon to be explained to the meaning and/or significance of the mark drawn by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents on his perimeter wall.

10. The Petitioner states that on 2<sup>nd</sup> February 2019 at around 7.00 am while on his way to work, he found a Notice dated 16<sup>th</sup> January 2019 fixed on the outer side of the perimeter wall notifying the owners of the buildings allegedly on the road reserve to remove any structures and buildings within 14 days from the date of its issue.

11. The Petitioner states that on the said 2<sup>nd</sup> February 2019, at around 9.00am he received phone calls from his neighbors who informed him that his perimeter wall was being demolished by the Respondents under the supervision of Administration Police Officers from Chuka Police Station.

12. The perimeter wall in question was constructed as a general boundary in 1996 upon issuance of the title deed and it has remained

there since then.

13. The perimeter wall was constructed as a form of security to the Petitioner's residential home.

14. The demolition was irregular, malicious, politically motivated and selectively targeted by the 1<sup>st</sup> to 3<sup>rd</sup> Respondent without any genuine intention of building a road now and/or in future.

15. The Petitioner has never received any information from the 1<sup>st</sup> to 3<sup>rd</sup> Respondents indicating that there is any intention of tarmacking the road headed to his home neither has there ever been any public participation from all the stakeholders and the residents of Check Point to Gakuuni area.

16. The Petitioner reads malice as he has sued the 3<sup>rd</sup> Respondent in another pending suit being Chuka ELC No. 215 of 217 Mutege Mugwetwa –vs- County Minister of Lands, Physical Planning, Energy & ICT, County Government of Tharaka Nithi & 6 Others where the Court granted an injunctive Order restraining the Respondents from demolishing the Petitioner's Commercial buildings erected on Plot Numbers 3 and 4 situated in Chuka Town, Tharaka Nithi County pending the hearing of the suit.

17. The Petitioner avers that the road in question is 6 meters and the Respondent are expanding it to 9 meters

18. The Petitioner avers that his perimeter wall was not within a road reserve, and hence it ought not to have been demolished. It is the 1<sup>st</sup> to 3<sup>rd</sup> Respondents who have encroached into his property by 2 meters width.

19. The Petitioner avers that he has incurred loss and damage to the tune of approximately Kshs. 12,000,000 due to the arbitral demolition of his perimeter wall.

#### **PARTICULARS OF BREACH AND CONTRAVENTION OF THE CONSTITUTION**

20. Infringement of the petitioner's right to property enshrined in Article 40 of the Constitution by the Respondents on the following;

(i) The illegal act of the Respondents demolishing the Petitioner's perimeter wall for the property known as Karingani/Ndagani/3880 situated at Tharaka Nithi County was contrary to the Petitioner's constitutional right to protection of his property as guaranteed under Article 40 of the Constitution as the demolition amounted to taking away the Petitioner's right to property as enshrined under the provisions of Section 26 of the Land Registration Act, No 3 of 2012 for failure to follow due process of Law.

(ii) The Petitioner has an indefeasible title to the suit property and the Respondents have no mandate to demolish the petitioner's perimeter wall without an order of the Court as their move amounted to breach of Article 40 and 64 of the Constitution and Section 26 of the Land Registration Act, 2012.

(iii) The Respondents acted ultra vires by exceeding their powers to demolish the Petitioner's perimeter wall which powers vests with the Environment and Land Court.

(iv) The Respondents have illegally and un-procedurally demolished the Petitioner's perimeter wall without compensating him as enshrined under Article 40(3) of the Constitution.

(v) As a result of the demolition of the Petitioner's perimeter wall, the 1<sup>st</sup> to 4<sup>th</sup> Respondents have continued trespassing, interfering and encroaching the Petitioner's property thus amount to infringement on the his right to property.

(vi) The demolition of the Petitioner's perimeter wall and the 1<sup>st</sup> to 4<sup>th</sup> Respondents trespassing upon the suit property has occasioned the Petitioner loss and damage to the tune of approximately Kshs. 12,000,000.00.

(vii) The action of trespassing and demolition by the Respondents after they had marked the Petitioner's perimeter with the ominous "Vertical and horizontal Arrow line" mark amounts to a breach of the Petitioner's proprietary rights over the suit property as the absolute and indefeasible owner thereof as enshrined in Article 40(1) and 65 of the constitution.

21. The Respondents jointly and severally violated the Petitioner's right to a fair administrative action guaranteed under Articles 10, 47 and 50 of the Constitution by:

(i) Arriving at a decision to demolish the Petitioner's perimeter wall without giving him a hearing in regard to the far reaching ramifications of the said decision.

(ii) The 1<sup>st</sup> to 3<sup>rd</sup> Respondents acted ultra vires by unlawfully instructing the 4<sup>th</sup> Respondent to supervise the demolition of the perimeter wall whereas there was no Court Order directing the 4<sup>th</sup> Respondent to supervise the said demolition.

(iii) The Petitioner was not afforded a hearing before the demolition of his perimeter wall whereas the intents and the purpose, the suit property falls within the constitutional definition of private property.

(iv) The Petitioner was not given ample notice addressed specifically to him in person and stating the reasons for demolition as enshrined in Article 47(2) of the Constitution.

(v) The unidentifiable vertical line and the horizontal arrow markings on the Petitioner's perimeter wall by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents were contrary to Articles

47 and 50 of the Constitution for lack of definite meaning of the markings to the general public.

(vi) The demolition Notice dated 16<sup>th</sup> January 2019 was conveniently and selectively back dated and served on 2<sup>nd</sup> February 2019 which day fell on a Saturday so as to unjustifiably fit the Respondents illegal and malicious actions of demolishing the Petitioner's perimeter wall.

(vii) The Respondents decision to demolish the Petitioner's perimeter wall without giving him a fair hearing was actuated by high handedness, misuse of power, politically motivated for the general public to feel that they can flex their muscles, are above the law and that they can intimidate, threaten, execute and exercise their imaginary excessive power without regard to Article 10 of the Constitution.

(viii) The 2<sup>nd</sup> Respondent's office acts like it's above the Law by giving verbal instructions left right and center to the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents to carry out illegal, unlawful demolition thus demonstrating its inability to exercise principles of good governance, integrity, transparency, social justice, inclusiveness, equality, non-discrimination, national unity, the rule of law, democracy, participation of the people and its failure to perform its duties with reasonableness.

(ix) The 1<sup>st</sup> to 3<sup>rd</sup> Respondents failed to exercise their powers within the confines of the Rules of Natural Justice and instead applied the law of the jungle in arriving at a decision to demolish the Petitioner's perimeter wall without affording him an opportunity to be heard.

(x) Failing to serve the Petitioner with documentary evidence that was relied on before arriving at a decision to demolish the Petitioner's perimeter wall.

(xi) Failing to afford the Petitioner an opportunity to appear before them to prove that the perimeter wall does not encroach on the road reserve.

(xii) Demolition of the Petitioner's perimeter wall without an order of court.

22. The Petitioner's absolute right to a fair trial, enshrined under Articles 50 and 25(c) of the constitution of Kenya, 2010, is being violated as the 1<sup>st</sup> to 3<sup>rd</sup> Respondents without the Petitioner's knowledge and reached a decision to demolish his perimeter wall an action that has denied him right to his own property.

23. The Respondents have generally and variously violated the law including ignorance of **Article 10 of the Constitution of Kenya, 2010.**

#### **PARTICULARS OF BREACH AND CONTRAVENTION OF STATUTES**

I. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents contravened the provisions of Sections 45 of the Physical Planning Act No. 6 of 1996 and Section 152 (2) of the Land Act No. 6 of 2012 by failing to serve the Petitioner with a Notice to demolish his perimeter wall.

II. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents contravened Section 52 of the Physical Planning Act No 6 of 1996 and 95 of the County Government Act by failing to publish the Notice in the local dailies for public participation to take place before arriving at a decision to demolish the Petitioner's perimeter wall.

III. The 4<sup>th</sup> Respondent failed to adhere to the National Police Service by striving for the highest standards of professionalism and discipline in that they acted without a Court Order to supervise the demolition.

IV. The 4<sup>th</sup> Respondent is tasked with the responsibility of providing security to all citizens of Kenya indiscriminately yet they failed to ensure that the Petitioner as an individual together with his property are protected within the confines of the Law.

#### **CONSTITUTIONAL ISSUES FOR DETERMINATION:**

24. The Petitioner proposes the following questions for Constitutional interpretation and determination by the Court:-

*i.* Whether the Petitioner is the lawfully registered owner of that parcel of land known as Karingani/Ndagani/3880 situated at Tharaka Nithi County.

*ii.* Whether the Petitioner was given ample notice in respect of demolition of his perimeter wall.

- iii. Whether the Petitioner was granted a fair hearing before demolition of his perimeter wall.
- iv. Whether his rights under the Constitution have been breached and therefore he is entitled to compensation.
- v. Whether the Petitioner is therefore entitled to immediate compensation and damages.
- vi. Who shall bear the costs of this Petition.

25. This Honourable Court has the jurisdiction to enforce the protection of fundamental rights and freedoms guaranteed under the Constitution of Kenya and to grant reliefs to remedy the breaches/contraventions thereof.

**Your Petitioner therefore prays THAT:**

- a. A permanent injunction do issue to the Respondents, their servants and/or agents restraining them from further trespassing upon, encroaching, demolishing and/or dealing in any way manner whatsoever interfering with the Petitioner's right to property known as Title Number Karingani/Ndagani/3880 situated at Tharaka Nithi County measuring Zero point Four Zero Five (0.405) Hectares.
- b. An order of prohibition do issue to prohibit the Respondents herein, their servants and/or agents from further trespassing, encroaching, demolishing and/or further dealing with the Petitioner's right to property known as Title Number Karingani/Ndagani/3880 situated at Tharaka Nithi County measuring Zero point Four Zero Five (0.405) Hectares for being in breach of Articles 40, 47, 50 and 60 of the Constitution of Kenya, 2010.
- c. A declaration that the Respondents decision to demolish the Petitioner's perimeter wall on property known as Karingani/Ndagani/3880 situated at Tharaka Nithi County is unconstitutional, null and void for being in breach of Articles 40, 47, 50 and 60 of the Constitution of Kenya, 2010.
- d. A declaration that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents notice dated 16<sup>th</sup> January 2019 was unconstitutional, null and void for failure to serve the Petitioner with a notice pursuant to Article 25(c), 47(2) and 50 of the Constitution of Kenya, 2010.
- e. A declaration that the 4<sup>th</sup> Respondent's actions of supervising the demolition without a Court Order directed to them to supervise the demolition was unconstitutional, null and void pursuant to Article 10 of the Constitution of Kenya, 2010.
- f. An order of judicial review under Article 23 (3) (f) in the form of prohibition barring the Respondents by themselves, their servants, agents and/or assignees from carrying on further destructions, demolitions and/or in any manner whatsoever interfering with the Petitioner's residential home erected on all that parcel of land known as Karingani/Ndagani/3880 situated at Tharaka Nithi County measuring Zero point Four Zero Five (0.405) Hectares.
- g. An order of judicial review under Article 23 (3) (f) in the form of mandamus compelling the Respondents by themselves, their servants, agents and/or assignees to reconstruct at their cost all the demolished perimeter wall and restore the condition of parcel of land known as Karingani/Ndagani/3880 situated at Tharaka Nithi County measuring Zero point Four Zero Five (0.405) Hectares to its original form.
- h. **ALTERNATIVELY** an order of mandamus compelling the Respondents by themselves, their servants, agents and/or assignees to promptly compensate your petitioner in the sum of Kshs.12,000,000/= together with interests at commercial rates with effect from 2<sup>nd</sup>/02/2019 until payments in full.
- i. A declaration that all officers who authorized enforced and/or supervised the demolition of the petitioner's property be declared to have breached the provisions of Chapter 6 of the Constitution and be permanently barred as long as they live from occupying a public office either in the county government or in the national government
- j. General Damages.
- k. Costs of this petition be award to the Petitioner.
- l. Any other or further relief as this honourable Court may deem fit and just to grant.

**DATED at Nairobi this 5<sup>th</sup> day of February, 2019.**

**MURIMI MURANGO ASSOCIATES**

**ADVOCATE FOR PETITIONER**

- 2. The Petition was canvassed by way of written submissions.
- 3. The petitioner's submissions are reproduced in full herebelow.

## **PETITIONER'S WRITTEN SUBMISSIONS ON THE PETITION**

**DATED 5<sup>TH</sup> FEBRUARY, 2019**

### **Introduction.**

1. On 5<sup>th</sup> February 2019, the Petitioner filed the Notice of motion under certificate of urgency of even date alongside a Petition supported by the affidavit of Mutegi Mugwetwa of said date.
2. On 26<sup>th</sup> March 2019, the 1<sup>st</sup> to 3<sup>rd</sup> Respondents filed a replying Affidavit sworn on 26<sup>th</sup> March, 2019 by Alfred Mwenda Riungu and a Preliminary objection in opposition the Petitioner's Notice of Motion dated 5<sup>th</sup> February, 2019.
3. The 4<sup>th</sup> to 5<sup>th</sup> filed only appearance through the office of the Attorney General.
4. On 22<sup>nd</sup> May 2019, the court ordered parties herein to put in their respective submissions.
5. On 20<sup>th</sup> June, 2019 the Petitioner filed a further affidavit sworn of even date

### **Facts**

6. The Petition is un-opposed by all the Respondents herein and thus supporting affidavit of Mutegi Mugwetwa and *Exhibit MM-1 to MM-8* thereto remains uncontroverted.
7. The Petitioner is the registered owner of all that Parcel of land Known as Title Number Karingani/Ndagani/3880.
8. The Respondents carried out demolition of the Petitioner's perimeter wall.

### **Petitioner's case**

9. The Petitioner case is relatively a straight forward. The Petitioner's contend that he is the registered owner and occupant of all that parcel of land known as Title Number Karingani/Ndagani/3880 issued on 3<sup>rd</sup> May 1996 by the Land Registrar (hereinafter called "the suit property").
10. That on or about 23<sup>rd</sup> January 2019, the Respondents, their servants and/or their agents marked his perimeter wall with a large vertical line and an arrow drawn horizontally.
11. That he was never called upon to be explained to the meaning and/or significance of the mark drawn by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents on his perimeter wall.
12. That on 2<sup>nd</sup> February 2019 at around 7.00 am while on his way to work, he found a Notice dated 16<sup>th</sup> January 2019 affixed on the outer side of the perimeter wall notifying the owners of the buildings allegedly on the road reserve to remove any structures and buildings within 14 days from the date of its issue.
13. That on the date 2<sup>nd</sup> February 2019, at around 9.00am he received phone calls from his neighbors who informed him that his perimeter wall was being demolished by the Respondents under the supervision of Administration Police Officers from Chuka Police Station.
14. That the perimeter wall in question was constructed as a general boundary in 1996 upon issuance of the title deed and it has remained there since then.
15. That the perimeter wall was constructed as a form of security to his residential home.
16. The demolition was irregular, malicious, politically motivated and selectively targeted by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents without any genuine intention of building a road now and/or in future.
17. That he has never received any information from the 1<sup>st</sup> to 3<sup>rd</sup> Respondents indicating that there is any intention of tarmacking the road headed to his home neither has there ever been any public participation from all the stakeholders and the residents of Check Point to Gakuuni area.
18. That he reads malice as he has sued the 3<sup>rd</sup> Respondent in another pending suit being Chuka ELC No. 215 of 217 Mutegi Mugwetwa –vs- County Minister of Lands, Physical Planning, Energy & ICT, County Government of Tharaka Nithi & 6 Others where the Court granted an injunctive Order restraining the Respondents from demolishing the Petitioner's Commercial buildings erected on Plot Numbers 3 and 4 situated in Chuka Town, Tharaka Nithi County pending the hearing of the suit.

19. That his perimeter wall was not within a road reserve, and hence it ought not to have been demolished.

20. That as a result act of the demolition, the respondents have infringed on his constitutional right as well incurred loss and damage to the tune of approximately Kshs. 12,000,000 due to the arbitral demolition of his perimeter wall.

21. That he prays for orders as so sought in the Petition.

### **1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' case**

22. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have not filed any response to the Petition, however we make assumption that they rely on the Affidavit sworn by Alfred Mwenda Riungu in opposition to the Notice of motion dated 5<sup>th</sup> February 2019.

23. That they carried out demolition of the Petitioner's perimeter within the provisions of Physical Planning Act No.6 of 1996 upon expiry of an Enforcement Notice which was served on the Petitioner's within the confines of Section 45 of the said Act.

### **The 4<sup>th</sup> and 5<sup>th</sup> Respondents**

24. The 4<sup>th</sup> and 5<sup>th</sup> Respondents have not opposed the Petition.

25. It is our submissions that the statement of the Petitioner is unchallenged and should be taken as truth that the 4<sup>th</sup> Respondent acted ultra-vires and gross abuse of its office by supervising the demolition of the Petitioner's perimeter in contravention of Article 10 of the Constitution.

26. We submit that in absence of a plea in opposition to the Petition, the Petitioner's evidence affirmatively point to the 4<sup>th</sup> Respondent involvement.

27. In the Case of **Rumba Kinuthia Versus Attorney General Nairobi HCCC 1408 of 2004** unreported it was held that:-

*“Despite the fact that the Applicant made very serious allegations the defendant, government agents, servants and police officers, no affidavit was filed in reply, so that all the facts deponed to by the Applicant in his affidavit are what will take as representing the correct factual position.”*

### **ISSUES FOR DETERMINATION**

28. The Petitioner adopt the questions for Constitutional interpretation and determination by the Court as framed in the petition:-

*i. Whether the Petitioner is the lawfully registered owner the suit parcel of land known as Karingani/Ndagani/3880 situated at Tharaka Nithi County?*

*ii. Whether the Petitioner was given ample notice in respect of demolition of his perimeter wall?*

*iii. Whether the Petitioner was granted a fair hearing before demolition of his perimeter wall?*

*iv. Whether his rights under the Constitution have been breached and therefore he is entitled to compensation?*

*v. Whether the Petitioner is therefore entitled to immediate compensation and damages?*

*vi. Who shall bear the costs of this Petition*

### **RESOLVING ISSUES**

**(i) Whether the Petitioner is the lawfully registered owner the suit parcel of land known as Karingani/Ndagani/3880 situated at Tharaka Nithi County?**

The answer is “Yes”

29. **Article 40 of the Constitution** guarantees every person the right to property. It protects a person from being **arbitrarily** deprived of his property by the state or a person. This right is not absolute and is qualified by sub-article (3) thereof which recognizes that a person may be deprived of his land by the state only where such deprivation:-

*(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or*

*(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-*

i. requires ***prompt payment in full, of just compensation to the person; and***

ii. Allows ***any person who has an interest in, or right over, that property a right of access to a court of law***

30. **Article 60 (1) (b)** of the Constitution enshrines the principle of security of land rights while **Article 64** recognizes private ownership of land.

31. The Petitioner avers that he is the registered owner and occupant of all that parcel of land known as Title Number Karingani/Ndagani/3880 measuring Zero point Four Zero Five (0.405) Hectares and was issued with a Title on 3<sup>rd</sup> May 1996 by the Land Registrar. **See Exhibit marked as MM-1**

32. That the Petitioner constructed perimeter wall around his parcel of land as a general boundary and security in 1996 upon being issued with a title deed and it has remained there until Saturday, 2<sup>nd</sup> February 2019 when it was demolished illegally and without justifiable cause by the 1<sup>st</sup> to 3<sup>rd</sup> Respondent, their servants and/or employees under supervision of contingent of Administration Police from Chuka police Station and a bull dozer and thus, they left the Petitioner in an open and inhabitable state. **See Exhibit marked as MM-3.**

33. The Respondents resolving to demolish the Perimeter without following due process was draconian act which was inhuman and a breach of enjoyment of the Petitioner's right to own properties. **Article 40 (3)** of the Constitution provides that "*The state shall not deprive a person of property of any description, or in any interest in, or right over property of any description.*"

34. It is our submissions that a Certificate of Title was issued to the Petitioner under the Registered Land Act (RLA), now Repealed Land Registration Act No 3 of 2012 pursuant to **Section 24 and 25 the Land Registration Act** created absolute ownership of land upon registration with all rights and privileges thereto, while **Section 26(1)** of the said Act creates indefeasibility of title. The Petitioner's certificate of Title can only be impugned on the basis of fraud or misrepresentation and or acquired unlawfully.

35. We submit that the Respondents acted in total disregard of law and in contravention of the Petitioner's freedom and security under Article 29, his right to privacy under Article 31 and his right to property under Article 40 of the Constitution by demolition of his perimeter wall without reasonable notice prior to the demolition and thus acted in violation of Article 47(1) which entitles every person to fair and reasonable administrative action.

In case of ***Wreck Motors Enterprises –vs- The Commissioner of Lands and Others Nairobi LLR 5066 (Civil Appeal No. 71 of 1997) Court of Appeal held, Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions . See Dr. Joseph N.K. Arap Ng'ok v Justice Moiwo ole Keiwua & 4 Others, Civil Application No. NAI.60 of 1997 (unreported). Court of Appeal held that Sections 23(1) of the Registration of Titles Act reads as follows:-***

***"Section 23 (1)***

*The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrance's, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proved to be a party."*

***(ii) Whether the Petitioner was given ample notice in respect of demolition of his perimeter wall?***

***The Answer is 'No'***

36. **Halsbury's Laws of England Judicial Review (Volume 61 (2010) 5<sup>th</sup> Edition) Para. 639**, states as follows with respect to the right to notice and opportunity to be heard:-

***"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice in itself to attract a duty to comply with this rule.... However, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. The circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations."***

37. The Petitioner avers that on 2<sup>nd</sup> February 2019 at around 7.00 am while on his way to work, he found a Notice dated 16<sup>th</sup> January 2019 affixed on the outer side of the perimeter wall notifying the owners of the buildings allegedly on the road reserve to remove any structures and buildings within 14 days from the date of its issue.

38. The Petitioner states that on the said 2<sup>nd</sup> February 2019, at around 9.00am he received phone calls from his neighbors who informed him that his perimeter wall was being demolished by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents under the supervision of Administration Police Officers from Chuka Police Station.

39. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents contend that the Petitioner was served with Enforcement Notice within the purview of Section 45 of the Physical Planning Act and not Section 455 of the said Act as enumerated by the counsel for the aforesaid Respondents.

40. It is our humble submission that no evidence has been tendered by the Respondents to support that Enforcement Notice or reason was duly served upon petitioner prior to the demolition. See paragraph 10 of the Replying Affidavit of Alfred Mwenda Riungu “.....wrote to all persons .....The said notice was fixed on the Petitioner’s wall”.

41. We submit that paragraph 10 of the said Replying affidavit does not state the officers who affixed the Notice, the time and the date when it was affixed. Sections 107 of the Evidence Act shift the burden of proof to the Respondents.

42. Article 47 (1) and (2) of the Constitution of Kenya 2010 which provides that: “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that “if a right on fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”.

43. **In the case of Dry Associates Ltd...Vs.. Capital Markets Authority & Ano. Petition NO.328 of 2011, the court held that:** “Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law..... but is to be measured against the standards established by the Constitution”

44. It is the Petitioner’s case that despite the weighty issues going to the heart of the Respondents jurisdiction, they failed serve Enforcement notice or give written reasons to the Petitioners prior to demolition of his Perimeter wall and thus, the Respondents discriminated the Petitioner and violated his right to fair and equal treatment guaranteed under Article 10, 27 and 47 of the Constitution.

45. It our humble submission the said Enforcement does not meet the tenets of Article 47(2) of the Constitution being a general notice addressed “To all residents” without specifications and thus Section 45 of the Physical Planning Act is unconstitutional in the eyes of Article 47(2) of the constitution.

46. In case of **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014** in which the Court of Appeal held that:

**“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are**

**now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.**

**(iii) Whether the Petitioner was granted a fair hearing before demolition of his perimeter wall?**

**The answer is “No”**

47. Section 95 of the County Government Act provides that:-*County communication framework (1) A County government shall establish mechanisms to facilitate public communication and access to information in the form of media with the widest public outreach in the county, which may include— (a) television stations; (b) information communication technology centres; (c) websites; (d) community radio stations; (e) public meetings; and (f) traditional media. (2) The county government shall encourage and facilitate other means of mass communication including traditional media*

48. In the case of **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held: **“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.**

49. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009**, the Court of appeal delivered itself as follows:

**“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.” [Emphasis mine].**

50. It is our submissions that the Respondents have not tendered any evidence to support that public Participation was conducted as

alleged in paragraph 20 of the Replying Affidavit. No minutes of the said meetings produced before this court. The burden of proof shift to the Respondents to rebut on the contrary. Refer Section 107 of the Evidence Act.

51. The Petitioner avers that he was not given the reasons prior to demolition and or the meaning of vertical and horizontal lines placed on the perimeter wall. Article 47(2) states: ***“Every person has the right to be given written reasons for any administrative action that is taken against him.***

52. It our submissions that the Respondents acting as they did, the Respondents violated Petitioner’s right to a fair Administrative Action contrary to Article 47(1) of the Constitution. Administrative Actions flows from statutes, must now meet the constitutional test of ***legality, reasonableness and procedural fairness.***

53. It is our submissions that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard as outlined in Article 47(2) of the constitution and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.

***(iv) Whether the Petitioner’s rights under the Constitution were breached and therefore he is entitled to compensation?***

***The answer is “Yes”***

54. By demolition of the Petitioner’s Perimeter wall , the 2<sup>nd</sup> Respondent herein is a County Government and the 1<sup>st</sup>,3<sup>rd</sup>, and 4<sup>th</sup> Respondents are public officers respectively breached the Petitioner’s right as enshrined in Article 10, 27,40,47 ,50 of the Constitution.

55. The Respondents by resorting to demolish the Petitioner’s perimeter wall instead of taking other measures as provided by the laws, the Respondents breached the Petitioner’s right as enshrined in Article 47 of the Constitution and therefore the Respondents’ action were not justified and the Petitioner is entitled to compensation with the purview of Article 23 of the Constitution to vindicate the rights violated.

***(v) Whether the Petitioner is therefore entitled to immediate compensation and damages?***

***“The answer is yes”***

56. It is evident that the Petitioner’s perimeter wall was demolished unfairly and illegally by the Respondents by infringements of the Petitioner’s rights as enshrined in the constitution. Due to the action of the Respondents, the Petitioner has incurred loss and damages in the sum of Kshs.12, 000,000 being cost for constructing a perimeter wall. See valuation report marked ***as MM-6.*** The said valuation has not been disputed by the Respondents.

57. In ***ELC No.480 of 2011, Virenda Ramji Gudila & Ano...vs... The Attorney General*** where the court awarded the Plaintiff the value of damages to the land, buildings and improvements lost in the demolition as pleaded in the Plaintiff,

58. It our submission that this court finds that the Petitioner is entitled to the prayers and relief sought in the Petition. ***in the case of Isaac Gathungu Wanjohi ..vs.. The Attorney General & Others, HCC Petition no. 154 of 2011, where the court awarded the Plaintiff a sum of 2,000,000/= as general damages for breach of Article 47 of the Constitution.***

***(v)Who shall bear the costs of this Petition?***

59. The costs follows the event.

### **Conclusion**

60. The court should safeguard inviolable rights against capricious and whimsical actions of Respondents that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. The abuse of power is no longer have place in our constitutional dispensation.

61. That’s all.

**DATED at Nairobi this 24<sup>th</sup> day of June 2019.**

**MURIMIMURANGO ASSOCIATES**

**ADVOCATE FOR PETITIONER**

4. The submissions filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are reproduced in herebelow.

**SUBMISSIONS ON BEHALF OF THE 1<sup>ST</sup>,2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS IN OPPOSING THE PETITIONER’S PETITION DATED 5<sup>TH</sup> FEBRUARY 2019**

1. May it please you my Lord; these are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents final submissions in respect of the petitioner's petition dated 5<sup>th</sup> February 2019.

2. The said respondents rely on the replying affidavit of ALFRED MWENDA RIUNGU dated 26th March 2019 and filed in court on even date and the submissions herein to oppose the petition.

3. The said respondents raise the following issues for determination by this honourable court;

(i) Whether the partly demolished wall which is the basis of this petition was built on the building line/ road reserve.

(ii) Whether the petitioner was given ample notice before the part-demolition of the perimeter wall.

(iii) Whether the petitioner's rights under the constitution of Kenya 2010 were violated.

(iv) Whether the petitioner is entitled to compensation as prayed.

**ISSUE 1: Whether the partly demolished wall which is the basis of this petition was built on the building line/ road reserve.**

My Lord the respondents have outlined in the replying affidavit of Alfred Mwenda Riungu that the county surveyor did carry out survey works on the *check point - Gakuuni Factory road* and established that the upper/front side of the petitioners perimeter wall had encroached on the said road reserve/ building line.

**This fact remains uncontroverted** by the petitioner.

That it is also not in dispute that the petitioner constructed a perimeter wall on the said property without seeking the requisite approval of the defunct local authorities and in particular the Municipal Council of Chuka town and the said wall ended up encroaching on the building line of the Check Point-Gakuuni Road by 1.5 Meters.

The said wall was also found to have been constructed on the building line contrary to the **The Local Government (Adoptive By-Laws) (Building) Order 1968** .

My Lord the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have averred that the petitioner neither applied nor got the requisite approval for the building plan for the construction of the said perimeter wall as is required under **section 3 of The Local Government (Adoptive By-Laws) (Building) Order 1968, the Local Government Act Cap 265 and the Physical Planning Act which omission led him to construct** the perimeter wall on the building line which is normally 1.5 meters on either side of the road. The building line is usually left for services such as drainage, power and sewer lines, foot paths and other utilities.

**These glaring facts too remain uncontroverted by the petitioner.**

In *Cycad Properties Limited & Anor Vs. Attorney General & 4 others [2013] eKLR*, it was held that:” *the burden on the Petitioners in a matter such as this is to demonstrate a violation of their constitutional rights. To do this, they would have to show entitlement to the 20 metres road reserve, and this, in my view, they have not been able to do. The Respondents are not, from their submissions before me, challenging the Petitioner’s title entirely. Their argument is that to the extent that it has encroached on 20 metres of the road reserve, it is unlawful.* ‘

**ISSUE 2: Whether the petitioner was given ample notice before the part-demolition of the perimeter wall.**

My Lord, as evidenced in the affidavit of Alfred Mwenda Riungu, the 3<sup>rd</sup> respondent on 16<sup>th</sup> January 2019 through the relevant office and in compliance of **Section 455 of the Physical Planning Act No.6 of 1996** wrote to all persons (including the petitioner) whose perimeter walls had encroached on the building line/road reserve requesting them to remove the structures on the road reserve. The said Notice was affixed on the petitioner's perimeter wall.

**The petitioner has admitted the same in his supporting affidavit to the petition and in the submissions by his counsel on record.**

Further my Lord, and in accordance with the provisions of the Physical Planning Act No.6 of 1999 the acting county surveyor ear-marked structures and/or trees that were on the building line with an ‘X’, the intention being that the owners would remove the offending structures voluntarily.

It is our submissions that the petitioner was served with sufficient notice.

It can only be a misconception of facts and imagined self-importance and pomposity on the part of the petitioner to expect to be treated differently from other citizens of the county by intimating that he should have been served with a personal notice.

**ISSUE 3: Whether the petitioner's rights under the constitution of Kenya 2010 were violated.**

The Petitioner states that the Respondents, without specifying who in particular , have contravened or violated the Petitioner's

constitutional rights under the constitution of Kenya as enshrined in Article 10,27,40,47 and 50 of the Constitution.

The petitioner has not attempted to demonstrate how the said rights were violated.

The petitioner has not adduced evidence to support the complaint on breach of Article 47 of the Constitution on the right to fair administrative action as alleged in the Petition.

The 3<sup>rd</sup> respondent has in the replying affidavit demonstrated that sufficient notice was given to the petitioner

My Lord it is common ground that a party who alleges violation or threatened violation of the constitution is required to demonstrate the manner in which the offending party violated or threatens to violate the provision in issue.

The burden of proof of the fact of prejudice lies with the petitioner who, in accordance with sections 107 and 108 of the Evidence Act, would desire the court to give judgment as to legal liability of the respondent, which is dependent on the existence of facts of prejudice which he asserts and who would fail if no evidence is received in the matter. It is thus apparent that the petitioner has failed.

In **Civil Appeal 69 of 2017 Base Titanium Limited v County Government of Mombasa & another [2018] eKLR** , the court of appeal sitting at Mombasa held at paragraph 23 that the appellant cited various provisions which the 1<sup>st</sup> respondent had allegedly violated but fell short of demonstrating the manner in which the 1<sup>st</sup> respondent violated the same and as such the 1<sup>st</sup> respondent could not be said to have violated the petitioners constitutional rights.

**ISSUE 4: Whether the petitioner is entitled to compensation as prayed.**

The prayers sought by the petitioner are premised on the erroneous presumption that the 3<sup>rd</sup> Respondent has compulsorily acquired the petitioner's land ; which is a fallacy as the 3<sup>rd</sup> respondent only demolished a perimeter wall that was constructed out of the confines of the petitioner's title to land ,on the building line/road reserve and without the necessary approvals of the defunct local authority .

Compensation is not merited for demolition of a perimeter wall and other structures constructed on a road reserve. It would be to make a compensation order in respect of an illegality.

In Sum my Lord, we submit that the present petition lacks merit.

**DATED AT CHUKA THIS 9<sup>TH</sup> DAY OF JULY, 2019**

.....

**MUTHOMI GITARI & CO**

**ADVOCATES FOR THE RESPONDENT**

5. On **23<sup>rd</sup> September, 2019, 8<sup>th</sup> October, 2019, 28<sup>th</sup> October, 2019** and on **12<sup>th</sup> November, 2019**, Mr. Murimi Murango, the petitioner's advocate, and Mr. Muthomi Gitari, the advocate representing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents had indicated to the court that they were negotiating an out of court settlement. Indeed, on **12<sup>th</sup> November, 2019**, they asked the court to give them 60 days to explore an out of court settlement. The advocates had earlier on on **8<sup>th</sup> October, 2019** told the court that they had reached a broad agreement and that they only wanted to thrash out one or two issues.
6. On **27<sup>th</sup> January, 2020**, the advocates informed the court that although there were on-going negotiations, if they did not record a consent with court on **3<sup>rd</sup> February, 2020**, they would ask the court to deliver its judgment.
7. On **3<sup>rd</sup> February, 2020**, Mr. Muthoi Gitari informed the court that the parties had failed to reach an out of court settlement. Hence this judgment.
8. The facts of this matter are fairly straightforward. There is no need to regurgitate them as they have been fully hereinbefore reproduced in the written submissions filed by the parties.
9. It is noted that although the **4<sup>th</sup> and 5<sup>th</sup>** respondents filed a Notice of Appearance, they did not, in any other way, participate in the proceedings.
10. On **22<sup>nd</sup> of May, 2019**, I delivered a ruling concerning a Preliminary Objection filed by the **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**. That ruling is reproduced in full herebelow:-

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CONSTITUTION PETITION CASE NO. 01 OF 2019**

**IN THE MATTER OF ARTICLES 19, 20, 21, 33, 23, 25, 27, 258, 259**

**AND 260 OF THE CONSTITUTION OF KENYA 2010 AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE RIGHT UNDER**

**ARTICLES 40, 60 AND 64 OF THE CONSTITUTION OF KENYA 2010 AND**

**IN THE MATTER OF THE ALLEGED INFRINGEMENT OF THE RIGHT TO**

**FAIR ADMINISTRATION ACTION ENSHRINED IN ARTICLES 10, 25, 47**

**AND 50 OF THE CONSTITUTION OF KENYA 2010 AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 (PROTECTION**

**OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE**

**FREEDOMS) PRACTICE AND PROCEDURE RULES 13, 19 AND 23 OF 2013 AND**

**IN THE MATTER OF ARTICLES 23, 159, 162 (B) OF THE CONSTITUTION OF KENYA 2010 AND**

**IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012 AND**

**IN THE MATTER OF PHYSICAL PLANNING ACT NO. 6 OF 1996 AND**

**IN THE MATTER OF COUNTY GOVERNMENT ACT 2012 AND**

**IN THE MATTER OF NATIONAL POLICE SERVICE ACT 2011 AND**

**IN THE MATTER OF TITLE KARINGA/NDAGANI3018, THARAKA NITHI COUNTY**

**BETWEEN**

**MUTEGI MUGWETWA.....PETITIONER**

**VERSUS**

**CHIEF OFFICER LANDS, PHYSICAL PLANNING,**

**HOUSING, URBAN DEVELOPMENT, ENVIRONMENT**

**AND NATURAL RESOURCES.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR, COUNTY GOVERNMENT**

**OF THARAKA NITHI.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF THARAKA NITHI.....3<sup>RD</sup> RESPONDENT**

**NATIONAL POLICE SERVICE.....4<sup>TH</sup> RESPONDENT**

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

**RULING**

1. This application concerns a Notice of Preliminary Objection dated 25<sup>th</sup> March, 2019 filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Notice states as follows:

## **NOTICE OF PRELIMINARY OBJECTION**

TAKE NOTICE that at the hearing of Notice of Motion dated **5<sup>th</sup> February, 2019**, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents shall object to said Notice of Motion and urge this honourable court to strike it out together with the petition herein dated **5<sup>th</sup> February, 2019** on the following principal grounds;

1. The application and the petition does not concern environment use and occupation or title of either the petitioner or the respondent but merely the demolition of unapproved construction on a road reserve and therefore this honourable court lacks the requisite jurisdiction to entertain both the petition and the application.
2. The petitioner's claim raises no constitutional issue. The issues raised are civil in nature and pertain to the boundary between the petitioner's property and the road, and the demolition of unapproved building.
3. The petitioner's claim before this honourable is for compensation for a demolished wall allegedly valued by the petitioner at Kshs.12,000,000/= and therefore this court has no jurisdiction to entertain this suit. Section 7 of the Magistrate's Court Act 2015 grants the magistrate's court pecuniary jurisdiction of up to Kshs.20,000,000/= and therefore this matter is a preserve of the lower court.

**Dated at Chuka this 25<sup>th</sup> day of March, 2019**

**MUTHOMI GITARI & COMPANY**

**ADVOCATES FOR THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS**

2. The Notice of Preliminary Objection hereinafter referred to as "PO" was canvassed by way of written submissions.

3. The submissions by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are reproduced hereby in exactly the way they have been filed by way of a soft copy and any spelling or other mistakes are, ipso facto, ascribable to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' advocates.

### **1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENT'S SUBMISSIONS IN RESPECT OF THE PRELIMINARY OBJECTION DATED 25<sup>TH</sup> MARCH 2019**

May it Please you my Lord, these submissions are made on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in supporting its notice of Preliminary objection to the petitioner's application and petition dated 25<sup>th</sup> march 2019.

#### **ISSUE 1: That the petition does not concern environment use and occupation or title of either the petitioner or the respondents contrary to section 13 of the environment and Land Court Act and Article 162(2)(b) of the constitution.**

This petition merely concerns a civil claim for compensation for a demolished wall. **Article 162(2)(b) of the Constitution** and **Section 13** of the **Environment and Land Court Act** sets out the strict jurisdiction of this honourable court which we humbly submit does not include civil claims for compensation of demolition of illegal structures.

#### **ISSUE 2: The petitioner's claim raises no constitutional issue.**

The claim raised in both the petition and its supporting affidavit is purely civil in nature. It does not touch on any specific infringement of a constitutional provision.

My Lord, a constitutional petition is a litigation initiated to either challenge breach of constitutional provisions or violation or infringement of rights and fundamental freedoms granted or recognized by the Constitution. These must expressly or impliedly recognized and protected rights and fundamental freedoms under the Bill of Rights.

The allegations in the petition and the supporting affidavit are in general terms breaches or failure by the Tharaka Nithi County government to comply with section 45 of the Physical Planning Act by demolishing an illegal structure "without notice". The petition does not allege breach or violation specific constitutional provisions or infringement of specific rights and fundamental freedoms and the manner of such breach violation or infringement.

It is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. This was stated in the case of **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** where the Court stated;

*"if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important(if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."*

My Lord, this principle was emphasized by the Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance&5**

others [2014] eKLR, where it stated that:

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... 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. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

It is our considered view my Lord that this petition and its supporting affidavit do not in any way show any semblance of a constitutional petition pleading breach of known constitutional provisions, violation of and or infringement of rights and fundamental freedoms. What we get from the petition and its supporting affidavit is a general pleading on breach of a statutory provision capable of redress in a normal suit and not through a constitutional petition.

**ISSUE 3: Section 11 of the Civil Procedure Act (CPA) provides that a suit be instituted in a court of lowest grade competent to try it.**

The claim by the petitioner lies on the magistrate's court. Section 7 (1) (a) of the Magistrate's Court Act 2015 grants the Chief magistrate's court pecuniary jurisdiction of up to Kshs 20,000,000 and not beyond this point. The petitioner's claim is for compensation to the tune of Kshs 12,000,000 which is far below the reach point of the Chief magistrate's court pecuniary jurisdiction.

Though the Environment and Land Court has original jurisdiction in land and environment matters, **Section 11 of the Civil Procedure Act (CPA)** provides that a suit be instituted in a court of lowest grade competent to try it and that the petitioner has not shown that there would be bias if the matter is tried in the lower court.

The *Court of Appeal in CA.No.287 of 2016 held that* Magistrate's Courts have jurisdiction to hear and determine land related matters or cases.

My Lord, these submissions above have clearly manifested that our preliminary objection is merited and we pray that the same be allowed with costs to the respondents.

**DATED** at Chuka this 8<sup>th</sup> day of April,2019

**MUTHOMI GITARI & COMPANY**

**ADVOCATES FOR THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS**

4. The submissions by the petitioner are reproduced herebelow in exactly the way they have been submitted by way of a soft copy and any spelling or other mistakes are ascribable, ipso facto, to the petitioners' advocates.

**PETITIONER'S SUBMISSIONS ON THE PRELIMINARY OBJECTIONS DATED 25<sup>TH</sup> MARCH, 2019**

**YOUR LORDSHIP,**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have raised a Preliminary Objection dated 25<sup>th</sup> March,2019 against the Petitioner's Notice of Motion dated 5<sup>th</sup> February2019 and the Petition of even date.

2. It is our Submission that the Preliminary Objection raised by the Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondent Mr. Muthomi does not meet the threshold set out in the case of **MUKISA BUSCUIT MANUFACTURING CO.LTD –VERSUS WEST END DISTRIBUTORS (1969) EA 696** and in the case of **HASAN ALI JOHO & Anor SULEIMAN SAID SHABHAL & 2 OTHERS** Petition no 1 of 2013 (2014) eKLR (paragraph 31 ) where the Supreme Court in the case of **INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION VERSUS- JANE CHEPEREN & 2 OTHERS (2015) Eklr** endorsed the Principle in above mentioned cases and held that:-

“ to restate the relevant principle from the precedent setting case, **MUKISA BUSCUIT MANUFACTURING CO.LTD –VESUS-WEST END DISTRIBUTORS (1969) EA 696**. “ A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the 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. 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 has to be ascertained or if what is sought is the exercise of judicial discretion.

3. The Joho decision has been subsequently cited by this Court in **Hassan NYANJE CHARO versus KHATIB MWASHETANI & 3 others ,Civil Application No. 23 of 2014 ,(2014) eKLR** and in **AVIATION & ALLIED WORKERS UNION KENYA versus KENYA AIRWAYS LTD & 3 OTHERS ,Application No. 50 of 2014 (2015) eKLR** in which the Court further stated ( paragraph 15).

“Thus a preliminary Objection may only be raised on a pure question on law. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts .The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.

4. It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law to the extent that the facts in petitioners Notice of Motion and the Petition are undisputed.

5. The issues raised by the 1<sup>st</sup> to 3<sup>rd</sup> Respondent in the preliminary Objection specifically paragraph 1 and 2 are contested by the Petitioner’s and this Court will therefore have to investigate the disputed facts.

6. The disputed facts in the preliminary objection are of a nature that would apparently require calling of evidence as to whether the rights of the Petitioner were violated by unlawful acts of the Respondents demolishing his perimeter wall around his suit property known as Title Number Karingani/Ndagani/3880 on Saturday, the 2<sup>nd</sup> February,2019 under supervision of contingent of Administration Police with Bull Dozers and earth Movers machines within the preview of Article 10,40,47 (2), 50 and 60 of the Constitution of Kenya 2010,

7. As to whether the perimeter wall had encroached on the road reserve is a question to be determined by calling of surveyors.

8. It is our submission that paragraph 1 and 2 of the preliminary objection are mere facts and are not pure point of Law.

9. We submit that Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Act 19 of 2011 vests the powers to hear and determine disputes relating to Environment and Land in the Environment and Land Court established under Section 4 of the same Act.

10. Section 13 ( 2 ) of the Environment and Land Act No. 19 of 2011 provides that in exercise on its jurisdiction under Article 162 (2) (b) of the Constitution of Kenya ,the Courts shall have power to hear and determine disputes relating to Environment and Land , including disputes:-

a) Relating to Environmental planning and Community Land protection, Trade Climate issues ,Land use planning ,Title ,Tenure Boundaries , Rates ,Rents ,Valuations,Mining,Minerals and other natural resources.

b) .....

c) .....

d) Relating to public, Private and Community Land and Contracts clauses in action or other instruments granting any enforceable interest in land.

11. The spirit of Article 162 ( 2) (b) of the Constitution of Kenya was to create a special Court to hear and determine Environment and land dispute which Court has original jurisdiction in matters relating to Environment and Land.

12. We submit the Petitioner’s in his Application and Petition specifically in relief sought refers to suit property Known as Title Number Karingani/Ndagani/3880 and on it erected his palatial home in its entirety .The perimeter wall and the Title Number Karingani/Ndagani/3880 are intertwined and inseparable.

13. Your Lordship, the Constitutional issues raised in the petition are weighty and in public interest in respect of government officers who misuse of power, politically motivated for the general public to feel that they can flex their muscles, are above the law and that can intimidate, threaten, execute and exercise their imaginary excessive power without regard to provision of Article 10 of the Constitution.

14. It is the duty of this Court to do justice to the Citizen where there rights are infringed and or violated by the Government and its public servants

15. It is our submissions that the preliminary objection is devoid of merit and should be dismissed with costs to the petitioner.

**Dated at Nairobi this 15<sup>th</sup> day of April, 2019**

**MURIMI MURANGO & ASSOCIATES**

**ADVOCATES FOR PETITIONER**

5. In their submissions the parties have elaborated on the principles enunciated by the authorities they have proffered in support of their diametrically opposed assertions. As the submissions have already been reproduced in full herein, I find it superfluous to regurgitate those principles.

6. The only issue to be determined in this matter is if or if not the Notice of Preliminary Objection succeeds or not. If it succeeds, this will bring to an end this Petition. If it does not succeed, the Petition will be escalated to full hearing.

7. I have considered the submissions and the authorities proffered by the parties in support of their assertions.

8. I find that ground 1 of the Preliminary Objection is not grounded on a pure point of law. It invites arguments regarding why this court lacks jurisdiction to hear this application. This is a matter that can only be canvassed during the full hearing of the Petition. Of course, a wall does not stand on air. It obviously stands on land. This is one of the issues that can be canvassed during the full hearing of the Petition.

9. Ground 2 of the Preliminary Objection also raises arguments as to whether the petition is merely a Civil matter and not a Constitutional matter. This is one of the issues that can be canvassed during the full hearing of the Petition.

10. Ground 3 of the Preliminary Objection raises the issue of whether this court has jurisdiction to hear a matter that involves a claim of less than Kshs.20,000,000/=. I note that this is only one of the orders sought by the petitioner. This is one of the issues that may be canvassed during the full hearing of the petition. It is noted that this court has original and appellate jurisdiction to hear all matters concerning land and the environment.

11. In the circumstances, this Preliminary Objection is dismissed.

12. Costs shall be in the cause.

**Delivered in open court at Chuka this 22<sup>nd</sup> day of May, 2019 in the presence of:-**

**CA: Ndegwa**

Dennis Muthomi for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Murimi Murango for Petitioner - Absent

**P.M. NJOROGE**

**JUDGE**

11. The parties in their pleadings and submissions agreed that a perimeter fence constructed by the petitioner along his land parcel No. Karingani/Ndagani/3880 had been demolished by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. They have disagreed on the legality and constitutionality of the impugned demolition. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents aver that the demolition was done in conformity with the law.

12. I do find that this petition raises valid constitutional points. There is reasonable specificity in the actions the petitioner alleges infringed on his constitutional rights. I, therefore, adopt the issues he has framed for determination as being valid.

13. I answer the issues as follows:

(i) Whether the petitioner is the lawfully registered owner of the suit parcel of land known as Karingani/Ndagani/3880 situated at Tharaka Nithi County.

Yes, the Petitioner is the registered owner of Land Parcel No. Karingani/Ndagani/3880.

(ii) Whether the petitioner was given ample notice in respect of demolition of his perimeter wall? From the submissions filed by the parties, my unequivocal finding is that the petitioner was not given ample notice before his perimeter wall was demolished and that the demolition was done without obeisance to due process.

(iii) Whether the petitioner was granted a fair hearing before demolition of his perimeter wall?

The answer is that the petitioner was not accorded a fair hearing before the perimeter wall was demolished.

(iv) Whether the petitioner's rights under the constitution have been breached and he is, therefore, entitled to compensation. The answer is yes.

(v) Whether the petitioner is, therefore, entitled to immediate compensation and damages? Yes, the petitioner is entitled to compensation and damages.

(vi) Who shall bear the costs of the petition?

The costs will follow the event.

14. The petitioner and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents veritably compromised this suit when they, on several occasions, intimated to the court that they had embarked on negotiations with a view to arriving at an out of court settlement. Somehow, by agreeing to compromise the suit, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents conceded that the petitioner's claims had validity. I am, however, not satisfied that prayers g, h and i in the

petition are merited.

15. I have considered the pleadings, the submissions and the authorities proffered by the parties in support of their diametrically incongruent assertions. As the submissions and the authorities have been reproduced in full in the written submissions reproduced in full in this judgment, I find it a pyrrhic and superfluous exercise to regurgitate them.

16. In the circumstances, judgment is hereby entered in favour of the petitioner against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the following terms:

a. A permanent injunction is hereby issued to the Respondents, their servants and/or agents restraining them from further trespassing upon, encroaching, demolishing and/or dealing in any way manner whatsoever interfering with the Petitioner's right to property known as Title Number Karingani/Ndagani/3880 situated at Tharaka Nithi County measuring Zero point Four Zero Five (0.405) Hectares.

b. An order of prohibition is hereby issued to prohibit the Respondents herein, their servants and/or agents from further trespassing, encroaching, demolishing and/or further dealing with the Petitioner's right to property known as Title Number Karingani/Ndagani/3880 situated at Tharaka Nithi County measuring Zero point Four Zero Five (0.405) Hectares for being in breach of Articles 40, 47, 50 and 60 of the Constitution of Kenya, 2010.

c. A declaration is hereby issued that the Respondents decision to demolish the Petitioner's perimeter wall on property known as Karingani/Ndagani/3880 situated at Tharaka Nithi County is unconstitutional, null and void for being in breach of Articles 40, 47, 50 and 60 of the Constitution of Kenya, 2010.

d. A declaration is hereby issued that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents notice dated 16<sup>th</sup> January 2019 was unconstitutional, null and void for failure to serve the Petitioner with a notice pursuant to Article 25(c), 47(2) and 50 of the Constitution of Kenya, 2010.

e. A declaration is hereby issued that the 4<sup>th</sup> Respondent's actions of supervising the demolition without a Court Order directed to them to supervise the demolition was unconstitutional, null and void pursuant to Article 10 of the Constitution of Kenya, 2010.

f. An order of judicial review is hereby issued under Article 23 (3) (f) in the form of prohibition barring the Respondents by themselves, their servants, agents and/or assignees from carrying on further destructions, demolitions and/or in any manner whatsoever interfering with the Petitioner's residential home erected on all that parcel of land known as Karingani/Ndagani/3880 situated at Tharaka Nithi County measuring Zero point Four Zero Five (0.405) Hectares.

g. For breach of the petitioner's constitutional rights, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are condemned to pay the sum of Kshs. 4,000,000/= to the petitioner.

h. Costs of this petition are awarded to the Petitioner.

**Delivered in open Court at Chuka this 4<sup>th</sup> day of February, 2020 in the presence of:**

CA: Ndegwa

Murimi Murango for the Petitioner

M/s Kithaka h/b Muthomi Gitari for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

**P. M. NJOROGE,**

**JUDGE.**