



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 223 OF 2011**

**HON GIDION MBUVI KIOKO ALIAS SONKO.....PETITIONER**

**VERSUS**

**1. THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**2 . THE COUNTY GOVERNMENT OF NAIROBI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Petitioner, then Member of Parliament for Madaraka, Nairobi, sued the Hon Attorney General, the Interim Independent the Electoral Commission, the City Council of Nairobi, the Kenya Pipeline Company Limited, National Environment Management Authority, the Kenya Power & Lighting Company Limited and the Kenya Railways Corporation seeking various relief son behalf of his affected constituents, following the fire incident of 12<sup>th</sup> September 2011 at Sinai Slum settlement in Embakasi, within the geographical area of the 1<sup>st</sup> Petitioner’s then Madaraka Constituency. The fire resulted in multiple loss of lives and property, and the injury of a large number of survivors who were hospitalized for long periods for the treatment and management of their injuries.

2. Upon the Petitioners’ an application by dated 31<sup>st</sup> October 2011, the Court granted a conservatory order putting a halt to planned removal of the people in Sinai Settlement and other informal settlements in the constituency, which was subsequently extended during the life of the litigation in terms:

*“That conservatory orders are hereby granted restraining the Respondents by themselves, their agents servants or howsoever from evicting, interfering and or [doing] anything prejudicial to the slum dwellers and informal settlers in Makadara Constituency until 4<sup>th</sup> November 2011.”*

3. Upon application by some respondents, the Court by a ruling of 4<sup>th</sup> December 2012 directed that the other respondents be struck off from the proceedings with no order as to costs – by amendment the petitioner removed the respondents together with the Electoral Commission - and the suit the proceeded against the Hon Attorney General and the City Council of Nairobi (now Nairobi City County) as the principal respondents now intituled in the Petition as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

4. In giving its directions the Court (Majanja, J.) in its ruling of 4<sup>th</sup> December 2012 concluded that:

*“34. A part from the State which bears the overall authority, the City Council of Nairobi as local authority has statutory authority for planning, provision of infrastructure, housing and other social amenities. In carrying out its functions under the Local Government Act (chapter 265 of the Laws of Kenya), it acts in concert with the central government. This case is primarily one for eviction of the petitioner’s constituents and the responsibility for the plight of the people living in the slums areas in the hands of the 1<sup>st</sup> and 3<sup>rd</sup> respondents (see **Susan Waithera and Others v. Town Clerk, Nairobi City Council and Others** Nairobi Petition 66 of 2010 (unreported)).*

*35. An analysis of the facts, depositions and the witness statement and prayers sought in the petition demonstrate that the petitioner’s concern for his constituents is that they should not be evicted and that the State should be ordered to meet its responsibility in that regard. This ruling points the petitioner to the correct direction on the road to judgment.*

*36. The petitioner has filed a representative suit in good faith to protect his constituent’s Cause but as I have demonstrated, it must be properly pleaded and placed before the court. The affected constituents still retain their individual right to enforced specific causes against any of the respondents in the case of negligence or misfeasance.*

*37. In the light of what I have stated, the inclusion of the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents is unnecessary for determination of the petitioner’s case. They are struck out from these proceedings with no order as to costs.*

*38. In the light of the aforesaid order I direct the petitioner to amend the petition, if necessary, within 30 days from the date hereof.”*

5. The Petition was amended severally on 22<sup>nd</sup> April 2013, 24<sup>th</sup> February 2014 culminating with the [Further] Further Amended Petition dated 3<sup>rd</sup> March 2014 which is the subject of this Judgment.

6. By a ruling dated 9<sup>th</sup> May 2014, the Court (Majanja, J.) declined an application for consolidation of the Petition with Civil Suit No. 207 of 2012 on the ground that the causes of action in the two were different holding that –

*“10.... The Petition in this matter concerns the issue of state liability for the tragic events that occurred at Sinai Village. It is filed in a representative capacity by the Member of Parliament of the area. On the other hand, HCCC NO. 207 of 2012 is a private law claim founded on the tort of negligence and breach of statutory duty. The considerations for fixing liability on the defendant or respondents are different in each case and consolidating the matters may obscure the real issues in controversy.*

*11. I dealt with this dichotomy in my ruling of 4<sup>th</sup> December 2012 where I struck out Kenya Pipeline Company Limited, Kenya Railways Corporation, Kenya Power and Lighting Company and National Environment Agency from the petition. I stated as follows: “[23] **I must state that the evidence that that has been presented by the petitioner and the witness statements raises two fundamental causes of action and conflates what would be private law actions on behalf of certain persons and public law action to enforce fundamental rights and freedoms under the Bill of Rights. On the other hand, there is claim which is located, as I have stated in Article 43 where residents of the slum areas in Makadara seek to be provided with housing, sanitation, water and education for their children.**”*

*12. While it would be attractive to consolidate the two matters, in my view, the defendants in HCCC No. 207 of 2012 would be prejudiced as the cause of action against them differs in material particulars and in respect of KPC and NEMA the issue of liability in respect of the petition has been determined.*

13. *In the circumstances, I decline to consolidate the matters and consequently the Notice of Motion dated 8<sup>th</sup> April 2014 is dismissed with no order as to costs.*”

7. From the discussion below it would appear that the petitioner did not heed the gratuitous advice by the Court as to the pleading of the causes of action in the petition to separate the private law claim and the public law enforcement of the Bill of Rights including Article 43 Rights.

### **THE PETITION**

8. The [Further] Further Amended Petition dated 3<sup>rd</sup> March 2014 (herein after the Petition) had two obvious intentions:

- a. To redress loss occasioned by the fire of 12<sup>th</sup> September 2011; and
- b. To obtain declarations and orders for the protection, observance and promotion of the rights of the petitioner’s constituents in their future life at the settlements.

9. By the Petition, the Petitioner primarily pleads his cause of action at paragraphs 7 and 8 as follows –

***“7. On or about 12<sup>th</sup> September 2011, while the constituents of the petitioner were lawfully residing, working and or visiting within the Sinai Slums, flammable petroleum product escaped to the Sinai Slums, ignited and caught fire and burnt the petitioner’s constituents and their properties occasioning some fatal injurie, others serious injuries and others loss and damage or both.***

***8. The Petitioner avers that as a result of the fire the fundamental rights of his constituents, particularly Sinai Village under Articles 26, 28, 29(c) and (f), 39, 40, 42, 43 and 56 of the Constitution have been, are being and are likely to be contravened by being deprived the right to life, human dignity, subjection to violence, physical and psychological torture, being treated in cruel, inhuman and degrading manner, [their] right to reside anywhere in Kenya, earn a living, movement, and ownership of property and to live in a clean and safe environment, have good social economic amenities and facilities and of not being marginalized have been curtailed and or threatened.”***

10. The petitioner alleged that the Government, represented by the 1<sup>st</sup> respondent, was responsible for various breaches of constitutional and legal duty leading to the said violation or threatened violation, at paragraph 11A – F as follows:

***“11A. The Petitioner avers that the Government abdicated its responsibilities by failing to ensure that a highly flammable material within its’ agents custody and their premises is store[d] in a proper manner thus letting it to escape to the area inhabited by the petitioner’s constituents causing the flammable material to ignite and burn down the petitioner’s constituents and their habitat thus causing the death of over 100 of them breaching their right to life as guaranteed under Article 26 of the Constitution.***

***11B. The 1<sup>st</sup> respondent failed to ensure that flammable products did not escape from its premises by failing to keep its machinery, plant and pipes in proper state of maintenance causing it to ignite and burn down the petitioner’s constituents habitat and property thus causing destruction to property and homes of over 300 of them breaching their right to own, hold and protection of property as guaranteed under Article 40 of the Constitution.***

***11C. The 1<sup>st</sup> Respondent failed to caution or notify the petitioner and his constituents of the escape of the flammable material from their premises thus causing the fire that occasioned injuries, burns and ugly scars to the residents of the Sinai Slum.***

11D. The 1<sup>st</sup> Respondent constructed a waste water shaft to pass through the area inhabited by the constituents allowing waste water duct to be used to dispose (sic) of industrial waste material exposing the petitioner and his constituents to hazardous waste thus threatening their environment breaching their right to a clean and safe environment as guaranteed under Article 42 of the Constitution.

11E. The 1<sup>st</sup> Respondent failed to construct the waste water duct in a proper manner, failed to ensure that the waste water tunnel is in good state of repair so that any waste is disposed in a proper manner. This infringed on the Petitioner and his constituents' right to inherent dignity by failing to ensure that the petitioner's constituents are safe guarded against exposure to dirt, flammable, noxious and poisonous waste in breach of Article 28 of the Constitution.

11F. The 1<sup>st</sup> respondents in allowing its agents to dispose of the hazardous material in areas inhabited by the petitioner's constituent, failing to ensure that the agents dispose its waste material in a proper manner and to ensure that the petitioner's constituents are not exposed to harmful waste material abdicated its responsibility of taking any of such measures to safeguard the environment inhabited by the petitioners."

11. The claim against the 2<sup>nd</sup> respondent was, broadly, that -

"13. The 2<sup>nd</sup> Respondent has failed and neglected to perform its functions under the 4<sup>th</sup> Schedule of the Constitution Part 2 thereof providing county health facilities, ambulance services, promotion of primary health care, provision of county roads, fire-fighting services and disaster management."

### **Loss and damage**

12. The Petitioner set out his constituents' loss at paragraph 11 H and I as follows:

"11H. The Petitioner's constituents homes and habitat was burnt down and they suffered loss and damage. The burns to their bodies left scars that cannot be erased even with time. They lost brothers and sisters and their family units [were] distorted and livelihood curtailed.

11I. The petitioner's constituents continue to suffer marginalization for lack of essential facilities as envisaged in Article 43 of our Constitution. They are threatened with eviction with no alternative place to go within the Republic of Kenya."

13. The Petitioner consequently sought the following reliefs:

### **"FURTHER AMMENDED PETITION DATED 3<sup>RD</sup> MARCH, 2014:**

a. A declaration that the residents' (particularly the residents of Sinai village) right to enjoy a clean and healthy environment as provided under Article 42 and 43 of the constitution have been denied, and/or threatened.

b. A declaration that the residents (Nairobi slum dwellers) right to equal treatment before the law under article 27 of the constitution has been denied, infringed, violated and/or threatened.

c. A declaration that the Sinai residents right to have them have access to adequate housing and to reasonable standards of sanitation under 43(1) (b) (c)(c) have been denied, infringed and/or threatened.

d. A declaration that the rights of the Petitioners residents of Sinai to life as enshrined in Article 26 of the Constitution were infringed and/or threatened.

e. A declaration that the inherent dignity of the Petitioners residents of Sinai was were not

*respected and Protected contrary to Article 28 of the Constitution*

- f. A declaration that the Petitioners residents of Sinai were subjected to physical and psychological torture and treat inhuman and degrading manner of burning down their residence.*
- g. A declaration that the Petitioners residents of Sinai rights to protection of the right of property was infringed and curtailed in contravention of Article 40 of the Constitution.*
- h. A declaration that the Petitioners residents (particularly Sinai village have been marginalized by reason of their social and financial status which contrary to the provisions of the Constitution.*
- i. A declaration that the Residents of Makadara (particularly Sinai village) are entitled to decent housing and health services.*
- j. An injunction do issue restraining the Respondents and severally or their agents servants or whosoever from evicting the Nairobi slum dwellers until they are either compensated and/or allocated alternative settlements.*
- k. A declaration that the purport. Object and spirit of the constitution outlaws evictions without consultation and adequate and reasonable notice.*
- l. A declaration that a forceful eviction of slum dwellers in Makadara constituency will destroy livelihoods degrades the environment and impact on the eco-system.*
- m. A declaration the slum dwellers are entitled to judicial review within the meaning of article 47(2) of the constitution before they can be evicted.*
- n. A declaration that forceful evictions of slum dwellers in Makadara constituency are inhuman and degrading within the meaning of article 25(a) of the constitution.*
- o. A declaration that forceful eviction of slum dwellers in Makadara constituency is tantamount to condemning the poor just because they are poor and this offends article 27(1)(2)(3)(4)(5) of the constitution.*
- p. A declaration that the slum dwellers in legitimate expectation to have decent housing water and electricity.*
- q. A declaration that failure by the Respondents to provide basic infrastructure like electricity, water and shopping malls has exposed residents of Sinai to insecurity where life is short nasty and brutish.*
- r. A declaration that the Respondents have a statutory duty to provide basic services to the Makadara particularly slum dwellers.*
- s. A declaration that the slum dwellers in Sinai having stayed continuously in the suit premises for over 50 years have acquired prescriptive rights.*
- t. A declaration that other than the Respondents trying to evict the residents of Sinai they should embark on programmes to improve the situation in the slums.*
- u. A declaration that it is irreconcilable that Makadara is home to many industries and enjoys the highest per capital income yet the residents are in abject poverty.*
- v A(i) An order directing the compensation of all the 103 families who lost their loved ones.*
- v A(ii)An order for general damages for all the Sinai fire victims who receive d burns from the*

disaster and special damages for medical expenses incurred on their behalf by the Petitioner.

v.A(iii) An order compensating all the victims who lost their properties during the disaster.

v.A(iv) A declaration that the Petitioner's Sinai residents of right to life and a livelihood under Article 26 of the Constitution has been infringed, violated, breached and/or threatened.

v.A (v) Any other orders the Court may deem fit and expedient to grant all the circumstances in this case into account.”

## **THE RESPONSES**

14. The 1<sup>st</sup> respondent a Replying Affidavit was sworn on 6<sup>th</sup> March 2014 by **Charles Wafula Sikulu** who was the Head of Slum Upgrading Department in the Ministry of Land, Housing and Urban Development [who also testified before the Court as RW2 and adopted the affidavit as his evidence], which set out the 1<sup>st</sup> respondent's response to the suit as follows:

“1<sup>ST</sup> RESPONDENT'S REPLYING AFFIDAVIT DATED 6TH MARCH, 2014

3. THAT I am aware that the Constitution under Article 43 recognizes housing as social economic right.

4. THAT based on the aforesaid, the Government is reviewing two policies namely the National Housing Policy and National Land Policy to re-align them with the constitutional provisions more so to the constitutional requirement under Article 43(1) (b) which stipulate that every person has the right to accessible and adequate housing, and to reasonable standards of sanitation.

5. THAT the National Housing Policy for Kenya Sessional Paper No. 3 of 2004 gives high priority to participatory upgrading of slums and advocates for minimum displacement to cater for provision of infrastructure and related services (Annexed herein and marked 'CWS1' is a copy of the said National Housing Policy).

6. THAT the Sessional Paper No. 3 of 2009 on National Land Policy aims at guiding the Country towards efficient, sustainable and equitable use of land for prosperity and posterity. In this regard, the policy recognizes that many Kenyans live as squatters in slums and other squalid places with Government being called upon to facilitate the regularization of existing squatter settlements for purposes of upgrading or development (**Annexed herein and marked 'CWS2' is a copy of the said National Land Policy**)

7. THAT the Government in collaboration with the stake holders has embarked on formulation of the National Slum Upgrading and Prevention Policy whose objectives is to empower and enable poor people living in slums to realize their housing rights as provided for under Article 43 of the constitution. (Annexed herein and marked 'CWS 3', CWS 4, CWS 5' and CWS 6 Concept Paper on slum Upgrading and [prevention Policy, Fundraising Proposal on slum Upgrading an Prevention Policy; Background Documents on Slum Upgrading and Prevention policy and draft Slum Upgrading and Prevention Policy.

8. THAT the Government in collaboration with other stake holders has initiated formulation of the draft eviction and resettlement bill whose objective is to provide for prohibition of unlawful eviction, procedure for eviction of unlawful occupiers and Protection, Prevention as well as redress against eviction of all persons occupying land (**Annexed herein and marked 'CWS 7' is a copy of the said Draft Eviction and Resettlement bill**).

9. THAT the Government in collaboration with UN-HABITAT and other stake holders initiated Kenya Slum Upgrading Programme (KENSUP) in 2004 with the purpose of improving livelihoods of people living and working in slums and informal and settlements. (**Annexed herein and marked**

**'CWS 8' is a copy of the said Kenya Slum Upgrading Programme).**

10. *THAT* since its inception KENSUP has made achievements in areas of institutional framework, capacity building, provision of social and physical infrastructure and housing improvements. (Annexed herein and marked 'CWS 9' is a copy of the said copy of PROGRESS REPORT on Kenya Slum Upgrading Programme of July, 2013.

11. *THAT* in this financial year, KENSUP was allocated **455 million shillings** for various projects country wide including development of housing in Kibera Soweto Zone A, **Planning of Mariguini Settlement in South C**, development of Social Hall and High Masts in Malindi, Development of primary school and market in Eldoret, development of High masts and primary school in Bungoma as well as development of high masts in further and without prejudice to the foregoing, for this financial year, the budget for aforementioned projects was approximately 2 billion shillings and therefore the amount which was allocated was not enough for the above projects.

12. *THAT* I am further advised by the Counsel on record which advise I verily believe to be true, that under the forth schedule part 1 of the Constitution, paragraph 20 the National Government is mandated to provide housing policy and the County Government is mandated to implement the housing policy as provided for under part 8 of the said schedule.

13. *THAT* I am further advised by the counsel on record which advise I verily believe to be true that under Article 20 (5) that in applying any right under Article 43 if the State claims that it does not have resources to implement the right, a court tribunal or other authority shall be guided by the following principles.

**(a) It is the responsibility of the State to show that the resources are not available.**

**(b) In allocating resources, the State shall give priority to ensure the possible enjoyment of the right or fundamental having regard to prevailing circumstances including the vulnerability of particular groups or individuals and**

**(c) The Court, or tribunal or other authority may not interfere with a decision of a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.**

14. *THAT* I know for a fact that the Government is keen to address the provision of shelter and access to housing for the marginalized groups especially for those living in slums and informal settlements, however, the same has to be achieved progressively as stipulated in the Constitution.”

15. The 2<sup>nd</sup> Respondent filed Replying Affidavit sworn by one Karisalha, the Legal Affairs Director of the Nairobi City County, who testified as RW1, on the 28<sup>th</sup> February 2014 and 10<sup>th</sup> March 2014, in response to the Further Amended Petition and [Further] Further Amended Petition of 3<sup>rd</sup> March 2014, respectively. The County Director of Planning Mr. J. K. Barreh also filed a witness statement dated 23<sup>rd</sup> April 2015, which he adopted when he testified as RW4 at the hearing of the Petition.

16. The primary defence of the 2<sup>nd</sup> Respondent is that the 2<sup>nd</sup> Respondent could not be made responsible for the loss caused by the fire occasioned by the defective gasket that caused oil spillage from the Kenya Pipeline Company a state corporation under the responsibility of the 1<sup>st</sup> Respondent's national Government as opposed to the Nairobi City Council, and that the Sinai Slums as an unplanned settlement could not attract provision of social services by the 2<sup>nd</sup> Respondent and some like the provision of roads would be difficult in the densely populated area as the same would require enough space would mean displacing the squatters who were not willing to be displaced to construct further roads.

## **THE HEARING**

17. **Viva voce** evidence was adduced in addition to the affidavit evidence filed by the parties, and witness statements were exchanged for that purpose. The entire oral hearing of the matter was taken before the Hon. Mr. Justice Majanja but who disqualified himself before writing the judgment on 18<sup>th</sup> May 2016 and this Court took over the matter pursuant to the practice of the Court set out in Order 18 rule 8 of the Civil Procedure Rules and undertook the writing the judgment on the basis of the evidence taken by the said Judge and the submissions thereon made by counsel for the parties in writing and orally before the Court.

18. Order 18 rule 8 of the Civil Procedure Rules is in terms as follows:

***“[Order 18, rule 8.]***

***Power to deal with evidence taken before another judge.***

***8. (1) Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.”***

19. Following the procedure for production of electronic evidence under section 106B of the Evidence Act with a certificate thereunder and confirmational testimony of the video photographer, (PW4), a DVD recording of the fire incident of 12<sup>th</sup> September 2011 and the Certificate were produced before the Court as Petitioner’s Exhibit No. 1(a) and (b). This Court has had an opportunity to view the DVD, which shows the effects of the fire on buildings made of iron-sheets, with bodies of people completely burnt to ashes and other burning to the skeleton, with persons with less severe burns being taken to hospital while residents attempt to put out the fire which appeared to follow a river or other drainage on a wet rainy day indicated on the footage as 12<sup>th</sup> September 2011. The fact of the fire and its devastating consequences on the lives and property of slum dwellers was, however, not in contest.

20. The petitioner called 12 witnesses including himself PW1, the photographer (PW3) who recording the events of the fire of 12<sup>th</sup> September 2012, eight (8) victims of the fire who testified as to their respective injuries (PW2, 4, 5, 6, 7, 8, 9 and 10) and two medical experts (PW11 and PW12) who testified on the nature of the injuries suffered by the victims and the need for post traumatic care and treatment and the cost therefor.

21. The petitioner relied on an affidavit sworn by Flora Okoth Company Secretary of the Kenya Pipeline Corporation seeking third party directions in a suit by the victims of the Sinai fire tragedy against the Corporation, the City Council of Nairobi and the National Environment Management Authority HCCC 207 Of 2012, in which the cause of the fire is given as a faulty and substandard gasket according to an Investigation Report therein attached. In material paragraphs the Affidavit is in the following terms:

*“I, FLORA OKOTH, a resident of Nairobi within the Republic of Kenya and of P.O.Box 73442-00200 Nairobi hereby make oath and state as follows:*

*1) I am the Company Secretary of the 1<sup>st</sup> Defendant Company. I am conversant with the facts of this suit and I have been duly authorized and competent to swear this affidavit on behalf of the 1<sup>st</sup> Defendant.*

*2) The plaintiffs filed this suit against the 1<sup>st</sup> Defendant on 9<sup>th</sup> May 2012 seeking, inter alia, general and special damages following a fire that razed the informal Sinai settlement on 12<sup>th</sup> September 2011 due to what the plaintiffs allege was negligence, inter alia, on the part of the 1<sup>st</sup> Defendant in causing oil spillage that ultimately resulted in a fire in the said settlement.*

*3) The said fire of 12<sup>th</sup> September 2011 occurred when the 1<sup>st</sup> Defendant’s pipeline was*

undergoing upgrading works that were being carried out by the intended Third Party pursuant to a contract between the 1<sup>st</sup> Defendant and the intended Third Party dated 30<sup>th</sup> October 2009. Annexed hereto and marked FO 1 are copies of the relevant sections of the said contract between the 1<sup>st</sup> Defendant and the intended Third Party.

4) It was a term of the said contract between the 1<sup>st</sup> Defendant and the intended Third Party that the intended Third Party shall be liable for any losses that would arise in respect of the pipeline on account of, inter alia, negligence on the part of the intended Third Party in discharging its obligations under the contract.

5) I am advised by the 1<sup>st</sup> Defendant's Advocate on record, whose advice I verily believe to be sound, that the questions and issues relating to liability and connected with the dispute herein should be properly determined not only as between the Plaintiffs and the 1<sup>st</sup> Defendant but as between the 1<sup>st</sup> Defendant and the intended Third Party. **This is because the cause of the spillage that resulted in the fire has been attributed to a fault and substandard gasket fitted by the intended Third Party and the poor workmanship in fitting the same. Annexed hereto and marked FO 2 is a copy of the Investigation Report on the cause of the fire.**

6) The 1<sup>st</sup> Defendant shall also be seeking directions of the Court at an appropriate time that the question of liability, between the 1<sup>st</sup> Defendant and the proposed Third Party, be tried at the trial of the suit herein.

7) In the circumstances, it is necessary that this Honourable Court grants leave to the 1<sup>st</sup> defendant to issue a Third Party Notice against the said China Petroleum Pipeline Bureau (CPP) in order that the issue of liability as between the Plaintiffs, 1<sup>st</sup> Defendant and intended Third Party be determined together. Annexed hereto and marked FO 3 is a copy of the draft Third Party Notice that the 1<sup>st</sup> Defendant intends to issue against the intended Third Party.

8) I am advised by the 1<sup>st</sup> Defendant's Advocates on record, whose advice I verily believe to be sound, that allowing this application will avert the possibility of multiplicity of suits as the claim by the Plaintiffs against the 1<sup>st</sup> Defendant and the claim by the 1<sup>st</sup> Defendant against the intended Third Party would all be heard and determined in one suit.

9) I am also advised by the 1<sup>st</sup> Defendant's Advocate on record, whose advice I verily believe to be sound, that the joinder of the intended Third Party to this suit will save on costs and facilitate the timely delivery of justice and resolution of the real issues in controversy in this suit.

10) It is in the interest of justice and fairness that this application be allowed.”

22. At Paragraphs 4-6 the details of the said the **KENYA PIPELINE COMPANY LIMITED INVESTIGATION REPORT ON THE PETROLEUM PRODUCT SPILLAGE THAT OCCURRED ON 12<sup>TH</sup> SEPTEMBER 2011 AT THE NAIROBI TERMINAL** are given as follows:

#### **“4. KEY OBSERVATIONS AND FINDINGS**

*From the sequence of events outlined above, the observations made were as follows;*

i. *The receiving tank 11TK202 gave a high-high-level alarm when the tank level was at 14.528m which was below the High-High set level of 16.300m (“NTI 5”). This was a premature alarm but had no adverse impact on the system as the Surge Relief system responded in the same safe mode that is expected has the alarm triggered at the set level of 16.300m.*

ii. *The tank level alarm system is serviced bi-monthly. For tank 11TK202, the last service was*

carried out on 29<sup>th</sup> August 2011 and was certified to be functional (“NTI 6”).

iii. As a result of the pressure buildup on the downstream of valve 10MOV 401, the safety mechanism (SRV) operated effectively and a volume of 240 litres (ATG) relieved into slop tank 10TK 701.

iv. The pressure buildup in the pipeline system upstream of station valve 10MOV401 unexpectedly resulted in the gasket collapsing.

v. Between the Station inlet valve 10MOV401 and the gasket that gave in, there are five other gaskets on the mainline (Line 1) and two other gaskets on the Line ¼ by-pass line. All these gaskets were exposed to the same increased mainline pressures and only one was affected. See (NTI 7”)

vi. From the SCADA records (“NTI 8”) the maximum line pressures attained during the incident was 85.1bar. This was within operating pressure of 102 bar for class 600 pipe works and fittings. The installed line 4 pipe work and fittings are class 600.

vii. The SCADA system is maintained through a maintenance contract agreement with the original software developer/vendor, M/s Telvent of Canada. M/s Telvent normally log into the SCADA system remotely and together with Kenya Pipeline Company staff, carry out maintenance in accordance with the agreement. A report of the maintenance agreement usage for the month of August 2011 is attached (“NTI 9”). The report indicates that the system was in a healthy state except for secondary back up that needed to be restored.

viii. The location of the tie-in section where the gasket gave in is in close proximity to an open storm drain. As a result of the high pressure and rate at which petroleum product was gushing out from the flange of the affected gasket, some of the product accidentally spilt into the storm water drainage which discharges into a common Nairobi City Council storm drain outside KPC premises.

ix. KPC internal emergency procedures were initiated and followed. The emergency levels are three as per international incident Command System (ICS). The Company initiated Level 2 and Level 3 responses immediately the incident occurred. Level 2 response (with the company premises) for the company prevented a catastrophe within the premises while Level 3 response which involves offsite agencies was slow due to traffic jams along the main emergency response road network where the oil terminals are located in industrial area. The key roads here are; Jogoo, LungaLunga, Nanyuki, Outering, Likoni and Tanga.

x. Petroleum product volumes released is estimated at 37.8m<sup>3</sup> out of which 18.2m<sup>3</sup> were recovered putting the unaccounted product at 19.6m<sup>3</sup>.

xi. Reports indicate that the residents of the informal settlement at Sinai area had been collecting the spilt petroleum product from the open drainage thus exposing themselves to the hazards of petrol including suffocation and fire. It was also noted that Sinai residents had stored petroleum product in their houses presumably for sale. Consequently, KPC placed adverts in the local newspapers from 13<sup>th</sup> September 2011 to warn the public of the dangers of storing, using and selling such product.

## **6. CONCLUSION**

The following conclusions can be made from this investigation:

i. The system SRV operated as per design by relieving into tank 10TK701.

ii. All the other five (5) class 600 gaskets along Line 1 upstream of 10MOV 401 and two (2) other

*gaskets on the Line 4 by-pass that were exposed to the same conditions withstood the mainline pressure of 85.01 bar.*

**iii. The gasket that gave way at the Line 4/Line 1 tee-off flange collapsed at 85.01 bar which is 83.3% of its expected operating capacity.**

**iv. It is not exactly clear why the gasket failed under the prevailing conditions which were within normal operating characteristics of the system.**

*v. The emergency response plan worked well up to level 2. Level 3 which involves external emergency agencies had mixed results.”*

23. The respondents called four witnesses, RW1, the Director of Legal Services at the 2<sup>nd</sup> Respondent; RW2, the Head of Slum Upgrading in the Ministry of Land, Housing and Urban Development; RW3 Media Relations Officer of the Kenya Pipeline Company Limited; and RW4 the Director of City Planning for the 2<sup>nd</sup> Respondent County Government.

### **SUBMISSIONS**

24. The Counsel for the parties – M/S Alphonse Mutinda & Co Advocates for the Petitioners, M/s Moronge & Co. Advocates for the 2<sup>nd</sup> Respondent and Litigation Counsel Ms. A. Kamande for the Attorney General - respectively dated 16<sup>th</sup> December 2015, 18<sup>th</sup> December 2015 and 23<sup>rd</sup> December 2015. The Counsel for the parties made supplementary oral submissions before this Court on and judgment was reserved.

### **RESPECTIVE CASES OF THE PARTIES**

#### ***The Petitioner's Case***

25. The petitioner's submission was essentially based on the Rule in ***Rylands v. Fletcher*** founded on the Report of Investigations into the Sinai Fire Tragedy that has allegedly established the cause of the fire as a leaking gasket in the Government owned Kenya Pipeline Company, as follows:

#### ***“PETITIONERS SUBMISSIONS DATED 16TH DECEMBER 2015***

*16. Your lordship, the Kenya Pipeline Company limited is the state owned corporation that has among other mandates, the mandate to own, manage or operate the pipeline for the conveyance of petroleum products from Mombasa to the hinterland. The Company is 100% owned by the Government. See paragraph 1 at page 47 of the Petitioner's Supplementary list of Documents filed on 25<sup>th</sup> February, 2014.*

*17. The source of the fire that razed the informal Sinai Settlement is the fuel that escaped from the Company's fuel depot into a storm drain that runs through Sinai. The cause of the spillage was attributed to a damaged gasket. See paragraph 1 at page 61 of the Petitioner's Supplementary List of Documents.*

*18. The company requires that communities living along the Right of way-leave do observe a 15-20 meter buffer zone on both sides of a pipeline. See Paragraph 1 at page 24 of the 1<sup>st</sup> Respondent's Further Supplementary List of Documents filed on 29<sup>th</sup> September, 2015.*

*19. Your Lordship, the residents of the informal Sinai settlement were in compliance of this directive as the inhabitants of the settlement had relocated from the pipeline reserve in 2009. The settlement sits approximately 800 metres from the Kenya Pipeline facility and approximately 400 metres from the main pipeline's 30 metre reserve. See Paragraph 2 and Page 31 of the Petitioner's Supplementary List of Documents filed on 25<sup>th</sup> February, 2014.*

20. Your Lordship, the Rule formulated in *Rylands v Fletcher* [1861-731] All ER imposes a strict liability on the owner of land for damages caused by the escape of substances to his neighbour's land. This rule was restated in *David M Ndetev. Orbit Chemical Industries Limited* [2014]eKLR by Justice Emukule, wherein the rule is quoted as thus:

*"We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to for mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all damage which is the natural consequence of its escape"*

21. As has been pointed out earlier, the source of the fire was the fuel that escaped from the Kenya Pipeline facility, into the storm water drain that ran through the informal Sinai settlement. Your Lordship, this is captured in the final report of the Kenya Pipeline Company investigation on the spillage that occurred on 12<sup>th</sup> September, 2011. See Paragraph 2 at page 45 of the Petitioner's Further Supplementary List of Documents, which states:-

*"MSP products spilt on the ground and some escaped into a storm water drain that discharges into a common Nairobi City Council storm water drainage outside KPC premises"*.

22. This position is further buttressed in the same report at Paragraph 3 at page 66 of the Petitioner's Further Supplementary List of Documents, where it is stated:

*"The location of the tie-in section where the gasket gave in is in close proximity to an open storm drain. As a result of the high pressure and rate at which petroleum product was gushing out from the flange of the affected gasket, some of the product accidentally spilt into the storm water drainage which discharges into a common Nairobi City Council storm drain outside KPC premises."*

23. Lastly Your Lordship, this is also evident from the Memorandum of Sinai Fire Tragedy Paragraph 8 at page 58 of the Petitioner's List of Documents filed on 3<sup>rd</sup> October, 2012.

24. The rule in *Rylandsv. Fletcher* imposes strict liability on the Company, and as we have shown, the fuel escaped from their premises and into the settlement. Your lordship, this Honourable Court on the 12<sup>th</sup> of March, 2014 played the DVD taken by Peter Maina in open court, and the same showed the tragic events of 12<sup>th</sup> September, 2011 and showed the source of the fire as the fuel that escaped from the company's premises, and into the informal Sinai Settlement, as has been argued above.

The import of strict liability as espoused in *Rylandsv. Fletcher* is to the effect that as the fuel escaped from the Company's premises into the storm water drain that ran through the in formal Sinai settlement, the company is liable for the damage that ensued a consequence of the escape of the fuel, however careful the Company may have been to prevent the damage. The question is not whether the Company acted with due care and caution, but their acts occasioned damage, which we contend, that on the material presented before this Honourable Court, the Company's actions did cause damage.

26. Further Your Lordship, the Supreme Court of India, in analyzing the rule in *Rylandsv. Fletcher*, went on to state that the law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic development taking place in the country. As a consequence of this, the Supreme Court of India in *M.C Mehta & Another v. Union of India & Others* 1987 SCR (1) 819 expounded further on the rule in *Rylandsv. Fletcher*, and held that:

*"An enterprise which is engaged in hazardous or inherently dangerous which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding area, owes a non-delegable duty to the community to ensure that if any harm results to anyone, the*

*enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity must be conducted with the highest standards if safety and if any harm results in account of such activity, the enterprise must be absolutely liable to compensate for such harm irrespective of the fact the enterprise had taken reasonable care and that the enterprise had taken all reasonable care and that the harm occurred without any negligence on its part”.*

*27. We humbly submit that the findings of the Supreme Court of India are highly persuasive with regard to the instant case, and urge Your lordship to find that the persuasive with regard to the instant case, and urge Your Lordship for find that the Kenya Pipeline Company Limited owe the inhabitants of the informal Sinai settlement and non-delegable duty, and the Company is absolutely liable to compensate the families of the victims, and survivors of the fire tragedy for the loss of life and property that was the consequence of the fire that resulted from the fuel that leaked from the Company’s premises. And the Company is 100% owned by the State, it is our humble submission that the State should compensate the families of the victims and the survivors of the tragedy.”*

26. It was submitted on special damages that the petitioner had presented before the court medical bills that he had settled for the victims of the fire, and as regards general damages that the sum of 60,000/- and 10,000/- paid by the 1<sup>st</sup> respondent, respectively as funeral expenses and for loss of livestock, was in adequate and a figure of Ksh.1,000,000/- was suggested.

### ***The Respondents’ Case***

27. The respondents case as confirmed by the two physical planners RW3 and RW4 of the planning departments of the National Government and County Government was partly on un-alienated government land with encroachment on adjacent riparian, road, railway reserves and wayleaves for planned drainage and electric power, and as such the Sinai slum settlement was an unplanned settlement not meant for residential occupation and for which no infrastructural services and social amenities could be provided, the 2<sup>nd</sup> Respondent contending that as un-alienated government land, Sinai village was not part of the City County.

28. For the 1<sup>st</sup> Respondent, its case was summarised in the submissions of 23<sup>rd</sup> December 2015 as follows:

#### ***“1<sup>st</sup> RESPONDENT’S CASE***

*On behalf of national government, the 1<sup>st</sup> respondent opposed the petition through a replying affidavit dated 6<sup>th</sup> March, 2014. The same is sworn by Charles WafulaSikuku who is the Director, Department of slum upgrading under the Ministry of Lands and Housing. It is the 1<sup>st</sup> respondent’s case that the government is taking positive steps towards eliminating slums by upgrading informal settlements. Through their witnesses Charles WafulaSikuku and George KasujaaOnyonyi the 1<sup>st</sup> respondent testified that the government has ensured it meets its obligations variously under the constitution of Kenya by replacing the informal settlements with descent houses.*

*In particular it has embarked on a program to provide habitable housing to low income earners that live in informal settlements. The 1<sup>st</sup> respondent also testified that the government has put in place efforts to sensitize the people living around the pipeline depot of the lurking dangers that they expose themselves to. It is their case that the petitioners voluntarily exposed themselves to risk despite being warned severally of the effects of settling too close to the pipeline. Thus, the government is not liable for the tragedy that occurred on the said date.”*

29. As a matter of law the 1<sup>st</sup> respondent set up the defences of *volenti non fit injuria*; non specificity in the constitutional claims and want of evidence of breach of constitutional rights of the persons represented by the petitioner. The 2<sup>nd</sup> respondent denied any responsibility and obligation to provides water, road and other social services to the Sinai area on the grounds that it was an unalienated

government land for which it had control and it was reserved for power, railway and storm water drainage and not planned for settlement.

30. On the evidence, the 2<sup>nd</sup> respondent objected that it had not been shown that it was involved in causing the fire in any way. In its written submissions, the 2<sup>nd</sup> Respondent, accepting the Report on the Investigations into the cause of the Fire adduced by the petitioner, placed the blame on the 1<sup>st</sup> respondent, as follows:

**“2<sup>ND</sup> RESPONDENT SUBMISSION DATED 18<sup>TH</sup> DECEMBER, 2015**

7. **Your lordship**, the petitioner allege that its only the duty of the 2<sup>nd</sup> Respondent to provide the services of infrastructure, housing, health care, fire lighting, roads, water, clean environment and other social/amenities of the residents of Sinai and other persons residing within the County Government of Nairobi, however it is evident from the petitioner’s supporting documents and the testimonies of the petitioner and his witnesses that the Sinai fire tragedy was caused by a defective gasket that caused the spillage of oil from the Kenya Pipeline Company terminal in Nairobi and into the open storm water drainage, which oil spill later ignited thereby causing the fire in Sinai.

8. It is upon the Kenya Pipeline Company to provide and maintain an efficient reliable and safe pipeline system as well as a safe storage system for its petroleum products. The 2<sup>nd</sup> respondent had no authority to maintain the pipeline system nor does it monitor the KPC pipelines installations to ensure that they are efficient and safe.

9. **Your lordship**, it is the petitioner’s evidence and that of his witnesses that the cause of fire subject of this further amended petition was caused by a defective gasket at the Kenya pipeline company premises that caused the spillage of oil from KPC terminal in Nairobi into the storm water drainage and which followed the open storm water drainage which passes in the informal settlement at Sinai Village.

10. **Your lordship**, from the evidence tendered both by the petitioner, his witnesses, 1<sup>st</sup> and 2<sup>nd</sup> Respondents witnesses it is not disputed that the Sinai Village is situated in a way leave meant for the Kenya pipeline usage for transportation of its oil products and in the area the 2<sup>nd</sup> Respondent has built storm water drainage system that drains the water to the adjacent river. **Secondly**, it’s dangerous for humans to occupy the place because of the dangers, of the underground pipelines which transport highly inflammable oil. **Thirdly** the 3<sup>rd</sup> Respondent is not obliged to provide for sewage, sanitation and others services offered by them since the Sinai village is unalienated land that comprises of the referred unplanned settlement. Further part of the Sinai Village has encroached unto the nearby Riparian, Road and Railway reserves within the area therefore not habitable.

11. Your lordship, even if the infrastructure was available and other social amenities the fire would have not been prevented as per the evidence of the **PW 1**.

12. **Your lordship**, the 2<sup>nd</sup> Respondent had provided for a storm water drainage system within Sinai Area as required of them as per copy of the preliminary report on the Sinai fire Tragedy in the petitioners supplementary list of documents filed on 25.2.2014 at page 60 of the bundle (page 23) at paragraph 3 fourthline **“unfortunately due to infrastructure challenges of the informal settlement along the storm water drainage, crowd control proved difficult and hampered effective drainage, crowd control proved difficult and hampered effective containment of the situation in times”**.

13. Page 64 of the same bundle of documents at paragraph **VIII** which says, **“The location of the tie-in section where the gasket gave in is in close proximity to an open storm drain”**

14. Also the copy of the KPC final investigation report on the petroleum spillage that occurred on 12<sup>th</sup> September 2011 at the Nairobi terminal appearing in the petitioners further supplementary list of documents filed on 27.11.2014 at page 54 (page 4 of 30) at paragraph 3 which says “USP products split on the ground and some escaped into a storm water drain that discharges into a common Nairobi City council (NCC) storm water drainage outside KPC premises.

15 . Also the memorandum on Sinai fire tragedy appearing on page 56 of the petitioner’s list of documents filed on 3/10/2015 at Paragraph 8 which states that “The storm water, through which fuel from the pipeline facility found its way into the settlement, is open months after the incidence and still pours into the adjacent river”.

16. Lastly the 2<sup>nd</sup> Respondent was only called much later after the KPC was unable to contain the fire. See paragraph 4 at page 60 of the petitioner’s supplementary list of documents filed on 25.2.2014 (page 23 of 35).

17. **Your lordship**, as per the evidence on record and documents of the Petitioner and Respondents witnesses all are in agreement that the Sinai area is a wayleave and not fit for human occupation. Therefore not possible to construct roads sewage system and other amenities. Lastly infrastructure will have only assisted in quick rescue and the fire will not be averted at all costs.”

31. In addition, the 2<sup>nd</sup> respondent also pleaded **volenti non fit injuria** in defence of the petitioner’s claim for damages.

32. It was further submitted by the 2<sup>nd</sup> respondent that prescriptive title cannot be obtained on government land see s.41 of the Limitation of Actions Act as follows:

**“41. Exclusion of public land**

*This Act does not—*

*(a) enable a person to acquire any title to, or any easement over—*

*(i) Government land or land otherwise enjoyed by the Government;”*

Under the Act, “the Government” includes the Corporations, so that land whether vested in the County Government, National Government or the Kenya Pipeline Corporation itself, is under the protection of section 41 of the Limitation of actions Act and therefore no prescriptive tile is possible thereon.

33. It was not clear who owned the land on which the Sinai settlement stands. It was contended by the petitioners and apparently accepted by the respondents that the land was unalienated government land which under Article 61 (1) (a) of the Constitution would vest it in the County Government. Nothing however, turn on this because, no prescriptive title arises.

**ISSUES FOR DETERMINATION**

34. The Court in its Directions given 27<sup>th</sup> February 2012, before the subsequent amendments to the Petition identified the issues for determination as follows:

1. Whether the Petitioner’s rights and fundamental freedoms guaranteed under Articles 26, 27, 28, 29, 30, 31, 33, 36, 39, 40, 42, 45, 47, 48, 50,53,54,56 and 57 of eh Constitution have been threatened, infringed or violated by the respondents acts as alleged in the petition.

2. Whether the petitioners are entitled to the reliefs set out in the petition as against the respondents.

35. In his submissions of 16<sup>th</sup> December 2016, the Petitioner identifies the following issues for

determination in the Further Amended Petition:

- a. *Whether the petitioner has the locus standi to bring the instant proceedings;*
- b. *Whether the petitioner's constituent's rights guaranteed under Articles 27, 28, 29 (c) and (f), 39, 40, 42, 43 and 56 of the Constitution have been threatened, infringed or violated by the respondents;*
- c. *Whether the Government (State) is liable for the fire that razed the Sinai informal settlement on 12<sup>th</sup> September 2011; [and]*
- a. d. *Whether the petitioner is entitled to the reliefs sought.*

36. For the 1<sup>st</sup> respondent, the issues were set out as follows:

- (a) *Whether the government has violated the rights of the people of Sinai.*
- (b) *Whether the government is responsible for the tragedy that occurred on 12<sup>th</sup> September, 2011.*
- (c) *Whether damages are payable in a representative suit."*

37. The 2<sup>nd</sup> Respondent identified three issues as follows:

- i. *Whether the Petition discloses any cause of action against the 2<sup>nd</sup> Respondent, the County Government of Nairobi.*
- ii. *Whether the petitioner's rights and fundamental freedoms guaranteed under Articles 26, 27, 29, 40, 42, 43 of the Constitution have been threatened, infringed or violated by the 2<sup>nd</sup> Respondents acts as alleged in the Further Amended Petition.*
- iii. *Whether the Petitioner is entitled to the reliefs set out in the further amended petitioner as against the 2<sup>nd</sup> Respondent.*

38. The Court considers that as the right of the petitioner to file the proceedings is subsumed in the question of entitlement to the reliefs and the liability of each of the respondents must be determined before a violation of the rights and relief therefor is established, a formulation of two broad issues encompasses all the questions to be determined may be crafted along the same lines as the previous trial court, as follows:

1. *Whether the rights and fundamental freedoms of the petitioner's then constituents have been threatened, infringed or violated as alleged in the Further Amended Petition; and*
2. *Whether the Petitioner is entitled to the reliefs sought in the Further Amended Petition for alleged breach of the said rights and fundamental freedoms.*

## **DETERMINATION**

### **Locus Standi of the Petitioner**

## **FACTS OF THE CASE**

39. These facts were proved:

- a. There was a fire at Sinai Slum settlement in which some people and their livestock were burnt to ashes while others suffered serious injuries. Some of the injured were hospitalized for long periods

of time and they required reconstructive surgery and post injury care and treatment, the exact nature and extent of which varied from one victim to another.

- b. The Sinai Slum settlement occupied an area reserved for power, pipeline and railway wayleaves.
- c. The fire resulted from burning fuel in storm drainage channels in wayleave reserved for the Kenya Pipeline Company Limited.
- d. The fire-fighting and rescue operations were hampered by the lack of adequate road access to the settlement.
- e. The Respondents had not provided roads, water and other social services at the Sinai Settlement.
- f. The 1<sup>st</sup> respondent's Kenya Pipeline had since about March 2000 sought to remove illegal squatters from its wayleave in Mukuru and surrounding slums.

40. The following facts were disputed, and in accordance with section 107 and 108 of the Evidence Act, the petitioner had the burden of proof:

- a. The exact cause of the fire was not proved. The reference to the Report on Investigations was merely hearsay as makers of the Report were not called as witnesses and the deponent of the affidavit to which the Report on Investigation was attached was similarly not called as a witness in the suit.

41. The question of locus standi of the Petitioner may quickly be resolved by reference to Article 22 of the Constitution which entitles a person to file proceedings for enforcement or protection of rights and fundamental freedoms in the interests of a group or class of persons and in public interest:

*“22. (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.”*

42. The fire victims of Sinai village are in an ascertainable class of persons affected by the fire of the 12<sup>th</sup> September 2011 and their Member of Parliament, as indeed any other person, would be entitled in public interest to litigate alleged breach of their constitutional rights.

### **Breach of Rights and Fundamental Freedoms**

*The right to life, etc.*

43. The claim to violation of the right to life Article 26, inhuman and degrading treatment Article 29 (c) and (f), right to freedom of movement and residence Article 39 and right to property Article 40 required evidence that the respondents were responsible for the events of 12<sup>th</sup> September 2011 by which these rights were violated or threatened with violation. There being no positive proof of the cause of the fire that caused the destruction the subject of breach of these rights, the claim to violation of the rights cannot be

established. As regards freedom of residence, there cannot be a right to live on an area reserved for way leaves for the various services such as power, railway and pipeline. The right to freedom of movement and residence must relate in my view to occupation of lands lawfully acquired by the person, and there can be no lawful occupation on private property owned by another person or unlicensed or unalienated government or public property. There was no evidence of inhuman and degrading treatment in the sense of Article 29, which relates to treatment meted out on a person especially in penal consequences.

### *Personal Injury claim*

44. It is now accepted since the Court of Appeal's decision (Kwach, Cockar & Muli, JJA.) in **Speaker of the National Assembly v. James Njenga Karume** [1992] eKLR, [2008] KLR (EP) 423, that where a procedure is provided under the constitution or statute for the redress of a particular grievance that procedure should be strictly followed:

*"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."*

45. The passage above of **Karume** holding above has been followed in many subsequent cases of the Courts including the Court of Appeal in **Chimweli Janga Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others** [2016] eKLR. Save where it can be held that the alternative remedy is inadequate as in **Bernard Murage v Fineserve Africa Limited & 3 others** [2015] eKLR per Lenaola, J., (as he then was).

46. This accords with the [doctrine](#) of constitutional avoidance under the [United States constitutional law](#) where courts refuse to rule on a constitutional issue if the case can be resolved on a non-constitutional basis. [Ashwander v. Tennessee Valley Auth.](#), 297 U.S. 288, 347 (1936)" - The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."

47. The constitutional avoidance principle has been adopted in Kenya both by the Supreme Court and the Court of Appeal. In **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** [2014] eKLR, the Supreme Court said:

*"[256] The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:*

*"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."*

*[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).*

*[258] From the foundation of principle well developed in the comparative practice, we hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court."*

48. Similarly, the five – judge of the High Court (Lenaola, M. Ngugi, Ong'undi, Chemitei and Onguto, JJ.) in the **Security Law Amendment** case, [Pet. No. 260 of 2015 **C.O.R.D. v. The Republic & Ors.**] held that –

*“The doctrine of constitutional avoidance requires courts to resolve disputes on a constitutional basis **only** when a remedy depends on the constitution.”*

49. I consider that the matter of the claim for personal injury herein which is based on alleged breach of rights and fundamental freedoms may properly and fully be redressed without resort to the Constitution by a suit in negligence.

#### *Marginalised community and discrimination*

50. The question of affirmative action programmes designed to ensure that minorities and marginalised groups under Article 56 does not arise because the persons residing in slum settlements are clearly not marginalised communities or groups. Marginalised communities and groups are defined in the interpretative Article 260 of the Constitution as follows:

*“**“marginalised community”** means—*

*(a) a **community** that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;*

*(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;*

*(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or*

*(d) pastoral persons and communities, whether they are—*

*(i) nomadic; or*

*(ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole;*

*“**marginalised group**” means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4);”*

51. There was no proof of discrimination as a breach of Article 27 of the Constitution where it is shown that persons in this suit have been treated differently from other in similar situations.

#### ***Social economic rights***

**52. Article 43 of the Constitution is in the following terms:**

*“(1) Every person has the right—*

*(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;*

*(b) to accessible and adequate housing, and to reasonable standards of sanitation;*

*(c) to be free from hunger, and to have adequate food of acceptable quality;*

*(d) to clean and safe water in adequate quantities;*

*(e) to social security; and*

(f) to education.

**(2) A person shall not be denied emergency medical treatment.**

*(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.”*

53. In applying Article 43 of the Constitution, the context of Article 20 (5) is crucial:

“(5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

(a) it is the responsibility of the State to show that the resources are not available;

(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

(c) the court, tribunal or other authority **may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.”**

54. There is also the positive obligations of Article 21 of the Constitution as follows:

*“21. (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.*

**(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.**

*(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.*

*(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.”*

55. MumbiNgugi, J. in **Consumer Federation of Kenya (COFEK) v Attorney General & 4 others** [2012]eKLRheld as follows:

*“39. In considering whether or not the state has met its obligations under Article 43 of the Constitution, I take the view that what the court should consider is whether the state has taken reasonable policy and other measures to meet those obligations. I find support in this from a consideration of the position in South Africa, from which our Constitution has borrowed heavily. In **The Bill of Rights Handbook, Fifth Edition, By Iain Currie & Johan de Waal**, the authors observe as follows with regard to the state’s obligation to take **‘Reasonable Legislative and other measures’** so as to meet its obligation to ensure enjoyment of socio-economic rights by the citizen:*

***‘According to the Constitutional Court, the key to the justiciability of the socio-economic rights in the 1996 Constitution is the standard of reasonableness. Though a considerable margin of discretion must be given to the state in deciding how it is to go about fulfilling the socio-economic rights, the reasonableness of the measures that it adopts can be evaluated by a court.***

40. They then cite the decision of the Constitutional Court of South Africa in *Grootboom v Osterberg Municipality* 2000 (3) BCLR 227(C) where the court expressed itself as follows:

***‘The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spend.***

***The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measure could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.***

41. From the pleadings and submissions before me, I am unable to find that the petitioner has made out a case that shows a failure by the respondents to protect the rights guaranteed under Article 43. In this case, the petitioner has conceded that the policy measures taken by the state have ameliorated the situation of citizens. It must also be acknowledged, and this the petitioner did acknowledge in the submissions by Mr. Kurauka, that many factors, including a failure in rainfall, have a negative impact on the availability of food and the cost of living, and that such factors are not a result of the failure on the part of the state to take appropriate ‘policy and other measures’ to ensure the realisation by citizens of the socio-economic rights guaranteed under Article 43. The respondents have therefore in my view, taken ‘reasonable measures’ to meet their obligations under the constitution.

42. It is not possible, on the basis of the material before me, to discern any failure on the part of the respondents to fulfil their constitutional obligations under Article 43. In the circumstances, I find no merit in this petition and the same is hereby dismissed.”

56. The current position of the law in Kenya in regard to the matter of eviction from informal settlements has set down by the decision of the Court of Appeal in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR as follows:

#### DETERMINATION

141. We have considered all the other grounds of appeal and we are satisfied that the grounds analyzed in this appeal are adequate and sufficient to dispose the appeal. **We hasten to add that in any eviction, forcible or otherwise, adequate and reasonable notice should be given. Respect for human rights, fairness and dignity in carrying out the eviction should be observed. The constitutional and statutory provisions on fair administrative action must be adhered to. Based on the facts of this case and the relevant applicable law, the analysis we have conducted above leads us to arrive at the following conclusions and determinations:**

a. The trial court made correct findings as regards the 3<sup>rd</sup> respondent but erred in law in making final orders that are applicable and enforceable against the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent as Commissioner of Lands is under no legal obligation to allocate or alienate land that is already alienated and registered in the name of a third party; to this extent the trial court erred in law in making a composite order and issuing directives applicable and enforceable against the 3<sup>rd</sup> respondent.

b. The trial court erred in abdicating its judicial function and bestowing the same to persons and entities not vested with the constitutional mandate to identify and determine appropriate relief and resolution to the petitioners’ grievances.

c. *Subject to limited exceptions, delivery of judgment renders a trial court functus officio. The trial court erred in law in reserving for itself outstanding issues to be considered after judgment. The court further erred in allowing affidavits and or pleadings to be filed after delivery of judgment.*

d. *Whereas a court has jurisdictional competence to issue interim orders, the trial court failed to appreciate that the concept of partial or interim judgment is not part of the Kenyan legal system. Whereas a trial court has the jurisdictional competence to make interim orders, the trial court erred in delivering a judgment that was not a final judgment that determined the rights and liability of parties.*

e. *Under the political question doctrine and noting the provisions of Article 20(2) and 20 (5) (c) of the Constitution, a trial court should rarely interfere with a decision by a state organ concerning the allocation of available resources for progressive realization of socio-economic rights solely on the basis that it would have reached a different conclusion.*

f. *The trial court erred in law in issuing orders and directions on unpleaded issues.*

g. *The trial court erred in law and fact when it failed to properly evaluate the pleadings and evidence on record and to take into account critical aspects of evidence relating to the flight path to Wilson Airport; the court failed to evaluate the security and safety of the flight path viz-a- viz the structures in Mitumba village; the court failed to evaluate the issue of unregulated garbage attracting birds along Wilson Airport's flight path. Due to these failures, we interfere with the findings and conclusions made by the trial court and come to a determination that the trial court erred in fact and law in failing to properly evaluate the evidence on record.*

h. *The trial court erred in law in issuing orders and directions compelling the appellant to formulate policy and programs for provision of shelter and access to housing for residents of informal and slum settlements while ignoring the appellants express statutory mandate.*

142. *The totality of the foregoing errors leads us to find that this appeal has merit and is hereby allowed. We set aside in entirety the judgment, decree, orders and directions given by the trial court in its judgment dated 11<sup>th</sup> April 2013. We set aside all consequential orders ensuing therefrom. Having held that a trial court becomes functus officio after delivery of judgment and that no further pleadings can be filed after judgment, and that on the facts of this case the trial court has no post-judgment supervisory powers, we hereby direct that no further proceedings shall be conducted by the trial court emanating from the amended Petition dated 1<sup>st</sup> December 2011.*

57. The defence in this case that there is policy and programme for Slum Upgrading and Prevention and that there are no adequate resources to provide for Slum upgrading for Sinai according to the 1<sup>st</sup> Respondent and further that there is no obligation to provide service at unplanned settlements according to the 2<sup>nd</sup> Respondent. However, while the Court may not in accordance with Article 20 (5) interfere with the allocation of resources by the government, the Court may properly give directions where it considers that no reasonable provision is made for a particular vulnerable community or groups or persons. Where the government does not make any provision at all, on the explanation as here that the settlement is unplanned the State would have failed to implement under article 21(2) of the Constitution **“measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43”, and the Court may properly intervene.**

58. The 2<sup>nd</sup> Respondent cannot run away from its obligation under Section 36 of the Urban Areas and Cities Act 2011 (commencing 27<sup>th</sup> August at 2011), which provides as follows:

**“. PART V – INTEGRATED DEVELOPMENT PLANNING**

36. *Objectives of integrated urban areas and city development planning (1) Every city and municipality established under this Act shall operate within the framework of integrated*

development planning which shall— (a) give effect to the development of urban areas and cities as required by this Act and any other written law;

(b) strive to achieve the objects of devolved government as set out in Article 174 of the Constitution;

**(c) contribute to the protection and promotion of the fundamental rights and freedoms contained in Chapter Four of the Constitution and the progressive realization of the socio-economic rights;**

(d) be the basis for—

(i) the preparation of environmental management plans;

(ii) the preparation of valuation rolls for property taxation;

**(iii) provision of physical and social infrastructure and transportation;**

(iv) preparation of annual strategic plans for a city or municipality;

**(v) disaster preparedness and response;**

**(vi) overall delivery of service including provision of water, electricity, health, telecommunications and solid waste management; and**

(vii) the preparation of a geographic information system for a city or municipality; (e) nurture and promote development of informal commercial activities in an orderly and sustainable manner; (f) provide a framework for regulated urban agriculture; and (g) be the basis for development control.

(2) In addition to the objectives set out in subsection (1), an integrated urban or city development plan shall bind, guide and inform all planning development and decisions and ensure comprehensive inclusion of all functions.

**(3) A county government shall initiate an urban planning process for every settlement with a population of at least two thousand residents.”**

## **CONCLUSION**

### **The claim for personal injury**

59. In the present case, it is unnecessary to decide whether the claimants may recover personal injury damages through a constitutional law suit as there is already a procedure in common law and statute (the Law Reform Act and the Fatal accidents Act) through which the matter may be conveniently and full resolved. A remedy in the matter of damages sought in the petition does not depend on the Constitution; it is a matter of private civil law claim for damages for personal injury. Indeed, such a suit is pending before the Court in HCCC NO. 207 of 2012.

60. The court much empathises with the victims of the Sinai fire tragedy. In that fire many people perished, many others suffered debilitating injuries most which require future correctional surgeries, care and management; may people lost their property in the fire and their business ventures were reduced to rubble; social lives were upset in the resulting discord. To date as witnessed by the large following the case in court, people are still striving to come to terms with the incident of 12<sup>th</sup> September 2011. And the Court is not without sympathy.

61. However, this is not the proceedings through which to recover compensation for the loss for personal injury, whether it involved loss of life, limb, health or property. The claimants are obliged to file a suit in negligence for recovery of damages. In the suit the claimant would have to each prove his individual loss

in addition to establish the tests of liability with regard to breach of duty, causation and damage as reiterated by Lord Bingham in the House of Lords decision of *Fairchild v. Glenhaven Funeral Services*[2003] 1 A.C. 32,[2002] UKHL 22,when discussing the principle of causation in personalinjury cases as follows:

*“Principle*

*8. In a personal injury action based on negligence or breach of statutory duty the claimant seeks to establish a breach by the defendant of a duty owed to the claimant, which has caused him damage. For the purposes of analysis, and for the purpose of pleading, proving and resolving the claim, lawyers find it convenient to break the claim into its constituent elements: the duty, the breach, the damage and the causal connection between the breach and the damage. In the generality of personal injury actions, it is of course true that the claimant is required to discharge the burden of showing that the breach of which he complains caused the damage for which he claims and to do so by showing that but for the breach he would not have suffered the damage.”*

### **Articles 28, 42 and 43 claim**

62. Consistently with the right to dignity, clean environment and health, sanitation and other Article 43 rights, the respondents may while taking steps to remove the persons living in the various slums provide them with such services as necessary for the enjoyment of such rights. Therefore, while the respondents are involved in Slum upgrading and prevention programme for various slum settlements in the City and elsewhere in the Country, which may include relocation they must take measures to ensure that the persons living in the said slum settlements enjoy the rights to clean environment, health and housing in order to live in the dignity which is the object of constitutional guarantees.

63. The respondents are accordingly directed to comply with section 36 (3) of the Urban Areas and Cities Act 2011.

### **ORDERS**

64. For the reasons set out above, the Court makes the following orders on the Petitioner’s Further Amended Petition dated 3<sup>rd</sup> March 2014:

1. The respondents shall include Sinai Settlement as part of its Slum Upgrading and Prevention Programme with liberty to relocate or otherwise compensate the persons resident therein in order to clear the Kenya Pipeline wayleave.
2. As part of that programme, the persons living in the slums may be removed subject to *adequate and reasonable notice*.
3. In the meantime, the respondents will provide such services to the persons resident in Sinai Slums as are necessary for the enjoyment of their rights to health, sanitation, adequate housing and dignity in accordance with the Urban Areas and Cities Act 2011.

65 . There shall be no order as to costs.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY 2017.**

**E. C. MWITA**

**JUDGE**

**Appearances:**

Mr. Mutinda with Mr. Ambani and Ms. Kwamboka respectively instructed by M/S Alphonse Mutinda & C. Advocates and M/S L. Kwamboka & Co. Advocates for the Petitioner

Ms. Kamande for Attorney General for 1<sup>st</sup> Respondent

Ms. Matunda instructed by M/S Moronge & Co. Advocates for the 2<sup>nd</sup> Respondent