



Magugu (Suing as the Administratrix of the Estate of the Late Arthur K. Magugu) v Karura Investment Limited & 5 others; Law Society of Kenya (Interested Party) (Petition E241 of 2024) [2025] KEHC 15857 (KLR) (Constitutional and Human Rights) (6 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E241 OF 2024
LN MUGAMBI, J
NOVEMBER 6, 2025**

BETWEEN

MARGARET WAIRIMU MAGUGU (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE ARTHUR K. MAGUGU) PETITIONER

AND

**KARURA INVESTMENT LIMITED 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
DIRECTORATE OF CRIMINAL INVESTIGATIONS 4TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 5TH RESPONDENT
DIRECTOR OF SURVEY OF KENYA 6TH RESPONDENT**

AND

LAW SOCIETY OF KENYA INTERESTED PARTY

JUDGMENT

Introduction

1. The original Petition dated 24th May 2024 was amended on 31st July 2024.
2. The Petition is supported by the Petitioner’s affidavit of even date and supplementary affidavits dated 21st June 2024 and 22nd August 2024.



3. The gist of this Petition are allegations of fraudulent and illegal scheme in the sub-division of L.R. 12422/204 and the ensuing alleged fraudulent acquisition of land parcel LR. No. 12422/319 by the 1st Respondent. The Petitioner thus contends that through the perpetration of the said unlawful and fraudulent schemes, her constitutional rights to property have been violated by the Respondents.
4. Consequently, the Petitioner seeks the following reliefs against the Respondents:
 - i. A declaration that the Petitioner's constitutional right to property and/or interest in or over the property LR. No. 12422/319 deserves the protection by the Court and that the protection do issue accordingly in terms of the declaration that the acquisition of the said properties by the 1st Respondent was arbitrary, unconstitutional, irregular, unprocedural, tainted, a nullity ab initio and therefore not worthy of any constitutional protection.
 - ii. A declaration that the subdivision of LR. No. 12422/204 was fraudulent, illegal and unlawful.
 - iii. A Declaration that all the subsequent subdivisions of LR. No. 12422/204 being LR. No. 12422/318 and LR. 12422/319 are a nullity ab initio.
 - iv. A declaration do issue that the acts of the Respondents of unlawfully attempting to deprive the Petitioner of the of land LR. No. 12422/204 in the light of the above was without any legal basis, an act of illegality and unconstitutional and are liable to the Petitioner in compensation and/or damages for losses, for loss of use land and for breach of their constitutional rights on such compensation as shall be assessed by the Court.
 - v. The 2nd Respondent be ordered to revoke and cancel the titles LR. No. 12422/318 and LR. No. 12422/319.
 - vi. The 2nd Respondent be ordered to restore Petitioner's LR. No 12422/204.
 - vii. Damages as against the Respondents, jointly and severally, for their acts of aiding and abetting the illegal, unconstitutionality of the acts above, of issuing suspect titles and for breach and/or violation of the Petitioner's constitutional right to property and protection of the same.
 - viii. Mesne profits.
 - ix. Costs of this Petition.
 - x. Interest on prayers 6 and 8.
 - xi. Any other or further order that this Honorable court deems fit and necessary to grant.

Petitioner's Case

5. The Petitioner depones that she is the administratrix of the Estate of the late Arthur Kinyanjui Magugu who was her husband and registered proprietor of land parcel LR No.12422/9 (IR No.37277) measuring 41.13 hectares. Her husband died on 15th September 2012. She stated that they have been occupation of the land since her husband acquired it.
6. The Petitioner depones that on 19th February 1991, her deceased husband obtained the requisite consent from Nairobi Land Control Board to subdivide the said property into two portions and which was accomplished and was issued with two Certificates of Title namely: L.R. No.12422/203 measuring 5.26 Ha and L.R.No.12422/204 measuring 35. 87 Ha on 25/10/1993 following that subdivision.



7. Her husband (now deceased) sold one of the land parcels, L.R.No.12422/203 to one Samson Muriithi Nduhiu (also deceased) for Ksh.5,200,000 while land parcel 12422/204 remained in her late husband's name.
8. The Petitioner contends that the remaining parcel, L.R.No.12422/204; she discovered in the course of collecting the estate of her deceased husband that the remaining parcel was without her deceased husband's knowledge or consent subdivided into L.R.No.12422/318 and L.R.No.12422/319. That the 1st Respondent was purportedly registered as the owner of L.R. No.12422/319, a parcel of land currently valued at 17 billion Shillings.
9. The Petitioner alleges that she lodged a complaint with the Directorate of Criminal Investigation (DCI) in 2018 which investigation confirmed the creation of false certificate of title and LRs nos. 12422/318 and 12422/319, presenting for registration that bore fake signatures of her deceased husband, uttering false consent dated 10th September, 1993, and a forged application dated 18th February, 1992 for subdivision of LR No. 12422/204 to the Director of Survey which was allocated to computation number 23380 which was similar to computation number initially allocated to LR 12422/9 among other illegalities.
10. That the alleged consent to transfer land LR No. 12422/319 to the 1st Respondent by the Petitioner's deceased husband was allegedly issued on 10th September 1993 long before the certificate of title to LR 12422/204 was created or issued considering that it was issued on 25th October, 1993 showing thus that the purported consent was in respect of a non-existing property. Besides, there was neither an application nor consent for subdivision of LR 12422/204 to LR 12422/319. Further, no evidence of sub-division schemes nor certificates of subdivision exist or are available in respect of LR 12422/319.
11. The Petitioner alleges that the subdivision of LR 12422/204 into LR 12422/318 and 12422/319 as well as the subsequent acquisition by the 1st Respondent was done by means of forged documents and is unlawful and infringes on Petitioner's rights under Article 40.
12. She depones the fraudulent scheme was hatched when the 1st and 2nd Respondent orchestrated the registry file for land parcel number LR 12422/204 belonging to her late husband to disappear to give way for the publication of gazette notice number 4169 of 20/6/2014 for LR 12422/319 wherein the 1st Respondent purporting to reconstruct the file was given the chance to introduce the forgeries by colluding with the 2nd and 6th Respondents.
13. The Petitioner as a result argues that the invasion and trespass of the cited property violated her right to property under Article 40 of *the Constitution*. She avers that she has suffered substantial loss owing to the 1st Respondent's unlawful actions of trespass and fraudulent sub-division of L.R.No.12422/204 and the subsequent transfer of L.R.No.12422/319. Consequently, she contends that the Title held by the 1st Respondent is illegal as was acquired unlawfully.
14. The Petitioner depones that she lodged a complaint with the National Land Commission in 2016 however the Commission argued that it lacked jurisdiction to handle the matter as raises fraud issues. In addition, she avers that she was appointed the Administratrix of the estate on the 10th October, 2016. She notes that prior to the confirmation of the grant, she lacked the requisite legal capacity to deal with the estate, however subsequent to the issuance of the said grant, she instituted Nairobi High Court ELC No. 159 of 2017 which was struck out for being statute barred under Section 7 of limitations of Actions Act and a subsequent Appeal No. 3 of 2018 was also dismissed.
15. The Petitioner states that she filed Civil Appeal No.10 of 2019 seeking leave to appeal to the Supreme Court. Further she filed ELC (OS) No. E001 of 2024 to seek leave to file a suit outside the limitation



period, she however withdrew this suit before it was heard. Additionally, she also filed Milimani ELC No. E124 of 2024 which she similarly withdrew arguing that the Court lacks jurisdiction to entertain constitutional matters. She also avers that she attended a parliamentary committee which was an inquiry provided for under Parliamentary rules under Inquiry No. 321/2022. She states however that the Committee failed to reach a decision as the parliamentary term ended.

16. The Petitioner contends that the 2nd Respondent's actions violated her rights under Article 27(1), 40 and 47 of *the Constitution*. Moreover, she faults the 2nd, 4th and 6th Respondent's for overlooking obvious irregular subdivision of the land in question and despite bringing the matter to their attention they have declined to take any action.
17. She avers that she despite lodging her complaint with the 4th Respondent in 2018 and investigations being done; She alleges has to date not been updated on the position of her matter despite making numerous follow ups.

1st Respondent's Case

18. In response to the Petitioner's case, the 1st Respondent through its Director, Sureshchandra Raichand Shah filed a replying affidavit sworn on 12th July 2024.
19. He asserts that the Petition is an abuse of the Court process as is designed to circumvent dismissal of the Petitioner's cause of action in ELC case no.159 of 2017: Margaret Magugu (Suing as the Administratrix of the Estate of the Late Arthur K. Magugu) v Karura Investment Limited and others owing to the operation of Section 7 of the *Limitation of Actions Act*.
20. Equally, he points out that the Petition is framed as raising constitutional questions yet the same are questions revolving around land which this Court lacks jurisdiction to entertain. He adds that the Petition is also offensive to the doctrine of constitutional avoidance. Additionally, he argues that this Petition invokes the doctrine of res judicata as the matter was already determined by this Court and dismissed and later on also dismissed by the Court of Appeal in Civil Appeal No. 3 of 2018.
21. He maintains that the Petitioner's case against the 1st Respondent as stated is barred by operation of Section 7 of the *Limitation of Actions Act* as read with the Section 26 of the Act. This is because the alleged fraud was never reported within the stipulated timeframe but 24 years later. He stresses thus that this Petition is an afterthought.
22. He depones that the Petitioner being dissatisfied with the Court of Appeal's decision, filed Civil Application No.10 of 2019 in the Court of Appeal on 23rd May 2019, seeking to appeal the decision in the Supreme Court. He states that the Petitioner however thereafter withdrew the matter. He informs that the Petitioner went on to file two suits other suits in ELC No. E001 of 2024 (OC) and ELC No. E124 of 2024. He asserts that in like manner the Petitioner withdrew these cases. He adds that the Petitioner also moved the National Assembly Departmental Committee on Lands on 4th October 2021 so that they may investigate the matter.
23. He depones that contrary to the Petitioner's allegations, the deceased undertook the cited sub-division of L.R. No./12422/204 to L.R. No.12422/318 and L.R. No.12422/319 and subsequently transferred the latter to the 1st Respondent. He notes that since the day of the purchase, this parcel of land has been occupied by the 1st Respondent, which is over 20 years.
24. Considering this, he contends that the 1st Respondent is entitled to peaceful enjoyment of the suit property by dint of Article 40 of *the Constitution*. For this reason, he argues that the averments against the 1st Respondent in the Petition are false and claims of forgeries unfounded.



25. He depones moreover that the National Land Commission following the Petitioner's complaint in its letter dated 23rd December 2016 affirmed the legitimate ownership of the said property, by the 1st Respondent.
26. He in sum, adjudges the Petition as being vexatious since the Petitioner has filed this suit against the 1st Respondent without any reasonable cause. Further in light of the multiple suits instigated, he argues that the Petitioner should be barred from abusing the discretion of the Courts. In view of the foregoing, he argues that the Petition should be dismissed.
27. In addition, the 1st Respondent filed a Notice of Preliminary Objection dated 29th January 2025 on the ground that:

The matter before the Court being a claim over L.R.No.12422/319 is within the exclusive jurisdiction of the Environment and Land Court and this Court by virtue of Articles 165(5) (b) and 162(2) has no jurisdiction to hear the matter.

2nd and 3rd Respondents' Case

28. These Respondents in reaction to the Petition filed their Notice of Preliminary Objection dated 29th May 2024 on the basis that:
 - i. This Court is divested of jurisdiction to hear and determine the Petition by dint of Article 162(2)(b) of *the Constitution*. The Court of Appeal in the case of Phoenix of E.A. Assurance Company Limited versus Simeon Muruchi Thiga t/a Newspaper Service [2019] eKLR held:

"At the heard of his appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a Court or a Tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a Court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a Court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such Court will be amenable to being set aside ex debito justitiae."
 - ii. The Petition herein is statute barred under Section 26 of the *Limitation of Actions Act*, which provides that the period of limitation for fraud begins to run when the fraud is discovered or could with reasonable diligence have been discovered. The Court of Appeal in Margaret Wairimu Magugu v Karura Investment Limited and others (2019) eKLR the Court cited with approval, Paragon Finance v D.D. Thackerar and Co. (1999) 1 All ER 400 where the Supreme Court of England stated that:

"The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could have discovered the fraud without exceptional measures which they could not reasonably have expected to take."
 - iii. The Petition offends the doctrine of constitutional avoidance.
 - iv. The Petition is an abuse of the Court process. The Court of Appeal in the case of Muchanga Investment Ltd versus Safaris Unlimited (Africa) Limited & 2 others (2009) held that:



"In our view, the often-quoted principle that a party should have his day in Court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the Court on a need basis and not as a matter of routine.

Judicial time is the only resource the Courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice."

Lord Diplock in *Hunter v Chief Constable of West Midlands Police & Others* (1982) AC 529 stated as follows:

"The inherent power which any Court of justice must possess to prevent misuse of procedure which, although not inconsistent with the literal procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people."

v. The Petition herein is res judicata. The Court of Appeal in *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR held that:

"The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

- i. The suit or issue was directly and substantially in issue in the former suit.
- ii. That former suit was between the same parties or parties under whom they or any of them claim.
- iii. Those parties were litigating under the same title.
- iv. The issue was heard and finally determined in the former suit.
- v. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

4th Respondent's Case

29. The 4th Respondent filed its Replying Affidavit by its Chief Inspector of Police, Jackson Guyo sworn on 10th September 2024.
30. He states that the 4th Respondent undertook an inquiry into the alleged fraudulent and illegal subdivision of land parcel LR.12422/204 by a surveyor called James Kamwere into the two parcels being LR.No.12422/318 and LR. No. 12422/319.
31. He depones that the complainant, the Petitioner herein, reported the matter to the 4th Respondent through her advocate, J.M. Kariuki and Company Advocates vide a letter dated 23rd August 2018 and another dated 15th September 2020. He avers that the Petitioner postulated that this illegal scheme had been orchestrated by the one, S.A. Harunani a shareholder at the 1st Respondent and the surveyor, James Kamwere.
32. He informs that all person adversely mentioned in the matter were summoned and their statements recorded as detailed in the affidavit. He avers that their investigation following this receipt of these statements and the procured documentary evidence, it was established with reference to the dispute herein that, the deceased was the registered owner of LR.No.12422/9 (IR No.37227) measuring 41.13 hectares and was issued with a Certificate of Title on 16th December 1982.



33. Later on, on 19th February 1991 the deceased appointed Kamwere and Associate Surveyors to sub-divide this parcel. As a result, the said property was sub-divided into LR.No.12422/203 and LR. No. 12422/204. He states that this sub-division was approved by the Director of Survey after the deceased instructed the James Kamwere to represent him before the Land Control Board. He avers that the deceased thereafter in 1992 instructed, James Kamwere to sub-divide LR.No.12422/204 into two portions being LR.12422/318 and LR.No.12422/319. He informs that this was done with the view of clearing a loan the deceased had taken.
34. He states that following the sub -division, the deceased approached one, the late Sobhagyachand Shah to purchase LR No.12422/319.He states that in a bid to assist him, the late Sobhagyachand approached the community to discuss how they would assist the deceased so as to offset the Ksh.36,742,880.05 loan. It is at this point that the 1st Respondent was created so as to assist the deceased and enable them purchase this property. Thereafter the Sale Agreement was drafted by Shah and Parekh Advocates, although the said Agreement was later on destroyed by the firm after lapse of the statutory timelines in law.
35. He notes that a complaint similar to that of the Petitioner was also lodged by one George Njoroge Kariuki against the 1st Respondent claiming that LR.No.12422/319 is his parcel of land in CR.No.121/259/2023 and CF No. E504 of 2023.
36. In sum, he avers that at the end of their investigations they concluded that there was no criminal element as purported by the Petitioner and thus recommended that the Petitioner seeks redress in a civil court. This recommendation was approved by the 5th Respondent and a similar recommendation made.

5th Respondent's Case

37. In reply, the 5th Respondent filed its Grounds of Opposition dated 15th October 2024 and founded its case on the premise that:
- i. The Prayers sought by the Petition are unconstitutional as they seek to prevent the Director of Public Prosecutions from exercising its mandate as provided under Article 157 of *the Constitution*. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.
 - ii. Under Article 157(10) of *the Constitution* and Section 6 of the Office of the Director of Public Prosecution Act (2013) the 3rd Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.
 - iii. Section 24 of the *National Police Service Act* mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.
 - iv. The Applicants have not adduced reasonable evidence to show that the 5th Respondent violated their rights by virtue of Article 47 of *the Constitution*.
 - v. The Petitioner must demonstrate that the 5th Respondent would occasion substantial injustice that would otherwise result in violation of their fundamental rights.
 - vi. The Petition is premature as investigations are still ongoing and the 5th Respondent has not yet made a decision to charge.



vii. The Petition is without merit and should be dismissed with cost to the 3rd Respondent.

6th Respondent and Interested Party's Case

38. These parties' response and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

39. J. M. Kariuki and Company Advocates for the Petitioner filed submissions dated 10th July 2024 and set out the key issues as: whether the preliminary objection is properly raised, whether this Court has jurisdiction to determine this Petition, whether the Petition raises constitutional issues, whether the Petition offends the doctrine of constitutional avoidance, whether the Petition is res judicata, whether the Petition is statute barred under Section 7 and 26 of the *Limitation of Actions Act* and whether the Petition is an abuse of the process of this Court.

40. Counsel on the first issue argued that the 2nd and 3rd Respondent's Preliminary Objection does not qualify as raising points of law as requires this Court to examine the facts pleaded by the Petitioner. Reliance was placed in *Mukisa Biscuits Manufacturing Company Limited vs West End Distributors (1969)JEA 696* where it was held that:

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence.”

41. Like dependence was placed in *Oraro Vs Mbaja (2005) KLR 141* and *Independent Electoral & Boundaries Commission V Jane Cheprenger & 2 Others (2015) eKLR*.

42. On jurisdiction, Counsel emphasized that the Petition wholly revolves around violation of the Petitioner's constitutional rights under Articles 10(b)(c), 27(1) and (2), 40(1) and (3), 47(1) and 244(a)(b) and (c) of *the Constitution* and thus this Court has jurisdiction under Article 165(3)(b) and (d) of *the Constitution* to determine this Petition. Dependence was placed in *Samuel Kamau Macharia Vs Kenya Commercial Bank Limited Civil Application No. 2 OF 2011* where it was held that:

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

43. Like dependence was placed in *Communications Commission Of Kenya & 5 Others V Royal Media Services Limited & 5 others (2014) eKLR*.

44. Counsel in the next issue submitted that contrary to the Respondents allegations, the Petition raises constitutional questions as demonstrates violation of the Petitioner's constitutional rights. Reliance was placed in *CNM v WMG (2018)eKLR* where it was held that:

“When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights or values”

45. Equally, Counsel in the next issue submitted that that the Petition does not offend the doctrine of constitutional avoidance since the issues raised in the Petition fall squarely within the jurisdiction



of this Court. Reliance was placed in *Brookside Dairy Limited V Mohamed & Anor Constitution Petition E339 Of 2022* where it was held that:

“The doctrine of constitutional avoidance does not divest this court of the jurisdiction to hear and determine this matter. What the doctrine means is that while this court can in deed hear and determine the matter, it restrains itself to hear the same because there is another appropriate forum that can hear and determine the matter effectively.”

46. Similar reliance was placed in *Ashwander V Tennessee Valley Authority, 297 U.S 288,347 (1936)* and *Communications Commission of Kenya & 5 Others (supra)*.
47. Counsel on the following issue highlighted that the Supreme Court in *John Florence Maritime Services Limited & Another Vs Cabinet Secretary For Transport & Infrastructure & 3 Others (2021)eKLR* outlined the principles of res judicata as:
 - i. There is a former judgement or order which was final;
 - ii. The judgement or order was on merit;
 - iii. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties.
 - iv. There must be between the first and the second action identical parties. subject matter and cause of action.
48. Comparable reliance was placed in *Benard Mugo Ndegwa V James Nderitu Githae & 2 Others (2010) eKLR*, *Rachael Bett Sibor V. Jackson Koech Civil Appeal No. 83 Of 2016(2019) eKLR*, *Independent Electoral & Boundaries Commission V Maina Kiai & 5 Others (2017) eKLR*, *Moses Mbatia V Joseph Wamburu Kihara (2021) eKLR*, *Suleiman Said Shabhal V Independent electoral & Boundaries Commission & 3 Others (2014) eKLR*, *Accredo Ag & 3 Others V Steffano Ucelli & Anor Civil Appeal No. 43 of 2018 [2019] eKLR*, and *Mitu -Bell Welfare Society V. Kenya Airports Authority & 2 Others (2021) eKLR*.
49. Counsel in this regard submitted that the suit in ELC No.159 of 2017 was not heard and determined on merit but was struck out on account of a Notice of Preliminary Objection raised by the Respondents in relation to Section 7 of *Limitation of Actions Act* for being statute barred. Counsel stressed that the issues therein thus remained undetermined on merit.
50. Further on whether this Petition is time barred, Counsel equally submitted that the Court would have to examine the facts of the case to determine this issue. Nonetheless Counsel submitted that the Petition raises constitutional issues which are not bound by the restrictions of time. Furthermore, Counsel submitted that the parties in the two suits are not similar as this Petition includes the 4th, 5th and 6th Respondents. Counsel further submitted that the issues raised in the two Petitions are dissimilar.
51. Counsel on the final issue, submitted that a suit can only be deemed an abuse of the Court process when it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak beyond redemption, which this Petition is not. Reliance was placed in Kenya Section of The



International Commission of Jurists V Attorney General & Two Others (Supreme Court. Application No. 1 of 2012 where it was held that:

“The concept of abuse of the process of court bears no fixed meanings but has to do with the motive behind the guilty Party’s actions and with a perceived attempt to maneuver the court’s Jurisdiction in a manner incompatible with the goals of justice.”

52. Equal dependence was placed in *Nishith Yogendra Patel V Pascale Miraille Baksh & Anor* (2009) eKLR and *Satya Bhama Gandhi V Director Of Public Prosecutions & 3 Others* (2018)eKLR.

1st Respondent’s Submissions

53. The 1st Respondent through AhmedNassir Abdullahi Advocates LLP filed submissions dated 15th July 2024 and underscored the key issue as: whether this Court has the requisite jurisdiction to entertain this Petition.

54. Counsel submitted that this Court lacks jurisdiction to determine this matter as the dispute lies with the Environment and Land Court (ELC), offends the doctrine of res judicata and suit is an abuse of the Court process. Counsel on the first issue, submitted that the ELC has original jurisdiction to hear and determine any other dispute relating to environment and land.

55. To buttress this point reliance was placed in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR) where it was held that:

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

56. Equal dependence was placed in *Hunter v Chief Constable of West Midlands Police & Others* [1981] 3 ALL E.R. 727.

57. On res judicata, Counsel submitted that the Petitioner had been moving from Court to Court over the issue of ownership of the suit property against the 1st Respondent which has been unsuccessful. According to Counsel, this action invokes the doctrine of res judicata as the matter has been determined by two courts of competent jurisdiction. Counsel noted that the Petitioner had now filed this Petition raising the same issues while disguising them as constitutional issues.

58. Dependence was placed in *Independent Electoral and Boundaries Commission v Maina Kiai and 5 others* (2017)eKLR where it was held that:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”



59. Comparable reliance was placed in John Florence Maritime Services Limited and another (supra) and Njangu v Wambugu and another Nairobi HCCC No.2340 of 1991(unreported).
60. Counsel in this regard submitted that the Court should frown upon litigants who are keen on instigating vexatious proceedings at the expense of other parties. Counsel further pointed out that the Petitioner raises an issue of fraud which action is barred by operation of the Statute of Limitation as also underscored in Justus Tureti Obara v Peter Koipetai Nengisoi[2014]eKLR. Owing to this, Counsel submitted that the Petition is incompetent.
61. Counsel further argued that the Petition is non-justiciable as invokes the doctrine of constitutional avoidance. Reliance was placed in Communications Commission of Kenya & 5 others (supra) where it was held that:
- “The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

3rd Respondent’s Submissions

62. Deputy Chief State Counsel, Allan Kamau Njoroge filed submissions dated 16th May 2024.
63. On whether this Court has jurisdiction to entertain this matter, Counsel submitted that this Court must only deal with a Petition that falls within the parameters of constitutional petitions in line with its jurisdiction under Article 165 of *the Constitution*. On the importance of jurisdiction, Counsel relied in Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others (2013]eKLR where it was held that:
- “So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”
64. Like dependence was placed in Owner of the Motor Vessel Lillian "S"(supra), Samuel Kamau Macharia(supra), Phoenix of E.A. Assurance Company Limited v S.M.Thiga t/a Newspaper Services(2019)eKLR, National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others[2023]KECA 80 (KLR), Kenya Ports Authority Ltd v Modern Holdings (EA) Ltd [2017] eKLR and In Re the Matter of the Interim Independent Electoral Commission (2011) eKLR.
65. Counsel challenged this Court’s jurisdiction to entertain this suit as the matter falls within the exclusive jurisdiction of the Environment and Land Court under Article 162(2)(b) of *the Constitution*. This is since it exclusively relates and revolves around land parcel L.R.No.12422/319 in relation to the alleged fraud. In view of this, Counsel submitted that the instant Petition falls short of a constitutional petition. Reliance was placed in Communications Commission of Kenya and 5 others(supra) where it was held that:
- “Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the



aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

66. Like dependence was placed in *Fredricks & Other v MEC for Education and Training, Eastern Cape and others* (2002) 23 ILJ 81 CC.
67. On whether this Petition offends the doctrine of *res judicata*, Counsel answered in the affirmative. This is since the instant Petition were directly and substantially ventilated in the previous former suit to wit the Court of Appeal decision in *Margaret Wairimu Magugu v Karura Investment Limited and others* [2019] eKLR and hence the same issues cannot be determined again. He adds that this doctrine does not only apply to the Petition but also applications.
68. To buttress this point reliance was placed in *Kamunye & Others vs the Pioneer General Assurance Society Ltd* [1971] EA 263 where it was held that:

“The rationale behind *res judicata* is based on public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments by concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unravelling uncontrollably”.
69. Comparable reliance was placed in *ET vs Attorney General and another* [2012] eKLR, *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* (2015)eKLR and *Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others* (1996] eKLR.

Other Parties Submissions

70. The other Parties submissions are not in the Court file or Court Online Platform (CTS).

Analysis and Determination

71. Having regard to pleadings and submissions of counsels in this Petition, I opine that there are only three key issues that deserve the attention of this Court in the instant Petition, namely:
 - i. Whether this Court has jurisdiction to entertain this dispute.
 - ii. Whether the Petition is merited.
 - iii. Whether the Petitioner is entitled to the reliefs sought.

Whether this Court has jurisdiction to entertain this dispute.

72. The Respondents contended that the nature of this Petition is a grievance which falls within the jurisdiction or competence of the Environment and Land Court, which is the specialized Court to deal with land matters as envisaged by Article 162(2) (b) of *the Constitution*. This argument was vehemently opposed by the Petitioner who argued that the Petition raises questions of violation of rights and



fundamental freedoms under Articles 10 (b), 27 (1) & (2), 40 (1) & (3) and 47 (1) which squarely fall within the purview of the High Court jurisdiction by dint of Article 165 (3) (b) and (d) of *the Constitution*.

73. A Court of law should not delve into merits of a case before settling a jurisdictional question that has been raised. This is because a decision made without jurisdiction is a nullity in law and is of no legal effect whatsoever. That principle was concisely laid down by the Court of Appeal in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR) where the Court emphatically stated thus:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

74. Correspondingly, the Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR guided thus:

“68. A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

75. The question that ranks in priority in the instant matter is therefore to decide if this matters falls within the jurisdiction of this Court (that is, the High Court) or the Environment and Land Court.
76. The Petition alleges violation of rights and fundamental freedoms as well as breach of constitutional values. In particular, the Petitioner alleges infringement of Article 10 (b) (c), 27 (1) & (2), 40 (1) & (3), 47 (1), 244 (a) & (b) of *the Constitution*.
77. Article 165 (3) (b) and (d) confers jurisdiction to the High Court in the following areas relevant to this Petition:
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;



- d) jurisdiction to hear any question respecting the interpretation of this Constitution including determination of:
-
- ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution.
78. However, the jurisdiction of the Constitutional jurisdiction of the High Court is by dint Article 165 (5) limited to the extent that there are matters that are exempted from the jurisdiction of the High Court. Article 165 (5)- the High Court shall not have jurisdiction in respect of:
- a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution or;
- b) falling within the jurisdiction of the Court's contemplated in Article 162 (2)
79. In that case, it thus becomes necessary to consider whether in the context of this case, whether it is the High Court or the ELC Court that has jurisdiction given the factual situation, the applicable law and the Constitutional provisions.
80. Article 162(2)(b) of *the Constitution* makes provision for Parliament to establish courts with status of the High Court to hear and determine disputes relating to “the environment and use and occupation, of and title to, land” while Article 162 (3) provides that Parliament shall determine the jurisdiction and functions of those courts.
81. As authorized by Article 162 (3) of *the Constitution*; Parliament enacted the *Environment and Land Court Act* which has the jurisdiction to deal with matters pertaining environment and land.
82. The Jurisdiction of the Environment and Land Court is outlined in under Section 13 of the Act as follows:

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

- (1) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b. relating to compulsory acquisition of land;
- c. relating to land administration and management;
- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e. any other dispute relating to environment and land.

Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.



- (2) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - a. interim or permanent preservation orders including injunctions;
 - b. prerogative orders;
 - c. award of damages;
 - d. compensation;
 - e. specific performance;
 - f. restitution;
 - g. declaration; or
 - h. costs.

83. The Supreme Court in *Republic v Chengo & 2 others* [2017] KESC *Republic v Chengo & 2 others* [2017] KESC 15 (KLR) made it clear there are distinct jurisdictional roles between the High Court and Courts of equal status. It held thus:

“[50] It is against the above background, that Article 162(1) categorizes the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of *the Constitution* intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts...

“...[52] ...We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

84. Equally in *Mugweru & 4 others (Being the administratrices of the Estate of Maaka Mukuhi Mugweru (Deceased)) v National Land Commission & 5 others; Estate of Samuel Mugweru Wathirwa & another (Interested Parties)* [2022] KEHC 13252 (KLR) the Court held as follows:

“134. My interpretation of the preceding Section is that the jurisdiction of the Environment and Land Court is founded on the existence of any dispute with relation to land or environment. In essence therefore, where the substratum of a dispute is founded on such, the matter should be exclusively dealt with in the Environment and Land Court.

..... I am guided by the Court of Appeal who speaking to this matter in the case 137... of *Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others* [2016] eKLR opined as follows:



“This Court considered the issue in Prof. Daniel N. Mugendi v. Kenyatta University & Others, CA No 6 of 2012 and in Judicial Service Commission v. Gladys Boss Shollei & Another, CA No 50 of 2014, involving the Labour and Employment Court, which, like the ELC, is a court of equal status as the High Court under Article 162(2) of *the Constitution*. The Court concluded that the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that *the Constitution* contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court. Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant’s claim that the ELC lacks jurisdiction to enforce constitutional rights is totally bereft of merit.”...

17. It is trite that the right to own land and the right to a clean and healthy environment cannot be dealt with in isolation from other rights like the right to a fair hearing, the right not to be discriminated against, the right to a fair administrative action, the right to equal protection and equal benefit of the law, the right to adequate housing, amongst other rights.
18. All these rights have to be interpreted in the context of the Petitioners’ right to own land and the right to a clean and healthy environment, and not in isolation as argued by the Respondents.”

85. The Supreme Court in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment)* Neutral citation: [2023] KESC 113 (KLR) emphatically stated:

“... under article 165(1)(c) of *the Constitution*, the High Court has the jurisdiction to determine whether a right or fundamental freedom outlined in the Bill of Rights has been denied, violated, infringed upon, or is under threat. In that context, article 165(5)(b) imposes limitations on the High Court’s jurisdiction concerning matters falling within the purview of the courts specified in article 162(2) which provides that;

“Parliament shall establish courts with the status of the High Court to determine disputes relating to

- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.”

96. Consequently, article 165(2)(b) mandates the establishment of courts possessing the status of the High Court to interalia and of relevance to the appeal before us, address issues related to the environment, as well as the utilization and ownership of land with Parliament assuming the responsibility to delineate the functions and jurisdiction of that court as stipulated in sub-article (3).”

86. In the instant case, the substratum of this Petition is founded on the Petitioner’s grievance that the estate of her late husband was deprived of land through fraudulent means by illegal sub-division of L.R 12422/204 which gave rise to land parcel LR. No. 12422/319 that was subsequently registered



in the name 1st Respondent in furtherance of the alleged fraudulent scheme. That is essentially is the bedrock of the instant Petition. In fact, even the reliefs sought by the Petitioner are centered around the property and don't go beyond it. This is despite amending the Petition to include the Director of Criminal Investigations and the Director of Public Prosecutions yet not even a single relief is sought against them. The prayers are as follows:

- a) A declaration that the Petitioner's constitutional right to property and/or interest in or over the property LR. No. 12422/319 deserves the protection by the Court and that the protection do issue accordingly in terms of the declaration that the acquisition of the said properties by the 1st Respondent was arbitrary, unconstitutional, irregular, unprocedural, tainted, a nullity ab initio and therefore not worthy of any constitutional protection.
- b) A declaration that the subdivision of LR. No. 12422/204 was fraudulent, illegal and unlawful.
- c) Declaration that all the subsequent subdivisions of LR. No. 12422/204 being LR. No. 12422/318 and LR. 12422/319 are a nullity ab initio.
- d) A declaration do issue that the acts of the Respondents of unlawfully attempting to deprive the Petitioner of the land LR. No. 12422/204 in the light of the above was without any legal basis, an act of illegality and unconstitutional and are liable to the Petitioner in compensation and/or damages for losses, for loss of use land and for breach of their constitutional rights on such compensation as shall be assessed by the Court.
- e) The 2nd Respondent be ordered to revoke and cancel the titles LR. No. 12422/318 and LR. No. 12422/319.
- f) The 2nd Respondent be ordered to restore Petitioner's LR. No 12422/204.
- g) Damages as against the Respondents, jointly and severally, for their acts of aiding and abetting the illegal, unconstitutionality of the acts above, of issuing suspect titles and for breach and/or violation of the Petitioner's constitutional right to property and protection of the same.
- h) Mesne profits.
- i) Costs of this Petition.
- j) Interest on prayers 6 and 8.
- k) Any other or further order that this Honorable court deems fit and necessary to grant.

87. Guided by the illumination gathered from the case law that I have reviewed above, this Court concurs with the Respondents submissions that the appropriate Court with jurisdiction to hear and determine this dispute is the ELC Court as the alleged claim springs from the right to land which is a preserve of the Environment and Land Court. This Court is precluded by Article 165 (5) (b) of *the Constitution* from assuming jurisdiction in matters specifically reserved for courts of equal status by dint of Article 162 (2) (b) of *the Constitution*.

88. The upshot therefore is that I must now down my tools hence there is no need to consider any other issue in this Petition.

89. The Petition is hereby dismissed. I have considered the the fact that the Petitioner is a widow (the administratrix of her late husband's estate) hence I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF NOVEMBER, 2025.



.....

L N MUGAMBI

JUDGE

