



**Abdi & another v Southdown Developers Limited & 2 others (Petition E341 of 2020)
[2026] KEHC 645 (KLR) (Constitutional and Human Rights) (30 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 645 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E341 OF 2020

LN MUGAMBI, J

JANUARY 30, 2026

BETWEEN

HAITHAR HAJJ ABDI 1ST PETITIONER

ABDI RAHIMAITHAR HAJI 2ND PETITIONER

AND

SOUTHDOWN DEVELOPERS LIMITED 1ST RESPONDENT

**JANET ATIENO OMONDI (AS THE LEGAL REPRESENTATIVE OF THE LATE
PAUL VINCENT OMONDI OMBAGO (DECEASED)) 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 22nd October 2020 is supported by the Petitioners' verifying affidavits in support of similar date and a further affidavit dated 18th May 2023. The Petition was subsequently amended on 25th October 2021.
2. The gravamen of this Petition is an allegation by the Petitioners that the 2nd Respondent fraudulently acquired their property known as L.R. No.13154 situated along Mbogani Road in Karen, Nairobi, measuring 4.816 acres, under the pretext of the 1st Respondent. They contend that as a result of the misrepresentations made by the 2nd Respondent in various suits, the Court found in favour 1st Respondent, hence sanctioned an illegality, inadvertently.
3. Consequently, the Petitioners seek the following reliefs against the Respondents:



- a. It be declared that the dispute resolution mechanism or process adopted in determining the above cases contravened the Bill of Rights and was inconsistent with *the Constitution*.
- b. It be declared that by reason of the fraud practiced on the Courts by the 2nd Respondent, the Courts in exercising judicial authority in the above cases were obstructed from promoting and/or protecting the purpose and principle of *the Constitution*.
- c. It be declared that by reason of the frauds practiced on the Courts by the 2nd Respondent, the Petitioners' right to fair trial or hearing was contravened or violated.
- d. It be declared that the actions taken by the 2nd Respondent of bringing legal action in HCCC No. 1181 of 1992 or other related cases in the name or under the cover or disguise of the 1st Respondent and giving false evidence in those suits to support the false claims were in contravention of *the Constitution* and invalid.
- e. It be declared that all the judgments, rulings, decrees, and orders made in favour of the 1st Respondent in the above disputes are unconstitutional, null and void.
- f. The 1st and 2nd Respondents pay damages to the Petitioners for the said Constitutional violations.
- g. The 1st and 2nd Respondents be ordered to pay the costs of the Petitioners in all the above disputes or cases.
- h. The costs of this Petition be paid by the 1st and 2nd Respondents.

Petitioners' Case

4. The Petitioners who are father and son, depone that they are the registered owners of the property known as L.R. No.13154 situated along Mbogani Road in Karen, Nairobi, measuring 4.816 acres. They allege that at some point, it was claimed that the 1st Respondent purchased the said parcel of land via an auction sale in 1992. This as expected instigated disputes concerning the purported auction sale.
5. The Petitioners state that these disputes were canvassed before various Courts in: Nairobi ELC No 1389 of 2004, Nairobi HCCC No 1181 of 1992, Nairobi HCCC No 2310 of 1993, Nairobi HC Misc No 546 of 2004, Milimani HCCC No 44 7 of 2004 and Civil Application No NAI 21 of 2006 UR 12/ 2006.
6. The Petitioners aver that Nairobi HCCC No 1181 of 1992 revolved around the 1st Respondent and the Kenya National Capital Corporation (chargee) which purportedly sold the property at the said auction. It is stated that the 2nd Respondent in the matter, falsely misrepresented to the Courts and the Petitioners that the 1st Respondent was the lawful purchaser. Equally, it is stated that the suits allegedly commenced by the 1st Respondent were prosecuted solely by the 2nd Respondent who claimed to be one of the Directors, shareholder and authorized Agent of the 1st Respondent. The 2nd Petitioner states that the Courts acting on the honest representations of the 2nd Respondent awarded Judgments in favour of the 1st Respondent in the said cases.
7. The 2nd Petitioner avers that in 2014, a suit being Misc. Application No.326 of 2014 was filed in Court. It revolved around the ownership and directorship of the 1st Respondent. He states that in the Judgment dated 16th November 2015, the Court found that there were various malpractices concerning the 1st Respondent's affairs. It is noted unfortunately that the 2nd Respondent who was the architect of the unlawful actions was not a party to the suit in this matter.



8. Soon thereafter in 2019, it is averred that the police established that the 2nd Respondent was neither a director nor shareholder of the 1st Respondent at the time auction sale took place. Equally, no authorization was granted by the 1st Respondent to commence the said cases. Furthermore, it was stated that the Parties that were presented to the Court as being the Directors and shareholders of the 1st Respondent were not.
9. It was also established that the 1st Respondent never purchased the suit property at the auction sale and no legal proceedings were commenced by the 1st Respondent which led to the grant of a favorable award in favour of the impugned auction. Owing to this, it is alleged that the Director of Public Prosecutions commenced a criminal suit against the 2nd Respondent being Criminal Case No. 1552 of 2019 for the alleged fraud.
10. The Petitioners aver that the cited cases herein have since been concluded and Judgments issued. The Petitioners protest that the Judgments do not connect the 2nd Respondent he was the one responsible for the alleged constitutional violations, which if upheld, would render the said Judgments unconstitutional, null and void.
11. The Petitioners aver therefore that the instant suit has been instigated so that this Court can determine the constitutionality of the 2nd Respondent's actions and the legal effect on the said Judgments. According to them, the dispute resolution mechanism that was utilized in the cited cases and rendered the said Judgments in favour of the 1st Respondent, violated the Petitioners right to a fair trial and hearing, by perpetrating the fraud and misleading the Court. As a result of this, the Petitioners argue that the Court ended up dispensing justice in a manner that contravened Article 10 and 159(1)(e) of *the Constitution* and issuing Judgments inconsistent with *the Constitution*.
12. The Petitioners in their further affidavit impugn the 2nd Respondent's reliance on Judicial Review Application No. E076 of 2022 and argue that the allegations therein are false and misleading. The Petitioners argue that the instant matter and the JR matter are distinct and founded on different facts. The Petitioners aver that this matter is founded on the new facts that came to light in 2019 from the affidavit of one Meschack Meshack Owino Njega Owino. It is alleged that the sworn statement of Meshack Owino was never disputed. The Petitioners as well stress that the issues raised in the Petition present unique issues that have not been tried before and also raise constitutional violations.

1st and 2nd Respondents' Case

13. On a preliminary note, the 2nd Respondent made a Reply to the Petitioner vide his Replying Affidavit sworn on 19th January 2021. Afterward, he unfortunately passed away where upon his wife took over the prosecution of this matter vide a Replying Affidavit sworn on 13th July 2021. The 2nd Respondent's wife and Co - Director of the 1st Respondent subsequently filed further affidavits dated 2nd May 2023 and 13th February 2024.
14. In his affidavit, the 2nd Respondent deponed that he is the Managing Director of the 1st Respondent. On the onset, he argued that the Petition should be dismissed as the issues raised had already been determined by Courts of competent jurisdiction and so this matter is an abuse of the Court process. Besides, he informs that the orders sought herein were placed before the said Courts.
15. Furthermore, the 2nd Respondent asserted that the Petitioners were not honest as the issues of the alleged fraud were dismissed in the now concluded matter in Suit No.1181 of 1992 vide the Judgment delivered on 13th November 2020. He informed that the matters were also determined by the Court of



Appeal, hence this Court lacks jurisdiction to adjudicate the matters afresh. This is especially in light of HCCC 1389 OF 2004 and the Court of Appeal matter in Civil Appeal 130 OF 2016.

16. In his view, the Petitioners are on a fishing expedition to deny the 1st Respondent justice through the numerous suits filed. Further to that, he argued that there can never be a violation of constitutional rights against a party where the rights have been ordered and complied with through a Court sanction. He noted in particular that the right to sale by auction and transfer of property was sanctioned by a competent Court and that those orders have never been vacated or challenged successfully. That said, he argued that the Petition was time barred hence this Court lacks jurisdiction to entertain this matter.
17. The 2nd Respondent's wife in her further affidavits avers that she filed a judicial review matter in JR No. 076 of 2022 to challenge the Petitioners' assertion that there existed a criminal component of fraud as a result of which charges were preferred. She alleges that the Court in its Judgment dismissed the charges against the 1st and 2nd Respondents. This is because the component of criminality had been adjudicated and decided upon by Courts of competent jurisdiction together with the appellate Court and thus the charges were a misuse of the criminal process.
18. Equally, she notes that the Petitioners allegations were considered and dismissed in Constitutional Petition No. E298 of 2022. She emphasizes that this Court in its Judgment dated 26th January 2024 in like manner pronounced that the decisions rendered in the civil cases determined in finality, that the 1st Respondent is a legal entity and its certificate of incorporation is not a forgery and also that it lawfully acquired the property.
19. In light of this, she stresses that these pronouncements cannot be ignored as the Petitioners allegations have been properly concluded in a competent Court of equal jurisdiction.

3rd Respondent's Case

20. In response to the Petition, the 3rd Respondent filed a Notice of Preliminary Objection dated 17th December 2020 on the premise:
 - i. The Petition herein discloses an ordinary land [L.R No. 13154 – IR No. 25749 (Original Number Part of 6861/4)] ownership dispute which is disguised as a constitutional issue and this is contrary to the provisions of Article 162(2) and 165(5) of *the Constitution* as read together with Section 4 and 13(2) of the Environment and *Land Act* are contravened therefore an abuse of the process of the court.
 - ii. By dint of Articles 162(2) and 165(5) of *the Constitution*, as read together with Section 4 and 13(2) of the Environment and *Land Act*, this Court lacks the requisite jurisdiction to hear and determine this Petition. This Petition ought to have been filed in the Environment and Land Court and not in this Court.
 - iii. This Court lacks the jurisdiction to transfer this Petition to the Environment and Land Court.
 - iv. To the extent that the Application and the Petition concern the validity of an auction sale and directorship of company, that is a party herein, this Petition does not raise any constitutional question(s) but a chain of commercial transactions – litigated over several cases before other Courts of competent jurisdiction over a span of three decades. The respective factual and legal issues raised in those cases belong to the respective Courts that they had been respectively raised and litigated over; and the Courts with relevant appellate jurisdiction. Cloaking the issues raised therein with the constitutional gowns is an abuse of this court's process.



- v. The Application and Petition herein seeks to invoke the jurisdiction of this Court over the matters litigated before, and determined by, Courts of similar jurisdiction and a higher jurisdiction. This presents an abuse to this Court's process.
- vi. The Application and Petition herein are disguised appeals and/or review applications, done outside the statutory/constitutional timelines; and outside the pronouncements of the Courts of record. This Court, therefore, has no jurisdiction to supervise or sit on appeal on its decisions.
- vii. Under both *the Constitution* of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 and 2013 (The Gicheru / Mutunga Rules - Respectively), decree that should a constitutional issue arise in any divisions of the [High] Court, that Court has the requisite jurisdiction to determine the same under the Rules. Accordingly, challenging all the decisions including orders, judgments and decrees made in respect to the issues in question in all the referred Court proceedings herein through a Petition, in this division, is an abuse of process and fatal to the Petition.
- viii. The Application and Petition herein, as drafted, fail to give sufficient details to the Respondents, particularly the 3rd Respondent, in order to call for a proper response. Particularly, the Petition fails to comply with Rules 10 (2) (e) and 11 of *the Constitution* of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2013 in as far as it does not give the details of the cases listed therein in as far as they are related to the Petition.
- ix. The Petitioner does not give the details of fraud as alleged; other than annexing a charge sheet 'ARH -2', which in law is not final finding by a Court of competent jurisdiction of the actual fraud.
- x. In as far as the Petitioners herein have appeared before other Courts of competent jurisdiction, and in one way or the other the issues they raised therein were determined [see paragraph 17 of the Petition], the act of approaching this court amounts to forum shopping. It is meant to embarrass this Court and it is therefore an abuse of this Court's process.
- xi. In toto the Application and Petition herein are incompetent and an abuse of this Court's process. The same should be dismissed on a preliminary, with costs to the 3rd Respondent.

Petitioners' Submissions

- 21. Sharley Barret and Company Advocates for the Petitioners filed submissions dated 1st March 2021 and further submissions dated 16th March 2022.
- 22. Submitting on the 3rd Respondent's Preliminary Objection, Counsel relying and reiterating the contents of the Petition, submitted that the Preliminary Objection is founded on disputed facts which a Preliminary Objection should not be. Reliance was placed in *Mukisa Biscuit Co. v West End Distributors* [1969] E.A. 696 where it was held that:

“A Preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or of what is sought is the exercise of judicial discretion”.



23. Essentially, Counsel submitted that this Petition originates from the constitutional violations which arose from HCCC No.1181 of 1992 where the 2nd Respondent falsely represented that he is an authorized agent of the 1st Respondent and which in the end led to the impugned Judgment. It was noted that the 2nd Respondent was not a party in these suits in his own capacity but under the 1st Respondent. Equally, Counsel pointed out that the 1st Respondent was not a duly registered company at the time when HCCC No. 1181 of 1992 was commenced, as can be gleaned from the adduced annexures. Counsel therefore argued that the Petition discloses the attendant constitutional violations.
24. Counsel as well disputed the issue of jurisdiction with key focus on the Environment and Land Court. This is since the impugned matter was tried by the High Court under the *Civil Procedure Act*, not Article 162(2) of *the Constitution*. For this reason, Counsel asserted that this Court has jurisdiction to entertain this matter, being a constitutional dispute.
25. Turning to the Petition, Counsel stated that the issues that arise for determination are: whether the 1st Respondent is a person and a proper party in the present case, whether on the facts of this case the Petition discloses and proves infringement or violation of the rule of law under Article 10 of *the Constitution*, whether on the facts of this case the Petition discloses and proves the infringement or violation of the right to fair hearing or fair trial, whether on the facts of this case the Petition discloses or proves the infringement or violation of the right to justice and proper exercise of judicial authority as guaranteed Article 159 of *the Constitution*, whether on the facts of this case the Petition discloses and proves any act or omission in contravention of *the Constitution*, if the answer to any or all of the above is in the affirmative did the said infringements or violations also violate the Petitioners right under *the Constitution* and remedies or reliefs are the Petitioners entitled to.
26. On the first issue, Counsel submitted that at the close of pleadings in the Petition, it was established that the 1st Respondent never legally existed as it did not have a valid Memorandum and Articles of Association signed by the subscribers. On this basis, Counsel submitted that the 1st Respondent lacks the legal capacity to defend or participate in the present proceedings as is not a person within the meaning of Article 260 of *the Constitution*. Counsel urged therefore that the name of the 1st Respondent be struck off.
27. On the second issue, Counsel referring to the impugned suit HCCC 1181 of 1992 submitted that it was not a proper and valid suit on the ground that the 1st Respondent was not a valid company. Counsel argued that effectively, there was no valid plaintiff in that suit, thus no person in whose favour the Court could issue a decree.
28. Counsel on the third issue submitted that HCCC No.1181 of 1992 and cited cases were disputes within the meaning of Article 25 and 50 of *the Constitution*. Counsel emphasized that the suits had been prosecuted on the false representation that the 1st Respondent was a legal entity with capacity to institute a suit. Counsel argued that hearing and determination of the said suit was an outcome of a fraud practiced on the Court by the 2nd Respondent in contravention of the right to a fair hearing and trial.
29. Turning to the fourth issue, Counsel argued that there was a total failure and miscarriage of justice in the cited cases as the Court was misled to believe and determine the said cases, by relying on the 2nd Respondent's false misrepresentations that the 1st Respondent existed as lawful party.
30. In light of the foregoing, Counsel submitted that ultimately the Petitioners suffered injuries and loss which resulted in violation of their constitutional rights due to the 2nd Respondent's unlawful actions.



Counsel stressed that unless these constitutional contraventions are nullified, the Petitioners stand to suffer serious injuries and loss in view of the said parcel of land, lose their right to redeem their securities charged under the loan agreement, lose sums exceeding Ksh.14,000,000 as legal costs to be paid to the 1st Respondent as an illegal entity and all of which will violate their rights under Article 27(a) and 40 of *the Constitution*.

31. Counsel in the sixth issue in light of the facts argued that the Petition discloses serious constitutional contraventions by the 2nd Respondent and so the Petitioners are entitled to remedies and relief as follows:
- a. A declaration that Southdown Developers Limited, the purported 1st Respondent in the present petition is not a person as defined under Article 260 of *the Constitution* or a company under the *Companies Act* and lacks the capacity to be enjoined as a party in the present Petition or participate in the proceedings herein.
 - b. A declaration that all actions or omissions in the name of Southdown Developers Limited as a limited liability company or legal person within the meaning of Article 260 of *the Constitution* including the actions or omissions in the said HCCC No. 1181 of 1992 and other cases refereed in paragraph 9 of the Petition arising from the judgement and decree in the said case were in contravention of *the Constitution*, invalid, null and void;
 - c. The judgements and decrees issued in the name and/ or in favour of Southdown Developers Limited as a limited liability company or a person within the meaning of Article 260 of *the Constitution* in the said HCCC No. 1181 of 1992 and other related cases referred to in paragraph 9 of the petition were in contravention of *the constitution* invalid, null and void and incapable of being executed;
 - d. A declaration that all the actions and omissions done or not by the 2nd Respondent in the name of or on behalf of Southdown Developers Limited as a limited liability company or a legal person as defined under Article 260 of *the constitution* were in contravention of *the constitution* invalid, null and void;
 - e. The 2nd Respondent do pay compensation or damages to the Petitioners being:
 - f. The additional interest accruing on the said loan agreement or charge after January 1992 which the Petitioners are or will be required to pay in order to redeem their securities charged to the lender.
 - g. All the legal costs, in full indemnity basis incurred by the Petitioners in the cases referred paragraph 9 of the Petition.
 - h. The costs of the present Petition or suit.
 - i. Interest on (ii) and(iii) above.
32. In reply, to the Respondents submissions, the Petitioners filed the supplementary submissions. On the dominant issue in the Petition, Counsel submitted that it is the violation of the Petitioners constitutional rights under Article 2(4),10, 27, 50 and 159 of *the Constitution* contrary to the 3rd Respondent's averment otherwise.
33. On the allegation that the matter is res judicata in light of the previous suits which have since been determined, Counsel submitted that the 2nd and 3rd Respondents were not parties in the suits, further the facts and evidence relied upon in the present Petition was at all material times held by the State and Respondents and only came to the Petitioners knowledge in 2019. Counsel argued that the



Respondents had withheld this crucial information. On this premise, Counsel reasoned that the claim on res judicata is unsustainable.

34. That said, Counsel maintained that the Respondents had not disputed the correctness of the sworn statement by Meshack Owino Njega Odera, therefore are estopped from relying on their own unlawful actions and violation of *the Constitution*.
35. On the review and appellate jurisdiction, Counsel submitted that this argument is irrational and untenable since if this Court finds, that on the unchallenged evidence and the facts proved by the sworn statement of Meshack Owino Njega Odera Advocate, the 1st Respondent never existed in law as a legal person or entity, then all previous proceedings between the Petitioners and the 1st Respondent were null and void ab initio, as the Court lacked jurisdiction.
36. Furthermore, Counsel submitted that this is the first litigation between the Petitioners and the 2nd and 3rd Respondents therefore there has never been a judgment or judgments between these parties, capable of being appealed against or reviewed in the present Petition. Lastly, Counsel pointed out that the Petition is grounded on information, evidence and facts which the Petitioner accessed for the first time in 2019. In sum, Counsel urged that the Petition is merited.

1st and 2nd Respondents' Submissions

37. Ayieko Kangathe and Company Advocates for these Respondents filed submissions dated 4th May 2021 and highlighted the single issue for discussion as: whether this Court has jurisdiction to grant the reliefs sought.
38. Counsel submitted that the instant suit touches on issues that have been litigated before by superior Courts in respective suits filed by the Petitioners. Counsel contended that the Petitioners had clothed the issues herein as having constitutional underpinnings whereas the said subject matter has been properly tried and dismissed in the High court and the Court of Appeal. On this basis, Counsel submitted that this Court does not have jurisdiction to entertain this matter. Reliance was placed in Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) limited [1989] KLR 1 where it was held that:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or 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. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



39. Comparable reliance was placed in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR and Uganda General Trading Co. Ltd vs. NT Patel Kampala HCCC No. 351 of 1964 [1965] EA 149.
40. Counsel as well submitted that Article 165(6) of *the Constitution* bars this Court from exercising supervisory jurisdiction over another superior Court. In this matter, Counsel underscored that the Petitioners seek to annul the said proceedings, judgments, rulings, orders and decrees before this Court which is supervisory jurisdiction. Considering this, Counsel urged the Court not to entertain the Petition as it is an abuse of the Court process.
41. Reliance was placed in Kenya Hotel Properties Limited v Attorney General & 5 others [2018] eKLR.

3rd Respondent's Submissions

42. The 3rd Respondent filed two sets of submissions in relation to its Notice of Preliminary Objection dated 8th February 2021 and to the Petition dated 18th March 2022.
43. On the first set of submissions, Counsel discussed the issues under various subtitles. On the onset, Counsel submitted that the Petitioners key issue being annulment of issued Judgments and decrees, demonstrates that the dominant cause of action involves the auction, transfer and current ownership of the land in issue which are questions which have been litigated over for more than three decades.
44. On the first topic, lack of constitutional and statutory jurisdiction, Counsel submitted that this Court lacks the requisite jurisdiction to entertain this Petition. Reliance was also placed in Owners of Motor Vessel Lillian "S" (supra). This is since the factual basis of the Petition discloses a cause of action that should be filed before the Environment and Land Court and second, ought to have been dealt with by way of a review under Order 44 of the Civil Procedure Rules, or through an appeal to the Court of Appeal.
45. Reliance was placed in Honey Creepers Investment Limited v Cab Investments Company Ltd & 4 others [2020] eKLR where it was held that:

“In the end we find and hold that the dominant issue in the petition is the right to renewal of leases over the suit land. We further find that the issue is intrinsically connected to the use and title to land. The dispute thus falls squarely within the purview of the ELC under Article 162(2) of *the Constitution* as read with Section 13 of the ELC Act. We also find that although the petitioner claims violation of various constitutional rights, those claims are intertwined with the dominant issue and that the ELC has jurisdiction to deal with the alleged violations...the Petitioner's main issue is the alleged alienation of his title and land by the 2nd Respondent. The alleged violation of constitutional rights through the actions of the 2nd Respondent will be dealt with by the E&LC. I therefore find and hold that this court lacks jurisdiction to entertain the Petitioner's case.”

46. Counsel as such urged that this Petition belongs to the Environment and Land Court, on account that the dominant cause of action is the sale /auction, transfer and current ownership of L. R No. 13154. Further that this Court lacks jurisdiction to transfer the matter to any other Court. In sum, Counsel argued that the suit, as filed, is incompetent and the same should be struck out. To buttress this point



reliance was placed in *Delmonte Kenya Limited v County Government of Murang'a & another* [2019] eKLR where the Court held that:

“The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article 162(2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. In this regard, my view is that the intention of *the Constitution* is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this Court has no jurisdiction. My strong view is that this suit ought to have been transferred to the proper court the moment *the Constitution* of Kenya 2010 divested this court the jurisdiction to hear the case. Buttressed by the provisions of *the Constitution* and section 13 of the *Environment and Land Court Act*, I am clear in my mind that this court cannot properly entertain the application before me...Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of the application before me. A boundary dispute or enforcing an order relating to a boundary dispute falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. The drafters of *the Constitution* were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status.”

47. Comparable reliance was placed in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] eKLR and *Republic v Chief Land Registrar & another* [2019] eKLR.
48. On appellate & review jurisdiction, Counsel submitted that the Petitioners seek to have all the judgments, rulings, decrees and orders made in favour of the 1st Respondent by the Courts in the cited cases declared as being unconstitutional, null and void, on account of discovery of new material. Counsel contended that the effect of issuance of such an order would overturn and set aside decisions which were issued upon giving evidence.
49. Counsel asserted that this would be akin to clothing this Court with appellate powers, which it lacks and akin to allowing this Court to exercise review powers, under Rule 44 of the Civil Procedure Rules, outside the prescribed procedure. Counsel argued thus that this Petition is a disguised appeal and review application.
50. Reliance was placed in *Robert Mwangi vs. Shepherd Catering Limited & Another* [2012] eKLR where it was held that:

“The Constitutional and Human Rights Division of the High Court is just an administrative Division of the High Court, with the same powers and jurisdiction as all the other Divisions of the High Court...”

‘A judge sitting in the Constitutional and Human Rights Division has the same jurisdiction as any other judge sitting in any other Division of the High Court. To ask such a judge to adjudicate in a matter that is before another judge of the High Court is to ask the judge to act in a matter that he or she has no jurisdiction over, and for the judge to do that is to engage in a nullity. As Justice Nyarangi so succinctly put it in the *Owners of the Motor Vessel “Lilians” vs Caltex Oil Kenya Ltd* [1989] KLR.”



51. Equal dependence was placed in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, citing the Trinidad and Tobago case of Harrikinson vs Attorney General of Trinidad and Tobago (1980) AC and Alphonse Mwangemi Munga & 10 others vs African Safari Club [2008] eKLR.
52. On the final topic, Counsel stated that the Petition is an abuse of the Court process. This is since no constitutional issue had been raised in the Petition. Second, breaches Rules 10(2) (e) and 11 of *the Constitution* of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2013, as the Petition as drafted fails to give sufficient details to the Respondents of all the cases filed before the various Courts on the subject matter. Moreover, that it denies the 3rd Respondent's the opportunity to sufficiently understand the nature of the Petitioner complaint and the opportunity to respond appropriately as guided in Anarita Karimi Njeru-Vs- Republic (1976-1980) KLR 1272 and by the Court of Appeal in Mumo Matemu-Vs- Trusted Society of human Rights Alliance Civil Appeal No. 290 of 2012 [2013] eKLR.
53. Comparable dependence was placed in Aura v Cabinet Secretary, Ministry of Education, Science & Technology & 3 others; Teachers Service Commission & 6 others (Interested Parties) 2020 eKLR and Kenya Planters Co-operative Union Limited v Kenya Co-operative Coffee Millers Limited and another [2016] eKLR.
54. Counsel in the second set of submissions underscored the key issues for determination in the Petition as: whether this Court has jurisdiction to hear and determine the Petition, whether the Attorney General has been properly enjoined in this Petition and whether the Petitioner is entitled to the orders sought.
55. On the first issue, Counsel maintained its position that this Court lacks jurisdiction to entertain this suit by virtue of its objections as captured in its Preliminary Objection preceding submissions.
56. Turning to the second issue, Counsel submitted that the Petition does not disclose any substantive or legal claim against the 3rd Respondent neither does the Petition disclose adequate particulars in support of the alleged violations of *the Constitution* against the 3rd Respondent. Considering this, Counsel submitted that the 3rd Respondent had been erroneously enjoined in this suit yet is not a necessary party and matter does not fall in the mandate stipulated under Article 156 of *the Constitution*.
57. Counsel concluded in the last issue, that the Petitioners having failed to disclose a plausible claim against the 3rd Respondent are not entitled to the relief sought against it.

Analysis and Determination

58. It is my considered take that the issues that arise for determination in this matter are as follows:
 - i. Whether this Court has jurisdiction to entertain this matter.
 - ii. Whether the instant Petition is an abuse of the Court process.
 - iii. Whether the Petitioners constitutional rights under Article 2(4), 10, 27, 50 and 159 of *the Constitution* were violated by the 1st and 2nd Respondents.
 - iv. Whether the Petitioners are entitled to the relief sought.



Whether this Court has jurisdiction to entertain this matter.

59. The gist of this Petition is an invitation by the Petitioner to this Court to nullify proceedings, judgement and orders arising from the High Court case No. 1181/1992 primarily on the basis that the 2nd Respondent falsely represented facts to the Court in relation to the legal status of the 1st Respondent(in particular, that he was the authorized agent of the 1st Respondent, that the 1st Respondent was duly registered, that there existed a valid suit before the Court) and thus caused the Court to arrive at a judgment that was based on fraudulent information, which in essence, is not only violation of the Constitution and the rights of the Petitioners. The Petitioners thus allege that there was violation of Article 2 (4), 10, 27 and 159 of the Constitution hence this Court has jurisdiction to determine the Petition and grant the orders sought in the Petition, which to reiterate comprise the following:
- a. A declaration that Southdown Developers Limited, the purported 1st Respondent in the present petition is not a person as defined under Article 260 of the Constitution or a company under the Companies Act and lacks the capacity to be enjoined as a party in the present Petition or participate in the proceedings herein.
 - b. A declaration that all actions or omissions in the name of Southdown Developers Limited as a limited liability company or legal person within the meaning of Article 260 of the Constitution including the actions or omissions in the said HCCC No. 1181 of 1992 and other cases refereed in paragraph 9 of the Petition arising from the judgement and decree in the said case were in contravention of the Constitution, invalid, null and void;
 - c. The judgements and decrees issued in the name and/ or in favour of Southdown Developers Limited as a limited liability company or a person within the meaning of Article 260 of the Constitution in the said HCCC No. 1181 of 1992 and other related cases referred to in paragraph 9 of the petition were in contravention of the constitution invalid, null and void and incapable of being executed;
 - d. A declaration that all the actions and omissions done or not by the 2nd Respondent in the name of or on behalf of Southdown Developers Limited as a limited liability company or a legal person as defined under Article 260 of the constitution were in contravention of the constitution invalid, null and void;
 - e. The 2nd Respondent do pay compensation or damages to the Petitioners being;
 - f. The additional interest accruing on the said loan agreement or charge after January 1992 which the Petitioners are or will be required to pay in order to redeem their securities charged to the lender.
60. The 1st and 2nd Respondent vehemently opposed the instant Petition on the grounds that that this Court lacks jurisdiction as the Petition is founded on a case that has been before other superior courts, that is, both in the High Court and the Court of Appeal since under Article 165 (6) of the Constitution, it cannot exercise supervisory jurisdiction over another superior court to the extent that it can be asked to nullify proceedings, judgment, orders and decrees issued by another superior Court.
61. Jurisdiction is at the core of every judicial determination. When an issue of jurisdiction is raised, the Court must take the earliest opportunity to ascertain the issue of jurisdiction because a decision made without jurisdiction is a nullity in law and is of no legal effect. 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 as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law 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 as 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”

62. 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.

63. Although the Petition alleges violation of rights and fundamental freedoms as well as breach of constitutional principles, it is necessary for this Court to determine if indeed it has jurisdiction before proceeding to decide on the merits of the allegations made in the Petition.

64. This Court’s jurisdiction to hear and determine constitutional disputes is enshrined by Article 165 of *the Constitution* which states as follows:

1. There is established the High Court, which—
 - a. shall consist of the number of judges prescribed by an Act of Parliament; and
 - b. shall be organised and administered in the manner prescribed by an Act of Parliament.
2. There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.
3. Subject to clause (5), the High Court shall have—
 - a. unlimited original jurisdiction in criminal and civil matters;



- b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court shall not have jurisdiction in respect of matters--
- SUBPARA a.
- reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- SUBPARA b.
- falling within the jurisdiction of the courts contemplated in Article 162 (2).
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
65. From the Petitioners' perspective, the reading of the above provisions together Article 22 and 23 empower this Court to determine infringement of their rights and fundamental freedoms that arose in the circumstances of this case. However, the 1st and 2nd Respondent's point of view is that these provisions must be read in way that also takes into account Article 165 (6) of *the Constitution* above, particularly, the limit of this Court's supervisory jurisdiction over other superior courts considering the implication of the orders sought. The question thus becomes, can this Court be invited to determine the question of constitutionality of a judicial decision that has been determined before another superior court or would it be a proper to determine the question of whether the rights of the Petitioners were violated in a proceeding before another superior Court?



66. In my view, this would be a direct transgression of Article 165 (6) which provides thus:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

67. In exercising its constitutional jurisdiction, this Court must respect the boundaries of its authority or risk judicial overreach. This is what the Petitioners are cajoling this Court to do by asking it to issue orders that seek to nullify judgements and decrees in HCCC No. 1181 of 1992 as follows:

‘The judgements and decrees issued in the name and/ or in favour of Southdown Developers Limited as a limited liability company or a person within the meaning of Article 260 of *the Constitution* in the said HCCC No. 1181 of 1992 and other related cases referred to in paragraph 9 of the petition were in contravention of *the constitution* invalid, null and void and incapable of being executed’

68. That is indeed the bedrock of this Petition. Such orders are incapable of being issued by this Court even in its exercise of constitutional jurisdiction in view of Article 165 (6) of *the Constitution* and the fact that they would undermine the finality of judicial determination. A constitutional Petition cannot be used to invalidate the decision of another superior court.

69. It even becomes more untenable and absurd considering that the High Court decision upon which the Petition is founded was itself appealed against the Court of Appeal and appellate decision rendered on the matter, a contention not disputed by the Petitioners. Granting the orders sought would also extend into nullifying this appellate decision and not just the High Court decision. As was held by the Court of Appeal in Kenya Hotel Properties LTD vs Attorney General & 5 Others (Civil Appeal 404 of 2018) (2020) KECA 427 KLR this is jurisdictionally indefensible. The Court opined thus:

“37. Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. *The Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts.

38. Moreover, under Article 164(3) of *the Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court.

39. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant’s submission that the issue pits supremacy of the courts against citizens’ enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing.



40. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong: without jurisdiction it would be embarking on a hopeless adventure to nowhere...”

70. The fact that the High Court cannot be invited to consider the question of violation of rights arising from a proceeding before a fellow Superior Court resonates and finds support in the Indian Supreme Court decision of Naresh Shridner Mirajkar vs State of Mahashtra (1967) AIR 1967 SCI, where the Court stated as follows:

“... Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the appellate Court. But it is singularly inappropriate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in relation to a matter brought before him for adjudication can affect the fundamental rights of the citizens under Art. 19(1). What the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by court in or in relation to a matter brought before it for its decision cannot be said to affect the fundamental rights of citizens under Art. 19(1). The impugned order is, in a sense, an order of a collateral nature; it has no direct relation with the decision of the dispute which had been brought before the Court in the proceedings between the parties... Just as an order passed by the court on the merits of the dispute before it can be challenged only in appeal and cannot be said to contravene the fundamental rights of the litigants before the Court, so could the impugned order be challenged in appeal under Art. 136 of *the Constitution*, but it cannot be said to affect the fundamental rights of the petitioners.”

71. The upshot of the foregoing is that the Court finds the foundation of this Petition makes it jurisdictionally incompetent. It is constitutionally impermissible under Article 165 (6) of *the Constitution* to require this Court to determine if the rights of the Petitioner were violated in a suit that proceeded before equivalent superior court. This is an abuse of the Court process. There are appellate and review mechanisms that are provided to deal with such shortcomings within the judicial process.

72. Having found it lacks jurisdiction, this Court finds it impossible to proceed with any further inquiry in this matter.

73. The Petition is thus struck out with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JANUARY, 2026.

.....

L N MUGAMBI

JUDGE

