IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)

CIVIL APPEAL NO. E104 OF 2022

BETWEEN

ALI JUMA MWAKANENO & 71 OTHERS.....APPELLANTS

AND

REGISTRAR OF TITLES, MOMBASA.....1ST RESPONDENT

ZAKAYO OSAPIRI MRUI.....2ND RESPONDENT

TWO THIRDS INVESTMENT CO. LTD.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

NATIONAL LAND COMMISSION.....5TH RESPONDENT

SETTLEMENT FUND BOARD OF TRUSTEES....6TH RESPONDENT

CHIEF LAND REGISTRAR.....7TH RESPONDENT

CABINET SECRETARY MINISTRY

OF LANDS.....8TH RESPONDENT

(***An Appeal from the Judgment of the Environment and Land Court at Mombasa (N.A. Matheka, J.) delivered on 23rd February, 2022***

in

ELC Pet. No. 19 of 2020)

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JUDGMENT OF THE COURT

The Appellants filed a petition against the Respondents seeking:

"a) A Declaration that at all material times herein the Petitioner herein was and is entitled against the Respondents and all persons to their fundamental rights and freedom enshrined in the Bill of Rights which applies to all and binds all state organs including but not limited to the freedom from discrimination, equal protection and benefit of the law and that in the relationship between, the parties herein the Respondent were and remain under a duty to observe the National Value enshrined in Article 10 of the Constitution.

b) A Declaration that the Respondents as public officers and citizens of Kenya have a constitutional duty to respect uphold and defend the Constitution and the fundamental rights of individual enshrined hereunder.

c) A Declaration that the 1st Petitioner (residents of Kibokoni, Utango Area) being the original indigenous residents on the subject parcel, of land comprising of Plot No 390/11/MN, who are in actual occupation, possession and use are entitled to be registered as legal owners and be 'issued with legal ownership instruments (certificate of title and/or title deed to that effect).

d) A Declaration that, the subject parcel of land at the time of acquisition by the 6th Respondent it was not available and/or capable of being sold, purchased, transferred or passed on to the Respondent in vacant possession or interfering with the quiet possession and enjoyment of the property by the Petitioner and/or their rights to being violated, infringed and/or threatened.

e) A Declaration that, the continuance of development and subdivision being done on the suit property is an affront to the rule of law as it is a furtherance of violation and infringement of the Petitioner's fundamental rights and freedoms.

f) An order prohibiting and restraining the Respondent whether by themselves, the agents, servants and other relevant officers of the 1st, 2nd, 3rd and 4th Respondents in the service of the Republic of Kenya for the time being concerned with registration, recognition and enforcement of the rights and interest in land and supervision thereof as well from granting approvals of transaction pertaining land

registering transfers supervising development, grant licenses for development and undertaking any other purpose directly or Incidental to development to sale, transfer and/or any alienation of whatever nature connected parcel, of land Plot No 390/11./MN shall affect, breach, infringe, violate and threaten the fundamental rights and freedom of the Petitioner.

g) A prohibitory order freezing arid restraining any sale transfer subdivision charging and in transaction of whatsoever nature on the suit property Plot No 390/11/MN.

h) Declaration that the act of omission and/or commission of the 1st, 2nd, 3rd, 4th and 5th Respondents was in violation of the rights of the Petitioner to access and own property and to be settled in preservation of their human dignity as unswagged by the Constitution.

i) An order of mandatory injunction compelling the 1st, 2nd, and 3rd Respondents to perform their constitutional mandate and discharge their constitutional obligation.

j) Declaration the any legal instruments be it title deed, grant lease, certificate of title held by the Respondents is null and void as the subject parcel of land was not available and capable of being acquired and/or purchased in the first instance.

k) An order restraining the Respondent by themselves, servants, and agents from evicting the Respondents cause to be evicted therefrom.

l) Any other orders the court may deem fit to grant in the interest of justice.

m) That the court be pleased to order cost of this petition borne by the Respondents."

It was the Appellant’s case that they are original and indigenous residents of Kibokoni, Utange. They claimed that the suit parcel comprising of Plot Number 390/II/*MN (the suit parcel)* measuring 28.3 hectares or thereabout was their ancestral land on which they have been in occupation and possession from time immemorial; that, sometimes in November 2016, some strangers started

claiming ownership of the subject parcel and commenced a process of eviction of the members of the community of Kibokoni, Utange; that some of the members of the community were arrested and charged with the offence of forceable detainer and creating disturbance at the behest of the strangers who were claiming ownership.

They claimed that they made inquiries to obtain information regarding the identity of the strangers, but were frustrated by the officials in the Land Registry in Mombasa who withheld all information regarding the suit parcel from them; that they later managed to obtain photocopies of some of the documents submitted to Mombasa county offices where the Respondents were seeking approval to carry out subdivisions of the suit parcel, and that it was the 3rd Respondent, Two Third Investments Limited, that claimed ownership and purported to be the registered owner of the suit parcel and the ongoing sub- divisions in concert with the other Respondents, their servants and agents.

It was their case that, if the government was to allocate the suit parcel, then they ought to have been given the first priority. They claimed that they were now victims of historical injustices as

they had been discriminated against; and that the action by the Respondents in continuing to disregard the laws was in breach of clear provision of the Constitution, and that their constitutional right

to acquire and enjoy property anywhere in the Republic of Kenya was infringed by the actions of the Respondents. Hence the Petition.

In response, the 2nd to 5th Respondents filed grounds of opposition to the Petition stating that the Appellants are unknown as the Petition failed to disclose the names and details of the 70 other petitioners thereby rendering the petition defective; that one Ali Juma Mwakaneno who has sworn the verifying affidavit to the Petition had no express authority from the other Petitioners as required by ***Order 1 Rule 13 (1*** and ***2)*** of the ***Civil Procedure Rules***; and that the Appellants have not claimed any known proprietary rights under the established regimes enshrined in ***Article 61*** of ***the Constitution***. Furthermore, the Appellants had also failed to set out the precise provisions of the Constitution which have been violated.

The 3rd Respondent stated that it is the registered owners of the suit parcel being a bonafide purchaser for value; that the suit parcel was initially registered in the name of Zakayo Oroni, who charged the property to Kenya Commercial Bank for Kshs. 7,000,000 in May 1983; and that, when Zakayo Oroni failed to pay

the loan, the bank exercised its statutory power of sale and, on 8th April 1993, sold the suit parcel to the 3rd Respondent who became the registered owner. The 3rd Respondent termed the Appellants as trespassers who had no rights over the suit parcel. The 3rd Respondent also claimed that there were

pending suits, namely *Mombasa ELC No. 232 of 2014* and another by the 3rd Respondent against the Petitioner in *ELC No. 3 of 2015* seeking to determine the ownership of the suit parcel and, as a consequence, this Petition was *sub judice*.

The court considered the Appellants' constitutional petition, the responses by the Respondents and the submissions on record. The central issue before the trial court was whether the Appellants had properly pleaded and proved the alleged violations of their constitutional rights in relation to ownership and occupation of the suit parcel, and whether the Petition was *sub judice*.

Although the Appellants cited several Articles of the Constitution, the court found that the Appellants failed to particularize how those provisions were violated by the Respondents; that the pleadings contained general allegations of infringement without specifying any acts, omissions, or factual details demonstrating the alleged violations.

The court further found that the Appellants did not adduce any evidence to support their claims. No affidavits or

documentary proof were presented to establish ancestral ownership, long occupation, eviction, arrests, or unlawful subdivision of the suit parcel. The court reiterated that constitutional claims cannot be determined in a factual vacuum, and that the burden of proof rested on the party alleging the violations. Additionally, the trial court noted

procedural deficiencies, including failure to disclose the identities of the *"70 others"* named as Appellants and the lack of authority authorizing one Appellant to swear affidavits on their behalf; and that these defects rendered the Petition incompetent.

The court also accepted the Respondents' argument that the matter was *sub judice*, given the other pending Environment and Land Court cases involving the same parties and the same parcel of land, and whose purpose was to determine ownership of the land.

In conclusion, the court held that the Appellants had not met the constitutional threshold required for a valid petition; that they failed to prove the alleged violations, and that they had improperly invoked the court's constitutional jurisdiction. Consequently, the Petition was struck out for lack of precision, lack of evidence, and for being *sub judice*, with costs awarded to the Respondents.

Aggrieved, the Appellants have filed an appeal to this court on the grounds: that the trial Judge was in error in finding that the Appellants had not surmounted the test of particularizing the

actual right and fundamental freedom infringed and violated by the actions of the Respondents; in finding that the Petition was *sub judice* and in failing to appreciate that the parties before it and

the cause of actions were distinctly different from any other matter already dealt with by the trial court or pending before any other court; in failing to find and hold that the Appellants were entitled against the Respondents and all persons to their fundamental rights and freedom as enshrined in the Bill of Rights being upheld by all and bind all state organs; in failing to appreciate and make a declaration that the Appellants, being the original indigenous residents of the suit parcel who were in actual occupation, possession and use, were entitled to be registered as legal owners and be issued with a certificate of title or title deeds; in failing to find that, at the time of acquisition of the suit parcel by the 3rd Respondent, the land was not available or capable of being sold, purchased, transferred or conferring vacant possession and title without interfering with the quiet possession and enjoyment of the suit parcel by the Appellants; in holding that the continued subdivision of the suit parcel by the Respondent was an affront to the rule of law; and in holding that the Petition has not been pleaded with a reasonable degree of precision, and that the alleged violation have not been proved.

When the appeal came up for hearing on a virtual platform,

learned counsel ***Mr. Mkan*** appeared for the Appellants while learned counsel ***Ms. Saru*** appeared for the 1st, 4th, 6th, 7th, and 8th Respondents, and learned counsel ***Mr. Maundu*** appeared for the 3rd Respondent.

However, prior to commencement of the hearing, Mr. Mkan sought leave to withdraw the appeal against the 2nd and 5th Respondents. As there was no objection from the other counsel, leave was granted for the appeal against the 2nd and 5th Respondent to be withdrawn.

Counsel for the Appellants filed written submissions. Briefly highlighting the submissions, counsel submitted that the Petition, together with the affidavits and documentary evidence placed before the Environment and Land Court, sufficiently disclosed violations of the Appellants' fundamental rights and freedoms under ***Articles 22, 23, 40*** and **47** of ***the Constitution***, thereby warranting substantive consideration on the merits rather than dismissal on technical grounds; that ***Article 22(1)*** of ***the Constitution*** grants every person the right to institute court proceedings where a right or fundamental freedom has been denied, violated, infringed, or threatened, and argued that the Appellants had properly invoked the constitutional jurisdiction of the court. It was contended that the learned Judge adopted an overly restrictive interpretation of the requirement for precision in constitutional pleadings contrary to the spirit and purpose of the

Constitution.

On the issue of *res judicata* and *sub judice*, counsel submitted that the Appellants were distinct parties from those in the alleged previous suits, and that

the matters before the trial court were not directly and substantially the same. Counsel maintained that the list of Appellants was duly annexed and demonstrated that the parties in the constitutional Petition were not identical to those in the earlier proceedings. Counsel also challenged the reliance placed by the trial court on affidavits filed by the Respondents, submitting that the affidavit sworn by J.K. Wanyoike on behalf of the 3rd Respondent was irregular, incompetent, and unsupported by a valid company resolution, and that it ought to have been expunged from the record. Yet, the learned Judge relied on such affidavit in dismissing the Appellants' Petition. The Appellants' prayed that the appeal be allowed and the Judgment of the Environment and Land Court be set aside.

On their part, counsel for the 1st, 4th, 6th, 7th and 8th Respondents submitted that the learned trial Judge properly exercised her discretion in striking out the Petition for failure to meet the well-established constitutional threshold on pleadings; that constitutional litigation is governed by the precision principle as enunciated in the case of ***Anarita Karimi Njeru vs Republic [1979] eKLR***, where

the court held that a party alleging violation of constitutional rights must plead with a reasonable degree of precision the specific provisions violated, the manner of violation, and the resultant injury; that the Appellants' Petition fell squarely below this threshold as it merely listed constitutional Articles without

setting out clear and particularised grievances against any specific Respondent; that the Appellants' pleadings were vague, generalized, and incapable of sustaining constitutional adjudication, thereby justifying the learned Judge's conclusion that the Petition was incompetent.

On the question of proof, counsel submitted that it is trite law that he who alleges must prove; that the Appellants failed to discharge this burden, having placed no evidence before the trial court to substantiate their claims of ownership, violation of rights, or unlawful conduct by the Respondents. The case of ***Leonard Otieno vs Airtel Kenya Limited [2013] eKLR*** was cited for the

proposition that decisions on constitutional violations cannot be made in a factual vacuum, and that unsupported hypotheses cannot ground constitutional relief; that the Appellants' case was precisely such a hypothesis, unsupported by affidavits, documentary evidence, or proof of violation, and that the learned Judge was therefore correct in declining to entertain the petition on its merits.

With regard to ownership and claims founded on ancestral

occupation, counsel cited the case of ***Joseph Letuya & 21 Others v Attorney General & 5 Others*** ***[2014] eKLR*** for the proposition that legal and equitable property rights under

Kenyan law are dependent upon formal processes of allocation, transfer and

registration, and that long occupation alone does not confer

ownership. Counsel submitted that the Appellants failed to

demonstrate any lawful process through

which title to the suit parcel accrued to them and therefore were incapable of sustaining a claim for violation of the right to property under ***Article 40*** of ***the Constitution***.

On their part, counsel for the 3rd Respondent, Two Thirds Investments Limited, submitted that the appeal is devoid of merit; that, although the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules do not mandatorily require a supporting affidavit, a petitioner is nevertheless required to adduce evidence in support of allegations made. Reliance was placed on the case of ***Daniel Kibet Mutai & 9 Others vs Attorney General [2019] eKLR;*** and ***Margaret Wanjiru Ndirangu & 4 Others vs Attorney General [2015] eKLR*** for the position that constitutional claims must still be proved to the requisite standard, and that the burden of proof lay squarely on the Appellants, a burden they failed to discharge. It was submitted that the Appellants called no evidence whatsoever and failed to prove occupation, indigeneity, or possession of the suit parcel as required by law. In this regard, reliance was also placed on ***Lalichandra Durgashanker***

Pandya & Another vs E.K.

Baya & Others ***[2021] eKLR;*** and ***Katana vs Nova Holdings Limited (ELC No. 205 of 2021) [2024] KEELC 3261 (KLR)*** for the position that evidentiary proof is a necessity in land claims; and that, further, the evidential burden never shifted to the Respondents since the Appellants failed to establish a *prima facie* case. It was

asserted that the 3rd Respondent placed evidence before the court through a replying affidavit sworn by J.K. Wanyoike, and submitted that the Appellants never challenged or controverted that affidavit.

On the question of constitutional pleading, counsel submitted that the Petition fatally failed the test laid down in ***Anarita Karimi Njeru vs Republic (supra);*** and ***Mumo Matemu vs Trusted Society for Human Rights Alliance & 5 Others [2013] eKLR,*** which requires a Petitioner to state with precision the specific right violated and the manner of violation.

Counsel then invoked the doctrine of constitutional avoidance, submitting that courts should decline to determine constitutional questions where a matter can be resolved through ordinary legal processes. Reliance was placed on ***Jorum Kabiru Mwangi & 2 Others vs Co-operative Bank of Kenya, Kawangware Branch [2016] eKLR;*** and the Supreme Court decision in ***Communications Commission of Kenya v Royal Media Services Ltd & 5 Others [2014] KESC 53 (KLR),*** submitting

that the Appellants' claim is, in substance, a claim for adverse possession and ownership, which suit was already pending before the Environment and Land Court and ought to have been pursued through appropriate statutory procedures rather than a constitutional petition.

On the issue of *sub judice*, it was submitted that the Petition was properly struck out as there were pending suits between the same parties over the same subject matter, namely *Mombasa ELC No. 232 of 2014* and *ELC No. 3 of 2015,* both seeking determination of ownership and possession of the suit parcel.

Finally, on the issue of unnamed parties, the case of ***Matawa C. Baya & Others vs Stima Investment Cooperative Society Limited [2022] KEELC 2161 (KLR)*** was relied on for the proposition that unnamed litigants cannot benefit from court orders, and that clarity of parties is fundamental to adjudication. Counsel submitted that the Appellants' failure to identify the "70 others" was fatal and rendered the petition incurably defective.

This is a first appeal. In the case of ***Peters vs. Sunday Post Ltd [1958] EA 424 at P 429,*** O'Connor (P) set out the duty of this Court in a first appeal thus:

> ***"An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand****."*

The test in deciding whether to uphold the trial court's

conclusions on fact is set out in the quotation from Lord Simon's speech in ***Watt vs Thomas*** ***[1947] AC, 484 at p 485*** as follows**:**

> ***"… an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be***

exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight…"

Upon considering the record of appeal and the written and oral submissions by counsel, we are of the view that the following issues arise for determination:

1. *whether the learned trial Judge was in error in finding that the Appellants' constitutional Petition failed to meet the threshold of reasonable precision and proof required in constitutional litigation;*

2. *whether the Petition was sub judice and therefore improperly before the trial court; and*

3. *whether the appeal has merit.*

The first issue is whether the Petition met the threshold of reasonable precision and proof required in constitutional litigation.

A foundational requirement in constitutional litigation is that a Petition must be framed with clarity and precision. This principle was firmly established in ***Annarita Karimi Njeru vs Republic (supra)*** and has since been consistently affirmed by the courts. A Petitioner is therefore required to distinctly identify the

constitutional provisions alleged to have been violated and clearly demonstrate how such violations have occurred. Vague or generalized allegations are insufficient to invoke the court's constitutional jurisdiction.

This requirement was upheld by this Court in the case of ***Mumo Matemu***

vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR where it was

stated that a party approaching the court for constitutional relief must articulate, with reasonable specificity, the complaint being raised, the provisions said to be infringed, and the manner of infringement. The Court emphasized that this level of precision is essential to enable both the court and the opposing party to understand the exact nature of the case being advanced.

The Supreme Court in the case of ***Communications Commission of Kenya &***

5 others vs Royal Media Services Limited & 5 others [2014] eKLR 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 Annarita 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".

The Appellants' Petition invoked a wide range of constitutional provisions. In particular, it cited ***Articles 2, 10, 19, 20, 21, 22, 23, 27, 28, 40, 47, 50*** and ***73*** of ***the Constitution***. These Articles were pleaded as the basis upon which the Appellants alleged violations of their fundamental rights and freedoms, including equality and freedom from discrimination, human dignity, the right to property, fair administrative action, access to justice, and observance of national values and principles of governance.

In so far as the alleged violations were concerned, it was pleaded in the Petition that the Appellants were original indigenous residents of Kibokoni, Utange, occupying the suit parcel as ancestral land since time immemorial. It was alleged that strangers emerged in or about November 2016 claiming ownership of the land, instigated evictions, caused arrests of some community members, and that the Respondents facilitated or acquiesced in these actions. The Petition further alleged that officers at the Mombasa Land Registry withheld information that the suit parcel was unlawfully registered in the name of the 3rd Respondent, and that subdivision and development approvals

were granted in violation of the Appellants' constitutional rights. These acts were described as amounting to discrimination, historical injustice, violation of property rights, breach of dignity, and disregard of the rule of law.

However, when the allegations are considered, it becomes evident that they were pleaded in broad and generalized terms. The Petition did not distinctly identify which specific Respondent committed the alleged unconstitutional act, and nor did it particularize how the conduct of the Respondents resulted in the violation of a specific constitutional Article and to whom. The pleadings repeatedly referred to “the Respondents” acting “in concert,” without differentiating the roles, decisions, or omissions attributable to each Respondent. As a result, the failure to map out the alleged violations in accordance with identifiable constitutional provisions or to particular actors rendered the Petition incompetent. After all, it is trite law that courts do not issue orders in vain.

With respect to the parties, the Petition was brought by the named petitioners *“and 70 others.”* The identities and names of the *“70 others”* were not disclosed, nor was it pleaded that the matter was a representative suit instituted in compliance with the laid down procedural requirements. This lack of specificity as to the parties on whose behalf the relief was sought further obscured the scope and application of the alleged violations.

In addition, the prayers sought were extensive and far-reaching. They

included declarations that the Appellants' constitutional rights had

been violated; declarations that the Appellants were entitled to be

registered as owners

of the suit parcel; declarations nullifying titles, leases, and other legal instruments held by the Respondents; prohibitory and mandatory injunctions restraining subdivision, transfer, development, and eviction; and orders compelling public officers to perform their constitutional mandates. While these prayers were clearly set out, they were not anchored on precisely pleaded violations demonstrating how the factual allegations satisfied the constitutional standards required to justify such relief.

It is therefore evident that, although the Petition cited numerous constitutional provisions, alleged multiple forms of violation of rights, named several Respondents, and sought extensive constitutional and proprietary remedies, it failed to connect these elements with the level of clarity and specificity demanded in constitutional litigation. It clearly failed to set out with reasonable precision, the exact constitutional rights infringed, the specific act or omission complained of, the particular Respondent responsible for the violation, and the manner in which the alleged violation occurred. On this basis alone, the Petition fell short of the precision requirement applicable to constitutional petitions.

In the case of ***Gwer & 5 Others vs Kenya Medical Research Institute & 3 Others*** ***[2020] KESC 66 (KLR)***, this Court underscored the principle that the

burden of proof lies with the party alleging a constitutional violation. Relying

on ***Sections 108*** and ***109*** of the ***Evidence Act***, the Court observed that a litigant who would fail in the absence of evidence bears the obligation to place sufficient proof before the court.

Further, the Supreme Court reiterated the position in the case of ***Wamwere & 5 Others vs Attorney General (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights)*** and held:

> ***66. The two superior courts below were of the unanimous view that a petitioner bears the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities. We affirm this juridical standpoint bearing in mind that such claims are by nature civil causes. See Deynes Muriithi & 4 others v Law Society of Kenya & another, SC Application No 12 of 2015; [2016] eKLR.***
>
> ***67. In this case, the onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that firstly, she owned or erected or lived in the alleged properties; and secondly, that state agents interfered or deprived her of the subject properties. This, as was aptly appreciated by the superior courts, is the import of section 107 of the Evidence Act on the burden of proof."***

Although the Appellants made serious factual allegations,

including ancestral occupation of the suit parcel, eviction, arrests, denial of access to land records, unlawful registration, subdivision and development of the property, these allegations were not supported by affidavits sworn by the alleged occupiers of the land. No documentary material was produced to demonstrate eviction or

arrests, and no official records were tendered to support the claim of unlawful dealings at the land registry or improper subdivision approvals. The Petition therefore rested entirely on unsubstantiated allegations contained in the pleadings without any scintilla of evidentiary support. As a result, the trial court was left without a factual foundation upon which it could interrogate or determine the alleged constitutional violations. In such circumstances, the Appellants failed to discharge the legal and evidentiary burden imposed upon them by ***Sections 107*** and ***109*** of the ***Evidence Act***.

It therefore follows that the evidential burden never shifted to the Respondents, and the court could not properly call upon them to rebut allegations that had not been substantiated in the first instance. The failure to adduce evidence was not a procedural technicality, but a substantive defect that went to the root of the Petition. Accordingly, the learned trial Judge was right in finding that the Appellants failed to satisfy the threshold necessary for founding a constitutional Petition.

The next issue is whether the petition was *sub judice* and therefore improperly before the trial court.

In the case of ***Speaker of the National Assembly & Another vs Senate & 12 others [2021] KECA 282 (KLR),*** this Court held that:

"***Sub judice is a Latin word meaning "under judgment". It denotes that a matter is being considered by a court or judge. The doctrine is codified in section 6 of the Civil Procedure Act."***

In the case of ***Kenya National Commission on Human Rights vs Attorney General & 17 Others*** ***[2020] eKLR,*** the Supreme Court expressed itself on the

doctrine thus:

"The term 'sub judice 'is defined in Black's Law Dictionary 9th Edition as: "Before the court or judge for determination." The purpose of the sub judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

It was the Respondent's contention that the constitutional petition was *sub judice* for the reason that there were other existing suits before the Environment and Land Court concerning the same subject matter. Specifically, it was contended that the Appellants had previously instituted *Mombasa ELC No. 232 of 2014* while the 3rd Respondent had filed *Mombasa ELC No. 3 of 2015*, both suits

seeking the determination of ownership and possession of the suit parcel. According to the Respondents, the constitutional petition was founded on the same factual matrix and sought, in substance, to re-litigate the ownership dispute under the guise of constitutional violations.

In response, the Appellants argued that the Petition raised distinct constitutional questions which were not directly and substantially in issue in the pending land cases. They maintained that the parties were not identical, and that the Petition sought enforcement of constitutional rights, including protection from discrimination and historical injustice, rather than a mere determination of title.

The record shows that the Respondents demonstrated that there were existing Environment and Land Court suits—namely *Mombasa ELC No. 232 of 2014* and *Mombasa ELC No. 3 of 2015*—seeking determination of ownership and possession of the same parcel of land. This fact was not disputed. The constitutional petition, although framed as an enforcement of constitutional rights, has sought substantive reliefs whose determination would necessarily resolve the same ownership dispute already pending

before a court of competent jurisdiction.

It is also of significance from a further interrogation of the Petition in relation to the other suits that the parties are largely the same, with Ali Juma Mwakaneno and the 3rd Respondent Two Thirds Investment Co. Ltd being the central proponents in all the suits. While the Appellants argue that the constitutional petition involved different parties because it was brought by named petitioners *"and 70 others,"* that argument does not hold. This is because, the Appellants having omitted to include the names of the *"70 others"* meant that the Petition brought by Ali Juma Mwakaneno against the 3rd Respondent, Two Thirds Investment Co. Ltd *inter alia* was a mere replication of *Mombasa ELC No. 232 of 2014* and *Mombasa ELC No. 3 of 2015,* thereby reinforcing the *sub judice* objection.

For the forgoing reasons, we find, as did the trial court, that, the Appellant's constitutional Petition was a parallel process anchored on the same dispute between the parties, thereby rendering the matter *sub judice*.

Having found that the Appellants' constitutional petition was incompetent for want of precision, unsupported by evidence, and on account of being *sub judice*, we are satisfied that the learned

trial Judge properly directed herself on the applicable law and, in so doing, rightly struck out the Petition. Consequently, we have no reason to interfere with the trial Judge’s decision.

In sum, the appeal has no merit and is hereby dismissed with costs to the 1st, 3rd, 4th, 6th, 7th, and 8th Respondents.

It is so ordered.

Dated and delivered at Malindi this 20th day of February, 2026.

A. K. MURGOR

.....

. JUDGE OF

APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF
APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF
APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR