

**REPUBLIC OF KENYA**

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

**ELC CONSTITUTION PETITION NO E004 OF 2024**

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

**AND**

**IN THE MATTER OF ARTICLES 40 AND 47 OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF; ARTICLES 2 [1], 10 [2], 19, 20, 21,  
22, 23, 28, 29, 31, 35, 64, 258 AND 259[1]**

**AND**

**IN THE MATTER OF; LAND ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF; THE REFUSAL BY THE LAND  
REGISTRAR KWALE COUNTY LAND REGISTRY TO ISSUE  
TITLE DEEDS WITH REGARD TO THE PARCEL OF LAND  
KNOWN AS KWALE/DIANI S.S/2244 HAVING BEEN SUB -  
DIVIDED INTO PLOT NUMBERS KWALE/DIANI SS/6229  
AND KWALE/DIANI S.S/6230**

**BETWEEN**

**KASSIM MWAMZANDI MWAMBODZE.....**

**PETITIONER**

**AND**

**THE LAND REGISTRAR KWALE**

**LAND REGISTRY**

**THE ATTORNEY GENERAL..... RESPONDENTS**

**JUDGEMENT**

**I. Preliminaries**

1. The Judgement of this Honourable Court pertains to the Constitution Petition dated 11<sup>th</sup> February 2025. It was instituted by *Kassim Mwamzandi Mwambodze*, the Petitioner herein. The Petition was filed against *the Land Registrar, Kwale, the Land Registry and the Honourable Attorney General*, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent herein.
2. The Petitioner alleged that there was blatant violation of his fundamental rights perpetrated by the Respondents herein as listed under Paragraphs 12 to 19 of the filed Petition. Subsequently, he sought to be compensated by way of damages.

3. Upon service, the Petition was opposed by joint Grounds of Opposition dated 18<sup>th</sup> July 2025 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein. The Honourable Court will be dealing with the said grounds of opposition at later stage in the Judgement.

## **II. Petitioner's Case**

4. The Petition was based on the grounds, the testimonial facts premised and the averments founded under the 18 Paragraphed Supporting Affidavit sworn and dated 11<sup>th</sup> February, 2025 of KASSIM MWAMZANDI, the Petitioner herein, together with nine (9) annextures marked as "KM - 1 to 9 annexed thereto. He averred as follows that:-

- a) He was a male adult of sound mind and a Citizen of Kenya holding the national identity card bearing all the details shown thereof and conversant with the facts of this case and hence competent to swear this Affidavit herein.
- b) He was the legal and absolute registered owner of all that parcel of land known as Plot no KWALE/DIANI SS/2244 (Hereinafter referred to as "The Suit Land").
- c) On or about 10<sup>th</sup> July 2024, the Petitioner entered into a sale agreement with a private company trading in the name and style of "***D & Z Uptown Stays Limited***" for the

sale of a portion of land measuring 0.20 hectares at a consideration of Kenya Shillings Nine Million Five Hundred Thousand [Kshs. 9,500,000/-].

- d) One of the directors of the purchasing company was travelling out of the Country and wanted to have the company's name included in the Title before the process of the sub - division could take place.
- e) Hence, the Law firm of Messers. Mbwiza & Co. Advocates were engaged by both the Purchaser and the Petitioner and undertook the said process of including the Purchaser's name in the Title for the Suit plot.
- f) On 24<sup>th</sup> July, 2024 the search was conducted and an issued Green Card which provided the joint names of the Petitioner and the said Director. Also a Green card
- g) The Petitioner then applied for consent to sub - divide the suit parcel into two portions whereby the 0.2 Hectares was to be transferred to the purchaser and the remainder in the Petitioner's name.
- h) That the Msambweni Land Control Board issued a consent to partition the plot on 11<sup>th</sup> September 2024. The advocate handling the transaction applied for valuation of the

property and a valuation report was issued by the ministry of lands and physical planning on 5<sup>th</sup> November 2024.

- i) The Petitioner surrendered the original title for the suit parcel to the 1<sup>st</sup> Respondent together with the consent to partition the plot into two portions sometimes in October 2024.
- j) Since then to date the 1<sup>st</sup> Respondent had refused and ignored to release the two title deeds which have been allocated plot no's KWALE/DIANI SS/6229 and 6230. Frequent visits to the Kwale Land Registry have borne no fruit and hence the Constitutional Petition before this court.
- k) All along he had been in physical occupation of the suit land and was about to hand over vacant possession of the portion of it to the Purchaser.

5. The Petitioner prays for the following orders:-

***a) A declaration that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents herein have infringed the Petitioner's rights as provided under Article 40 and 47 of the constitution of Kenya 2010***

***b) An order of appropriate relief under Article 23 of the constitution of Kenya 2010 being an order of MANDAMUS compelling the 1<sup>st</sup> Respondent herein to***

***issue the petitioner with title deed for plot numbers KWALE/DIANI SS/6229 and KWALE/DIANI SS/6230***

- c) An order directing the 1<sup>st</sup> Respondent to effect any transfer or proves relating to any dealings relating to plot no KWALE/ DIANI SS/6229 presented for registration by the Petitioner***
- d) An order of appropriate relief under Article 23 of the constitution of Kenya 2010 being compensation in form of damages***
- e) Any other relief that this Honourable court may deem fit to grant.***
- f) Costs of the Petition.***

### **III. The Respondents Case**

6. In response to the Petition, the Respondent filed joint grounds of opposition dated 18<sup>th</sup> July 2025. It raised the following grounds that:-

- a) The Petition never disclosed any genuine constitutional law grievances and/or cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
- b) The Petitioner's pleadings and prayers revealed the issue in dispute regards to a contest on ownership of the suit property known as Land Reference Numbers KWALE/DIANI SS/6229 and 6230.

- c) The Petitioners Petition suit was a judicial review application disguised as a Constitutional Petition, therefore the Petitioner had not exhausted the available remedies available in law
- d) The Petition was predictive, speculative and anticipatory where the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had not cancelled and/or revoked any title to the suit property which never justified the interference of this Honourable Court.
- e) The Petitioner's claim against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as pleaded violating the provision of Articles 40 and 47 of the Constitution of Kenya, 2010 had not been sufficiently pleaded to disclose a constitutional claim thereby against the principles established in the case of:- "**Anarita Karimi Njeru - Versus - V R [2979] eKLR**".
- f) The suit as otherwise instituted is frivolous, vexatious and an outright abuse of the court process.

#### **IV. The Submissions**

7. On 21<sup>st</sup> July 2025 upon the closure of filing pleadings and exchange of pleadings as earlier directed by court, Parties were directed to file their Written Submissions within stringent timeframe. Subsequently, the Honorable Court reserved a day to deliver its Judgment accordingly on 25<sup>th</sup>

February 2026 as already stated in the directions given above.

**A. The Written Submissions by the Petitioners**

8. The Law firm of Messrs. Osundwa & Company Advocates filed submissions on behalf of the Petitioner dated 12<sup>th</sup> August 2025. Dr. Chitemwe Advocate for the Petitioner commenced the submissions by providing a brief summary of the facts leading to the Petitioner's case. The Learned Counsel submitted that he would be entirely relying on the Petition. That at all material times the Petitioner was the registered owner of the suit land. He was issued with a title Deed on 21<sup>st</sup> December, 2015 as per the Green Card. On 10<sup>th</sup> July, 2024 he entered into a sale agreement with "D & Z Uptown Stays Limited" (Hereinafter referred to as "The Company") for the sale of 0.202 HA of the suit land. The Petitioner obtained the consent to transfer the property to the Purchaser and who requested to be included in the title first and thereafter have it sub - divided it.

9. Eventually, on 18<sup>th</sup> July, 2024 the land was duly transferred and a Title Deed was issued by the 1<sup>st</sup> Respondent. The title deed was in the names of the

Petitioner and the Company. It was sub - divided and two titles were created. Despite of this and several requests made, the 1<sup>st</sup> Respondent refused to issue the two title deeds as would have been expected.

10. The Learned Counsel stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had failed to explain whether the land was owned by any other person other than them. It was submitted that it had been over a year since the documents were submitted to the 1<sup>st</sup> Respondent as a keeper of all land records in order to facilitate the transfer but that it had not been made possible.

11. The Learned Counsel made reference to the provisions of the Land Registration Act No 3 of 2012 and specifically Section 14 which gives the Land Registrar power to summon any person to appear before him for clarification on any matter arising from a land transaction. Further reference was made to the provision of Section 26 of the said act on the effect of a land title as conclusive evidence of ownership.

12. The Learned Counsel averred that in the absence of issuance of a title or any explanation from the Land Registrar who issued the searches and Green Card, the

Petitioner had then proved his case against the Respondents and the orders sought ought to be granted.

13. That the Petitioner's right to ownership of property as envisaged under Article the provision of Article 40 of the Constitution had been violated and hence the need to seek redress thorough a Constitutional Petition.

14. It was the contention by the Learned Counsel, that the Petitioner's right to fair administrative action had equally been infringed as he had not been informed why his Title Deeds could not be released.

15. In conclusion, therefore, the Petitioner prayed that the Petition be allowed as prayed.

**B. The Written Submissions by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents**

16. The written submissions by the 1<sup>st</sup> & 2<sup>nd</sup> Respondent were filed by M/s. Nimwaka Kiti Muema, the Deputy Chief Litigation Counsel on behalf of the Attorney General. The submissions was dated 28<sup>th</sup> November 2025. M/s. Kiti Advocate commenced by stating that the submissions was in support of the Joint Grounds of Opposition filed for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents herein. The Counsel recounted on the background details of the matter and the reliefs

sought by the Petition from the filed Petition. The Learned Counsel listed the following three ( 3 ) issues for determination;

17. Firstly, it was submitted that the Petitioner does not meet the threshold for a Constitutional Petition as was set by the Court of Appeal in the case of:- **“Anarita Karimi Njeru Versus Republic [1979] eKLR”**. That the court in **“the Anarita [Supra] case”** established that a Constitutional Petition must be couched in a way that the constitutional violations are pleaded with a reasonable degree of precision and the manner in which the violations were committed and to what extent.

18. Counsel for the Respondents submitted that the Petitioner has placed reliance on the provisions of Article 40 of the constitution and stated that his rights under the same had been infringed. That however from the evidence tendered in the affidavit in support of the Petition, the Petitioner had not demonstrated how his right to property had been infringed as alleged. That it is trite that he who alleges must prove but the same is not the case herein.

19. Secondly, whether the Petitioner had exhausted all the available remedies in law. The Learned Counsel submitted

that they are aware of the Petitioner's rights to fair administrative action as guaranteed under Article 47 of the constitution and the Fair Administrative Actions Act. That this is to the extent that the 1<sup>st</sup> Respondent ought to have dealt with the Petitioner by offering the administrative assistance and facilitation by the Respondents as per the principles of natural justice and which was executed. That the Petitioner alleges to have visited the land registrar's office severally but has not annexed any evidence of such visit.

20. Counsel suggested that the Petitioner should have registered a caution to safeguard his rights on the property and stated that the 1<sup>st</sup> Respondent had not cancelled or revoked any title with respect to his land to warrant the intervention of the constitutional court.

21. The Respondents maintain that there is no constitutional issues to be addressed in the instant Petition and as such the same ought to be dismissed. Reference was made to the holding in the case of:- ***John Harun Mawu & 3 Others Versus Attorney General & 2 Others [2012] eKLR and Royal Media Services Limited versus attorney general Civil Appeal No 45 of 2012.*** The Respondents submit that a delay in

issuing a title ought not to be misconstrued as refusal to issue it.

22. Finally, whether the court should grant the remedies sought. The Petitioner was advised to seek redress from the office of the ombudsman and to exhaust all the alternative remedies as required under the provision of Section 9 (2) and (3) of the Fair Administrative Action Act. The court was urged to dismiss the Petition.

#### **V. Analysis and Determination**

23. I have carefully read and considered the pleadings herein being the Constitution Petition dated 11<sup>th</sup> February 2025, the Grounds of Opposition in response to it, the submissions on record from both parties, several cited authorities and the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

24. In order to arrive at an informed, reasonable, fair and Equitable decision, the Honorable Court has four (4) framed issues for determination as follows: -

- a) Whether the Petition constitutes a proper Constitutional Petition and meets the laid - down threshold.***

***b) Whether the filed Constitutional Petition filed by the Petitioner is meritorious.***

***c) Whether this was the proper forum to institute this suit and if so, were the parties herein entitled to the reliefs sought?***

***d) Who bears the costs of the Petition?***

***ISSUE No. a). Whether filed Constitution Petition filed by the Petitioners is meritorious and meets the threshold of a Petition.***

25. Under this sub - heading the Honourable Court shall critically examine the efficacy and substratum of a Constitution Petition. Fundamentally, prior to the Honorable Court proceeding any further, it recognizes the fact that the constitutional provisions which are at the core of this Petition must be thoroughly reviewed. Additionally, the said provisions shall be fully appreciated within the constitutional jurisprudence and Constitutionalism and its value as a whole. The said provisions cited by the Petitioner are mainly under the provision of Articles 2, 3, 10, 19, 20 ( 1 ) & ( 2 ), 22 ( 1 ), 23, 35, 40, 47, 162 ( 2 ), 258 ( 1 ) and 259 ( 1 ) of the Constitution of Kenya,

2010. For clarity sake, I wish to expound on them

thus:-

- Article 2 (1) provides that the Constitution is the supreme law of the Republic and binds all persons and all State organs at all levels of government.
- Article 3 (1) provides that every person has an obligation to respect, uphold and defend the Constitution.
- Article 10 (2) ( b ) sets out all the national values and principles of Government that binds all the State offices, State organs, public offices and all persons whereas they apply or interpret the Constitution. These include public participation, inclusivity non - discrimination & protection of the marginalised, social justice, equity and the rule of law;
- Article 19 ( 1 ) & (2)- it is on the Bill of Rights which is the integral part of the Kenya's democratic state and is the framework for social, economic and cultural policies.

The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice.

- 20 ( 1 ) & (2) - Application of the Bill of Rights.
- 22 ( 1 ) - Enforcement of the Bill of Rights.
- 23 - Authority of Courts to uphold and enforce the Bill of Rights.

- 35 - Access to information held by State. And/or any other person.
- Article 40 (1) provides the right for every person to acquire and own property at any part of the Republic; the 1<sup>st</sup> and 2<sup>nd</sup> Respondent desiring to determine where the Petitioners should belong and own their property. This will crush their hopes of ever obtaining title deeds permanently.
- 47 - Fair Administrative action.
- 162 ( 2 ) - Establishment of the Environment & Land Court.
- 258 ( 1 ) - Enforcement of this Constitution.
- 259 ( 1 ) - Construing of this Constitution.

26. The Honorable Court has also taken deep cognizance to the importance and sensitivities apportioned to land in this country. Indeed, land is a source of livelihood and very emotive. It is not a matter to treat so lightly but with great care and circumspect lest one is misunderstood and it leads to grotesque conflict which may even cause blood shed as it has happened before and quite often. Therefore, no citizen is to be deprived off his land by the State or

any public authority against his wish unless expressly authorized by law and public interest. It is not a matter to treat so lightly but with great care and circumspect lest one is misunderstood and it leads to grotesque conflict which may even cause blood shed as it has happened before and quite often.

27. As a matter of course, the Constitution of Kenya under the provision of Article 259 (1) provides a guide on how it should be interpreted as such:-

**This Constitution shall be interpreted in a manner that:-**

- a) Promotes its purposes, values and principles;**
- b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
- c) Permits the development of the law; and**
- d) Contributes to good governance.....”**

28. This Court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided. Further, it is important to fathom that the Constitution is **“a living instrument having a**

***soul and consciousness of its own***” . It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

29. Based on the principles set out in the edit of The Court of appeal case of ***the Mumo Matemu - Versus - Trusted Society of Human Rights Alliance & Another (2013)eKLR*** provided the standards of proof in the Constitutional Petitions as founded in the case of ***Anarita Karimi Njeru -Versus - Republic [1980]KLR 154*** where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

***“Constitutional violations must be pleaded with a reasonable degree of precision.....”***

Further, in the ***“Thorp - Versus - Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR*** said in the year 1876 and which hold true today:

***“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense***

***and delay especially as regards the amount of testimony required on either side at the hearing”***

30. In application of these set out Constitutional principles for filing a Constitution Petition to this case, the Honorable Court is fully satisfied that the Petitioner herein has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> Respondents herein and pleading for the prayers sought.

**ISSUE No. b). Whether this Petition constitutes a proper Constitutional Petition**

31. Under this Sub - heading the Honorable Court shall be examining whether the instant Petition is meritorious or not. The provision of Article 258 of the Constitution is explicit on who can institute a constitutional petition before court. the same provides as follows:-

**“(1) Every person has the right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention.**

**(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by -**

- a. A person acting on behalf of another person who cannot act in their own name;**
- b. A person acting as a member of, or in the interest of, or a group or class of persons;**
- c. A person acting in the public interest.”**

32. In relying on the above provisions of the constitution, it is clear that the Petitioner has a right to institute the Petition before court and the same has therefore been correctly exercised. The Petitioner alleges upon entering into a sale agreement to dispose off the suit land and also causing its sub - division into two portions, there has been an abuse of his rights by the Respondents in failing to issue him with a title deed over his sub - divided land parcel and which is the suit property herein. The Petitioner maintains that his right to ownership of property and use of the same has been violated and has necessitated the institution of the instant Petition.

33. I have considered the affidavit evidence as relayed upon the court by the Petitioner. It is not however, enough to allege that one's fundamental freedoms or rights have been violated. The violation must be proved. Section 107

(1) of the Evidence Act Cap. 80 Laws of Kenya is clear in this regard and provides as follows;

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”**

34. The letter and spirit of the above provision has been captured in several decisions of the superior courts including but not limited to the cases of “**Anarita Karimi Njeru (Supra)** and **Mumo Matemu (Supra)**. Ancillary to the foregoing is the requirement that any prospective Petitioner ought to set out his or her complaint with precision and clarity to enable the court to ascertain whether or not a given right or fundamental freedom has been infringed.

35. In the case of “**Anarita Karimi (Supra) Trevelyan & Hancox, JJ**, [and which has been heavily relied upon by the Respondents], threshold for proof of infringement and violation of Fundamental rights was summarized as follows;

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

36. The Court of Appeal in the Case of ***“Mumo Matemu (Supra)”*** observed as follows:-

***(44) We wish to reaffirm the principle holding on this question in “Anarita Karimi Njeru (Supra)”. In view of this we find the petition before the High Court did not meet the threshold established in that case. At the very least the 1<sup>st</sup> Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of the shortcomings, it was not enough for the Superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting” without requiring remedy by the 1<sup>st</sup> Respondent.”***

37. Further in the case of:- ***“Ostenah Ogero Taracha - Versus - Ethics & Anti-Corruption Commission & Attorney General [2017] eKLR”*** the court held that:

***“It is not however, enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be proved. Section 107 (1) of the Evidence Act Cap. 80 Laws of Kenya is clear in this regard and provides as follows; “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”***

45. Based on the above sound legal ratio, I have carefully perused through the Petition as filed. The gist and substance of the Petition surrounds the actions of omission and/or commission by the 1<sup>st</sup> Respondent herein in failing to discharge his duties of effecting the transfer of the suit properties and preparing titles to the said sub - divided parcels of land. The Petitioner further challenges the 1<sup>st</sup> Respondent’s failure to give any proper reason as to why the title deeds have not been issued to date and why he has not been summoned in order to shed light on anything concerning the suit property. I will reproduce the entire Article 40 of the Constitution.

**40. Protection of right to property**

**(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—**

- (a) of any description; and**
- (b) in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person—**

- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**
- (b) to limit, or in any way restrict the enjoyment of any right under this**

**Article on the basis of any of the grounds specified or contemplated in Article 27(4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**
- (b) is for a public purpose or in the public interest and is carried out in accordance with this**

**Constitution and any Act of Parliament that—**

- (i) requires prompt payment in full, of just compensation to the person; and**
- (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

**(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold Title to the land.**

**(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

38. To my mind, the thrust of Article 40 is to protect proprietary rights under the law. Such rights are governed by various statutes in place, It is not in contention that the Petitioners are not the registered owners of the suit property. The Petitioners have no absolute and indefeasible title of the suit property that it is capable of being protected under Article 40. This right is only available once a title is issued under the Act, the holder thereof acquires an indefeasible title which cannot be taken away except in accordance with the Constitution and the law. For that reason, the argument advanced by the Petitioners herein is not only untenable, unsustainable but unfounded. It must fail.

39. In my opinion, the court is being called upon to make a determination on the conduct of the Land Registrar in failing to discharge his duties but the pleadings are being clothed with a veil of abuse of rights which does not fit. It is my considered view that the Petition as drafted does not

meet the threshold of a Petition as set out in “***the Anarita Karimi’s case*** and emphasized in “***Mumo Matemu’s case. (Supra)***”. Therefore, I discern that the Constitution Petition by the petitioner is not merited and hence must fail thereof. .

**ISSUE No. c). Whether this was the proper method or mode to institute this suit and if so, the parties herein are entitled to the reliefs sought from the filed pleadings.**

46. Under this sub heading, the Honorable Court extrapolate further on an issue strongly brought out by all the Respondents while attacking the Petition. The said issue is whether this was the Constitution Petition was the proper method to have sought for the said reliefs. From the very onset, the Honorable Court has comprehensively deliberated on this issue herein and thus the answer is already stated. In simple terms, from the relief sought by the Petitioner, the suit ought to have been by way of filing an ordinary suit and not a Constitution Petition. By arriving at this decision, the Court considers the fact that it would lead to or germinate to what is now termed as “***Doctrine or principle of Constitutional Avoidance***” . It is a preference of deciding a case on any other basis other than one which

involves Constitutional issue being resolved. This is where it is possible to decide a case without reaching a Constitutional issue, it should be done. It is argued that where infringement of rights alleged can be founded on the substantive law, the proper course is to bring the claim under the law and not the under the Constitution through a Petition. It encompasses three main principles which are standing, ripeness and mootness. Comparatively, this doctrine is just like in the case of the Doctrine of Exhaustion or Res Judicata or doctrine of Justiciability (the limitations on the Constitutional arguments that the Court will entertain). , the doctrine of avoidance precludes a Court from entertaining a case which is conferred by a statute. The doctrine of avoidance is primarily viewed by Courts from the position that although a Court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In other words the Court will not determine a Constitutional issue when a matter may properly be decided on another basis. This legal position was upheld in several decisions including the cases of: ***“Sports & Recreation Commission - Versus - Sagittarius Wrestling Club***

**& Another“ (2001) (2) ZLR 501 (5) and John Harun Mwau - Versus - Peter Gastrow & 3 Others [2014] eKLR** and the Supreme Court case of **“Communication of Kenya & 5 Others - Versus - Royal Media Services Limited & 5 Others (2014) eKLR page 259”** the Court held that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

**“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”**

47. Similarly, in the case of **“Uhuru Muigai Kenyatta - Versus - Nairobi Star Publications Limited [2013] eKLR, Lenaola, J** (as he then was) held that:

**“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries where the converse may have been expressed as the position. My mind is clear however**

***that not every ill in society should attract a constitutional sanction and as stated in AG - Versus - S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”***

48. The Learned Judge, Justice Sila Munyao in the case of ***“Parkire Stephen Munkasio & 14 others - Versus - Kedong Ranch Limited & 8 others [2015] eKLR*** rendered himself thus:-

***26. I think this is a good point to also address the argument that this Petition is incompetent for seeking to pursue a claim for adverse possession as a Constitutional Petition. I agree with this argument. Claims for adverse possession are adequately addressed by the Limitation of Actions Act, CAP 22, Laws of Kenya, and the Civil Procedure Rules, specifically Order 37 thereof. Claims of adverse possession are private law claims which need to be addressed through the private law legal channels provided. I do not see how the Petitioners can assert a claim for adverse possession, a purely private law claim, through a constitutional petition. Indeed I doubt if there is a constitutional violation which one will point at, when pursuing a suit for adverse possession. It follows that even if I am wrong on the point that the issue of adverse possession on behalf of the same parties herein has previously been litigated, the aspect of this Petition, that relates to pursuance of a right over land by dint of adverse possession is incompetent, for there are laid down procedures on how to pursue an adverse possession suit, which ought to be followed.***

**27. I agree with Mr. Musangi for the 3<sup>rd</sup> Respondent that not every violation of proprietary rights ought to provoke a constitutional petition. I agree, that where there are private rights being agitated, the proper recourse is to file an ordinary suit, for determination and not to file a Constitutional Petition. Mr. Musangi's view was that the entire Petition pursues private rights. On my part, I hesitate to make a final conclusion of this argument at this preliminary stage, for on the face of it, the petitioners cite various constitutional violations, which appear to go beyond the agitation of private proprietary rights. I would rather hear the petitioners first, before concluding that the Petition agitates purely private rights.**

49. As already indicated above, in direct application of the above cited provisions, certainly I conversely state that a Constitutional Petition is not an appropriate mechanism to ventilate claims based on where a Public Servant - in this case the Land Registrar - is alleged to have failed to discharge his duty - issuance of title deeds to the sub - divided parcels of land and even to provided an explanation for that matter. For avoidance of doubt this issue is better dealt with through laid down procedure perhaps through Judicial Review.

50. For these reasons, I hold that the Constitution Petition is the wrongful mode to have instituted this suit and therefore it fails on arrival.

**ISSUE No. c). What orders should issue based on the findings in issue [1] above**

40. The Petitioner has stated that he is keen on having fair administrative action from the Respondents and which he states is for the court to issue orders of mandamus compelling the Respondents to issue him with titles to the suit properties.

41. The provisions of Article 47 of the Constitution provides for fair administrative action, it states: -

**1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

**3) Parliament shall enact legislation to give effect to the rights in clause (1) and the legislation shall: - a) Provide for review of administrative action by a Court**

**or, if appropriate, an independent and impartial tribunal;**

42. Further Section 4(1) of the Fair Administrative Action Act No.4 of 2015 provides that:

**“Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**

43. Section 4(3) of the Fair Administrative Action Act provides that:

**“Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision— 4**

**a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**b) an opportunity to be heard and to make representations in that regard;**

**c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**d) a statement of reasons pursuant to section 6;**

**e) notice of the right to legal representation, where applicable;**

f) notice of the right to cross-examine or where applicable; or

g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

I reiterate that the process through which the Petitioner should have approached court for redress is in my opinion by way of a Judicial Review and not a Petition. Through the said suit, the Petitioner should have sought specific Prerogative writs compelling the Respondents to carry out the duties vested on them as being sought. Having not met the threshold for a Petition, the court will automatically have to strike out it for being incompetent. In arriving at this decision, I am guided by the holding in "**Francis Oyagi - Versus - Samwel Motari Mangare and 2 Others (2018) eKLR**" the Honourable Court observed and which observation I agree with that:- **"The court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding**

***whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand.”***

44. Arising from the above legal reasoning, once more, I hold that the Petition cannot succeed.

**ISSUE No. d. Who will bear the Costs of the Petition**

51. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of a legal action or proceeding in any litigation. The Black Law Dictionary defines “Cost” to mean, ***“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”***.

It is not well established that and from Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (***The Mutunga Rules***) 2013, the award of costs is at the discretion of the Court.

***“In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms.***

52. Additionally, the Proviso of the Provisions of Section 27(1) of the Civil Procedure Act Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation.

53. In the case of ***“Reids Hewett & Company - Versus - Joseph AIR 1918 cal. 717 & Myres - Versus - Defries (1880) 5 Ex. D. 180***, the House of the Lords noted:-

***“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....” (aso see from the Court of Appeal cases of “Rosemary Wambui Munene - Versus - Ihururu Dairy Cooperatives Societies Limited (2014), eKLR & Cecilia Wambui Ngayo -Versus -Barclays Bank of Kenya Limited (2016) eKLR)***

Further, the Supreme Court fortified this position in the case of ***“Jasbir Singh Rai & 3 others - Versus - Tarlochan Singh Rai & 4 Others [2014] eKLR*** thus:

***“so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.***

45. In the instant case, The Petitioner has failed in meeting the threshold for a competent Constitutional Petition and the Petition must fail. However, it is also evident that the facts of the Petition with regard to the conduct of the 1<sup>st</sup> Respondent have not been disputed. If anything the Respondents in their submissions on record have pointed out that the failure to produce the title deeds is not refusal but just a delay on their part. For the above reasons the court finds that each of parties herein should bear its own costs.

## **VI. Conclusion & Disposition**

54. Consequently, having conducted a comprehensive and expansive expositions on the framed issues, this Honourable Court is satisfied that the Petitioner herein has failed to establish their case. Specifically, the Honourable Court holds:-

**a) THAT Judgement be and is hereby entered against the Petitioner herein and in favour of the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents herein.**

**b) THAT the Constitution Petition dated 11<sup>th</sup> February 2025 filed by the Petitioners be and is hereby found to be unmeritorious. Hence, it fails in entirety and is dismissed.**

c) THAT each party to bear its own costs.

**IT IS ORDERED ACCORDINGLY.**

**JUDGEMENT DELIVERED THROUGH THE MICRO - SOFT  
TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE  
THIS...3<sup>RD</sup> ..... DAY OF .....MARCH.....2026**

.....  
**HON. MR. JUSTICE L.L NAIKUNI,  
ENVIRONMENT & LAND COURT  
AT  
KWALE.**

**Judgement delivered in the presence of: -**

- a) Mr. Daniel Disii, the Court Assistant.
- b) Dr. Chitembwe Advocate for the Petitioner.
- c) M/s. Kiti Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.