



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MALINDI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 20 OF 2025**

**IN THE MATTER OF ENFORCEMENT OF HUMAN RIGHTS**

**AND**

**FUNDAMENTAL FREEDOMS, ARTICLES**

**19,20,21,22,23,24,25,258, 259 AND 260**

**OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE  
RIGHT TO PROPERTY UNDER ARTICLE 40 AND ARTICLE 64**

**OF THE CONSTITUTION OF KENYA, 2010**

**-AND-**

**IN THE MATTER OF PROPERTY KNOWN AS MN/111/366**

**REGISTERED AS CR 11716**

**-AND-**

**IN THE MATTER OF UNFAIR ADMINISTRATIVE ACTION**

**UNDER ARTICLE 47 OF THE CONSTITUTION**

**-AND-**

**IN THE MATTER OF THE ABRIGEMENT OF THE NON-  
DEROGABLE RIGHT TO A FAIR HEARING ENSHRINED IN  
ARTICLES 50 AND 25 OF THE CONSTITUTION OF KENYA,**

**2010**

**-AND-**

**IN THE MATTER OF THE ALLEGED INFRINGEMENT OF THE  
RIGHT TO FAIR ADMINISTRATIVE ACTION ENSHRINED IN  
ARTICLE 47 AND ARTICLE 10 OF THE CONSTITUTION OF**

**KENYA, 2010**

**-AND-**

**IN THE MATTER OF THE CONSTITUTION OF KENYA  
(PROTECTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**-AND-**

**IN THE MATTER OF ARTICLES 23,159, 165 (3) OF THE  
CONSTITUTION OF KENYA 2010**

**-AND-**

**IN THE MATTER OF THE SUPERVISORY JURISDICTION OF  
THE HIGH COURT UNDER ARTICLES 165 (6) AND (7) OF  
THE CONSTITUTION 2010**

**-BETWEEN-**

**SEA POINTE LIMITED**.....

.....**PETITIONER**.....

**-VERSUS-**

**THE HONOURABLE**

**CHIEF MAGISTRATE, KILIFI** .....**1<sup>ST</sup>**

**RESPONDENT**

**SILAS MWITHALI M'MAUTA** .....**2<sup>ND</sup>**

**RESPONDENT**

**DCIO,**

**MTWAPA**

**3<sup>RD</sup> RESPONDENT**

**OCS**

**KIJIPWA**

**4<sup>TH</sup> RESPONDENT**

**LAND REGISTRAR, MOMBASA** .....**5<sup>TH</sup>**

**RESPONDENT**

**RULING**

**1.** The petitioner filed its petition and application dated 25<sup>th</sup> July 2025, as subsequently amended on 26th August 2025, pursuant to leave of court granted on 31st July 2025, allowing the petitioner to amend its documents.

2. The 2nd respondent, on the other hand, filed a Preliminary Objection (PO) to both the application and the petition dated October 6, 2026.
3. The court directed that the application and the PO be canvassed through written submissions.
4. I acknowledge receipt of the submissions from counsel for the applicants and the 2nd respondents with gratitude, as they went a long way to assist the court in reaching its verdict on the issues raised in both the PO and the application.
5. The applicant's application sought a stay of proceedings and a temporary injunction emanating from proceedings in Land Case **No. E040 of 2023 -Kilifi**.
6. On the other hand, the 2nd respondent's PO attacks the petition and the application in the following manner:
  - a) ***The petition lacks merit and is an open abuse of the court process, as this honorable court cannot sit and adjudicate a matter that was heard and finalized by a court of competent jurisdiction, judgment delivered, and is therefore functus officio***
  - b) ***The instant petition is mischievous, an open violation of the Constitution, and an abuse of the court process. It***

***amounts to an appeal from Land Case Number E040 of 2023, in which the petitioner is a total stranger to the suit in the lower court and has not yet been given leave to join the proceedings after judgment was duly delivered.***

***c) The petition directly offends the provisions of sub judice and is an abuse of the court process because the petitioner benefited from the orders of the lower court and registered them with the 5th respondent through misrepresentation.***

***d) The entire petition is based on fraud and misrepresentation and is a calculated move to paint the court in a bad light while the petitioner is in contempt of the court orders issued by the 1st respondent.***

***e) The petitioner, as registered, is in contravention of the Companies Act, 2015, since the company changed its name to an existing company with a similar name contrary to the Business Registration Service.***

***f) The petitioner is therefore not the proprietor of the disputed parcel of land, has never been on the land, and has grossly engaged in fraudulent conduct, misleading both the court and the 5th respondent to force re-entry onto the land and change its face.***

**7.** The issues I frame for this court's decision are whether the PO raised is sustainable, whether to grant the orders sought in the application, and who should bear costs.

- 8.** As background, the applicant contends that the 2nd respondent filed a suit in Kilifi, in the Magistrate's Court, that is **ELC No. E40 of 2023-Silas Mwithali M' Mauta v East African Industries, Beka James and Yusuf Aronano**, seeking to be declared the owner, by way of adverse possession, of two parcels of land, namely Parcel No. MN/III/366 and MN/III/756.
- 9.** That Sea Pointe Ltd was the registered proprietor of parcel Number MN/III/366, registered as CR.11716, and has been in possession and occupation of the parcel since 2007.
- 10.** The 1st respondent, without ever having jurisdiction to entertain adverse possession claims, entered an irregular default judgment on 20th March 2025 and a decree dated 16th April 2025, which declared the 2nd respondent the owner of the suit property by way of adverse possession and directed the Land Registrar, Mombasa, to “rectify” and register the 2nd respondent as the owner.
- 11.** The petitioner was neither a party (defendant or otherwise) to the 2nd respondent’s aforesaid suit nor served with Court Summons to defend against the 2nd respondent’s claim. Yet the impugned Decree affected its proprietary

rights over parcel Number MN/III/366, registered as CR. 11716, without affording it a hearing.

- 12.** On May 23, 2025, the petitioner applied (as a proposed interested party) under a certificate of urgency to stay execution and to have the impugned decree set aside for want of jurisdiction on the part of the 1st respondent.
- 13.** On May 26, 2025, the 1st respondent granted a stay of execution orders while leaving the prayer for joinder of the petitioner in abeyance, despite the petitioner demonstrating with evidence that it was the registered proprietor of parcel Number MN/III/366, which had been affected by the impugned default decree.
- 14.** Notwithstanding the stay orders being granted in the presence of the 2nd respondent and served upon the 5th respondent, the 2nd respondent, allegedly in collusion with the 5th respondent, proceeded to simultaneously register the impugned decree against the petitioner's property, vesting the property in the 2nd respondent. The registration of the impugned decree was therefore illegal because it could not be registered against the petitioner's property, as the petitioner was not a party named in the impugned decree,

thus violating the petitioner's right to property, right to be heard, and the right to fair administrative action guaranteed by the Constitution.

**15.** On July 15, 2025, the Mtwapa DCI Officers, acting under the instructions of the 3rd respondent and without a court order, trespassed onto the petitioner's property in the company of the 2nd respondent and arrested the petitioner's employees residing on the property, claiming that the 2nd respondent had trespassed in reliance on the impugned decree. The arrest was intended to transfer possession of the property to the 2nd respondent and to sanitize his fraudulent claim of adverse possession.

**16.** The petitioner filed an application before the 1<sup>st</sup> respondent under a Certificate of Urgency on 18th July 2025, seeking injunctive relief against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from trespassing and/ or interfering with its property rights pending hearing of its earlier application to set aside the default Judgement for want of jurisdiction

**17.** On the same day, the 2nd respondent filed a similar application seeking injunctive relief, restraining the petitioner from allegedly evicting it from the property, on the false

allegation that it was already in occupation of the property, having briefly gained access on 15th July 2025 after the arrest of the petitioner's employees and with the help of the 3rd respondent, DCIO officers.

**18.** The 1st respondent certified both applications as urgent, directing that the status quo be maintained pending the hearing of the said applications. The petitioner continued to possess its property, as has been the case since 2007.

**19.** On July 22, 2025, the 2nd respondent filed a similar application, without seeking a prayer for a review and/or the setting aside of the status quo orders dated July 18, 2025, which sought an injunction to restrain the petitioner from accessing and/or entering its property. In the said application, the 2nd respondent never sought to vary and/or set aside the status quo orders as earlier granted by the 1st respondent.

**20.** The applicant contends that the 1st respondent, in contravention of the petitioner's right to be heard and without the requisite jurisdiction, allowed the 2nd respondent's application dated 22nd July 2025 and issued three contradictory orders at different times on 22nd July

2024 and 23rd July 2024, the net effect of which was to order the petitioner and its employees, servants and/or guards to vacate its property without affording it a hearing.

**21.** According to the applicant, in the said orders, the 1st respondent captured the petitioner as an interested party, yet no order for joinder as an interested party had been made. The petitioner believes that the respondents' overall conduct has been to support illegality. They seem to have approved decrees issued without jurisdiction by the 1st respondent, which were intended to legitimize the 2nd respondent's claim of adverse possession over the petitioner's property. Furthermore, it appears that the petitioner has been purposefully evicted from its property through carefully crafted judicial actions, all while being denied the opportunity to participate as an interested party to challenge these orders if necessary.

**22.** The applicant avows that because the petitioner was not a party to the 2nd respondent's suit, it could not appeal the impugned decree. The 1st respondent also appeared determined to scuttle the petitioner's efforts to arrest the unfortunate situation it found itself in, where its property was

being taken away outright based on a suit to which it was not a party and which was decided neither on the merits nor on tangible evidence of possession or occupation.

**23.** In the PO, the 2nd respondent asserts that the avenue used by the petitioner is tantamount to a back-door appeal from the judgment regularly obtained in the lower court, in which the petitioner herein was neither sued nor participated. The judgment in that matter has not been appealed from nor set aside. The petitioner filed an application in the lower court for leave to be joined as an interested party after the decree had already been implemented. Before the application for leave could be heard by the lower court, he went to the suit parcel of land in collusion with the police, and his guards removed the 2nd respondents' guards and began renovating the houses, which are almost fifty years old. When the 2nd respondent filed an application for contempt, instead of replying, the petitioner ran to this court for orders.

**24.** 2nd respondent asserts that the application and the petition constitute a clear abuse of the court process because the petitioner is clearly engaged in forum shopping

and remains a stranger to the lower court case, as demonstrated by the reply, and because the judgment was clearly implemented.

**25.** The 2nd respondent avers that the amended application is sub judice and again violates the Constitution, as it subjects the 2nd respondent to double jeopardy. The petitioner filed a similar application for stay orders in the lower court, where he was granted a temporary stay. Still, when confronted with a contempt application, he sought protection by filing a petition with this court. A party that ignores contempt proceedings cannot hide behind a higher court for similar orders, as that would constitute an abuse of the court process. When the application for an injunction was heard, the court ordered that the status quo be maintained, and the 5th respondent registered those orders. He then approached this court with the instant petition, a clear and clever way to appeal that decision. Therefore, the application for stay orders had already been heard by the lower court, which granted orders maintaining the status quo. This petition is therefore cleverly choreographed as a petition. Yet, it is an appeal against the orders issued by the 1st respondent, and

the 1st respondent was included only for the purpose of granting or refusing those orders.

**26.** Regarding the issue of fraud, the 2nd respondent asserts that the petitioner has grossly misrepresented and misled the court by alleging that the petitioner has been on the land and has changed names. However, the land registry records differ significantly. The partner, AF Gross, who is the proprietor of the law firm handling this matter, is currently conflicted because he claims to be a director of Sea Pointe. Yet, the land registry records list very different individuals as the actual directors. The director who signed the company's indemnity is identified as Zaheed Ameer Akbarali. Paragraphs 23, 24, 25, and 26 of the replying affidavits clearly demonstrate the nature of the fraud committed by the petitioner. All these events occurred in 2024, after the judgment was delivered, and the documents prima facie constitute evidence that the petitioner is misleading the court. The matter has been reported to the Directorate of Criminal Investigations (DCI) and is currently under serious investigation, as evidenced by the correspondence. The 2nd

respondent maintains that the petition, together with the application, lacks substantive merit and should be dismissed.

**27.** Regarding company registration, the petitioner claims that the company changed its name through a resolution, according to the documents. However, the 2nd respondent avers that the records show the company was already established. The company registration provisions clearly specify that a person shall not register a company with a similar or existing name.

**28.** The 2<sup>nd</sup> respondent is therefore of the view that the authority in the case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distribution Company Ltd, 1969 EA**, on the principles governing PO has been established.

**29.** In a rejoinder, the applicant states that the 1st respondent has never had jurisdiction to hear and determine a claim of adverse possession. The sub judice bar is therefore not available to the 2nd respondent in that context.

**30.** Applicant avers that the 2nd respondent's contention that this honorable court "*cannot sit and adjudicate on a matter which was heard and finalized by a court of competent*

*jurisdiction and judgment delivered, and therefore it is functus officio*” is legally untenable. First, the impugned default judgment and/or decree dated 16th April 2025 by the 1st respondent was not made by this honorable court, and therefore, the doctrine of *functus officio* is not applicable.

**31.** What is before this honorable court is the petitioner’s petition alleging violation of its property right, the right to be heard, and the right to fair administrative action by the respondents. The petitioner has further urged this court to stay proceedings before the 1st respondent, invoking its supervisory jurisdiction under Article 165(6) of the Constitution, in the interests of justice. Second, the petitioner questions the jurisdiction of the 1st respondent to deal with the adverse possession claim filed by the 2nd respondent and has indeed sought, in its petition, to have the said impugned default judgment and/or decree dated 16th April 2025 quashed for want of jurisdiction. It is not immediately clear what legal authority the 1st respondent was exercising in hearing and determining a claim of adverse possession, or in continuing to entertain the 2nd respondent’s applications despite this lack of jurisdiction being adequately brought to

its attention. It is therefore difficult to see how this honorable court is functus officio or how the petition offends the sub judice rule.

**32.** As regards the 2nd respondent's further contention that the petition amounts to an appeal, it is submitted that the 2nd respondent is either feigning ignorance or has yet to comprehend the petitioner's case. As clearly articulated in the facts in support of the petition and in the supporting affidavit, and as conceded by the 2nd respondent at paragraph 2 of the PO, the petitioner was not a party to the 2nd respondent's suit before the 1st respondent, namely the Magistrate Court at Kilifi, **ELC NO. E40 of 2023, Silas Mwithali M' Mauta v East African Industries, Beka James and Yusuf Aronano.** Yet the impugned decree dated 16th April 2025 purported to extinguish the petitioner's possessory and proprietary rights over its parcel number MN/III/366.

**33.** As such, the petitioner would have no locus to appeal since it was not a party thereto. It is a trite law that a party aggrieved by a decision can only appeal if it was a party to the proceedings or the decision sought to be appealed. The

petitioner, having not been made a party to the 2nd respondent's suit, and the 1st respondent having failed to join it as an interested party to challenge the impugned default decree while continuing to issue irregular and prejudicial interim orders, was clearly a violation of the petitioner's rights as pleaded in the petition.

**34.** The petitioner contends it is therefore entitled to seek redress through the petition herein alleging violation of its rights. The 2nd respondent's contention that the petition amounts to an appeal is therefore legally unsustainable. In the above circumstances, it is submitted that the issues raised in the 2nd respondent's PO require factual interrogation by the court and therefore the PO fails to meet the legal threshold.

**35.** I have reviewed the parties' submissions in **Kabogo v Gitau (Civil Appeal 82 of 2019) [2025] KECA 193 (KLR)**, as cited by the applicant. The Court of Appeal held as follows regarding what constitutes a PO:

*“Having considered the two preliminary objections which formed the basis for the learned Judge’s decision, we find that, in the circumstances of this case, the preliminary*

***objections were not properly taken and ought not to have been sustained.***

***As Law, JA. in the Mukisa Biscuits case (supra) held:***

***“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and, in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”***

**36.** A PO must raise a pure point of law that can be resolved without evidence.

**37.** Seeing that the issues raised in the petition call into question the 1st respondent's jurisdiction to address adverse possession claims, that the petitioners' title was

extinguished without a hearing, and that the petitioner was never a party to the suit that extinguished its title and has no right of appeal, the issues raised in the petition cannot be wished away through a PO in the manner raised by the 2<sup>nd</sup> respondent. They must be interrogated at a hearing.

**38.** Therefore, the PO is unsustainable and is dismissed with costs.

**39.** Whether the petitioner has established a case for the grant of a stay of proceedings and a temporary injunction

**40.** In the Magistrate Court at Kilifi, **ELC No. E40 of 2023, Silas Mwithali M' Mauta v East African Industries, Beka James and Yusuf Aronano**, it is not disputed that the 2<sup>nd</sup> respondent's claim was for adverse possession of two properties, namely parcel Number MN/III/366, registered as CR.11716. It is also not in dispute that the petitioner was, at all material times, the registered proprietor of parcel Number MN/III/366, registered as CR.11716, and that it was neither served with court summons nor joined in the 2<sup>nd</sup> respondent's suit as a defendant or otherwise to defend the claim or challenge the court's jurisdiction. The petitioner was

therefore denied the right to be heard before the impugned default judgment affecting its property right was entered, which was a clear violation of its rights as pleaded in the petition.

**41.** Regarding the prayer for a stay of proceedings before the 1st respondent, it is settled law that Magistrates' Courts lack jurisdiction to hear adverse possession claims. The court vested with jurisdiction to hear such claims is the Environment and Land Court. By issuing the impugned default decree affecting the petitioner's property and continuing to issue orders that were prejudicial to the petitioner, the 1st respondent purported to exercise a jurisdiction it did not possess, as clarified by the Court of Appeal's decision in **Sugawara v Kiruti (Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own capacity) & 3 others (Civil Appeal E141 of 2022) [2024] KECA 1417 (KLR)**. By this practice, the 1st respondent was therefore acting ultra vires and in

excess of its express powers and/or jurisdiction under the law.

**42. In *Biwott & another v Amin; Tanui (Interested Party) (Miscellaneous Application E004 of 2025) [2025] KEELC 3391 (KLR)*, the court had this to say regarding Magistrates' courts exercising jurisdiction over matters of adverse possession:**

***"As a result, the argument that the decision can only inform future adverse possession cases is misguided. In the celebrated case of *Owners of Motor vessel Lillian 'S' vs Caltex Kenya Limited (1989) KLR, Nyarangi J.A held that: -****

***"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction ... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."***

***30. In line with the above authority and pursuant to the decision of the Court of Appeal in *Nairobi Civil Appeal****

*E141 of 2022, any Magistrates court handling an adverse possession claim ought to down its tools. There can be no retrospective application where matters of jurisdiction are concerned. To hold so would amount to allowing Magistrates' courts to proceed and hear matters which they had no jurisdiction to entertain, contrary to statute and the doctrine of stare decisis to which Kenyan courts are bound."*

**43.** The petitioner sought to be joined as an interested party in the suit and to have the impugned decree set aside for lack of jurisdiction. The 1st respondent continued to entertain the matter without joining the petitioner as an interested party and issued ex parte interim orders with far-reaching consequences for the petitioner's right to be heard and to own property.

**44.** It is widely accepted that, in the absence of jurisdiction, proceedings before the first respondent and all subsequent impugned decrees and orders lack legal validity and are therefore null and void. Accordingly, this honorable court possesses supervisory jurisdiction over subordinate courts, including the authority to issue stay orders to uphold the ends of justice. See **Republic v Chief Magistrate, Mombasa & three others; Sega Ventures Limited &**

**another (Interested Parties); Kirima (Ex parte) (Judicial Review Application 1 of 2022) [2023] KEELC 180 (KLR) (24 January 2023) and Mary Kerubo Ogoti v Chief Magistrate’s Court, Kisii Law Courts & five others [2016] eKLR.**

**45.** Therefore, the following orders will be germane to issue in the interim:

- a) An order is hereby issued staying further proceedings in the Chief Magistrate Court at Kilifi, ELC No. E40 of 2023, Silas Mwithali M’ Mauta v East African Industries, Beka James, and Yusuf Aronano.**
- b) An order is hereby issued and stays the implementation of the impugned decree dated 16th April 2025 and all subsequent interim orders issued therein, pending the hearing and determination of the petition herein.**
- c) The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents are barred from entry and trespass on the suit property pending the hearing and determination of the current petition.**
- d) Costs to the applicant.**

Dated, signed, and delivered virtually at Nyeri on this 29<sup>th</sup> day of January 2026.

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

**Mr.Njuguna for the Applicant**

**Kendi: Court Assistant**

**In the Absence of:**

**Mr. Mtana for the 2<sup>nd</sup> respondent.**