



**Kibera v Chief Land Registrar & 4 others (Constitutional Petition  
E031 of 2023) [2024] KEELC 1053 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1053 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CONSTITUTIONAL PETITION E031 OF 2023**

**JO MBOYA, J**

**FEBRUARY 29, 2024**

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 162(2) (B), 258,  
AND 259 OF THE CONSTITUTION OF KENYA, 2010 IN THE MATTER OF:  
ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 40, 42, AND 43 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**JEREMIAH MUTEKA KIBERA ..... PETITIONER**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**EDWARD NJUGUNA KANG'ETHE ..... 4<sup>TH</sup> RESPONDENT**

**HAJI OMARI (SUING ON BEHALF OF THE ESTATE OF TAABU  
BINTI YUSSUF ALSO KNOWN AS TABU YASSUF MARIGI  
(DECEASED) ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION AND BACKGROUND:**

1. The Petitioner herein has approached the Honorable court vide Petition dated the 21<sup>st</sup> June 2023; which is brought pursuant to the provisions of Articles 1, 2(4), 3, 10(2), 19, 20, 21, 22, 27(1), 47, 48,



50(1), 159, 162(2)(b), 258 and 259 of *the Constitution* 2010; and in respect of which the Petitioner has sought for various reliefs, namely;

- i. Declaration that the Petitioner is entitled to due protection and benefit of the law pursuant to and in accordance with the Human Rights and Fundamental Freedoms contained at the foot of *the Constitution*, 2010.
- ii. Declaration that the Petitioner's Rights and Fundamental Freedoms, have been breached, violated by the Respondents herein.
- iii. Declaration that the transfer, registration and the ultimate issuance of an indenture over the suit property to and in favor of the 5<sup>th</sup> Respondent by the 1<sup>st</sup> Respondent, was illegal, unlawful and violated the Petitioner's rights to the suit property.
- iv. Declaration that the proceedings which were carried out and undertaken vide ELC No. 1030 of 2013, between the 5<sup>th</sup> and the 4<sup>th</sup> Respondents, respectively, albeit without the involvement of the Petitioner, who is the lawful owner of the suit property were illegal, unconstitutional and thus a nullity.
- v. An order of Judicial Review in the nature of prohibition to bar the implementation of the impugned proceedings and in particular the judgment which shall affect and negate the Petitioner's rights to the suit property.
- vi. Declaration that the Certificate of Title/Indenture by the 5<sup>th</sup> Respondent, was illegal, fraudulent and thus nullity ab initio.
- vii. Cancellation and/or revocation of the Certificate of Title/indenture by the 5<sup>th</sup> Respondent.
- viii. Declaration that the Certificate of Title/Indenture by the Petitioner is the only lawful and valid instrument pertaining to and concerning ownership of the suit property.
- ix. An order of permanent injunction be issued to restrained, bar and/or prohibit the Respondents and in particular the 5<sup>th</sup> Respondent by himself, agents, servant and/or employees from interfering with the Petitioner's rights to, occupation of and use of the suit property.
- x. General damages for fraud, conversion and abuse of office.
- xi. Costs of the suit.
- xii. In the alternative and without prejudice, the Honorable court be pleased to order and/or direct the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein to pay indemnity to and in favor of the Petitioner assessed at the current market value of the suit property amounting to Kes.130, 000, 000/= only.
- xiii. Further in the alternative and without prejudice to the foregoing, the honorable court will be pleased to direct full refund of the purchase price which was paid to and in favor of the 4<sup>th</sup> Respondent, comprising of the purchase price and the market value of the development over the suit property.



- xiv. Such other and/or further reliefs that the court may deem fit, appropriate and expedient to grant.
2. The instant Petition is premised and predicated on various grounds which have been enumerated in the body thereof. Furthermore, the Petition is supported by the affidavit of the Petitioner sworn on the 21<sup>st</sup> June 2023; and in respect of which the Petitioner has attached various documents in support thereof.
3. Upon being served with the Petition beforehand, the 5<sup>th</sup> Respondent filed a Replying affidavit sworn on the 10<sup>th</sup> July 2023; and wherein same annexed assorted documents, inter-alia, a copy of the Judgment which was delivered in respect of ELC No. 1030 of 2013; Ruling in respect of Civil Application No. E225 of 2023, as well as a further Ruling rendered vide ELC No. 1030 of 2013, respectively.
4. On the other hand, the 4<sup>th</sup> Respondent filed a Replying affidavit sworn on the 30<sup>th</sup> October 2023 and in respect of which same also annexed assorted documents in support of the averments thereunder.
5. Other than the 4<sup>th</sup> and 5<sup>th</sup> Respondents, who filed the Replying affidavit[s], details highlighted in the preceding paragraphs, the rest of the Respondents neither entered appearance nor filed any Responses to the Petition.
6. Be that as it may, the Petition herein came up for mention on the 6<sup>th</sup> December 2023, whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Petition on the basis of affidavit evidence. Furthermore, Learned counsel for the Respective Parties also intimated to court that same would be filing and exchanging written submissions.
7. Pursuant to and at the instance of the advocates for the respective Parties, the Honourable court circumscribed the timelines for the filing and exchange of the written submissions.
8. Moreover, the Petitioner proceeded to and filed written submissions dated the 20<sup>th</sup> February 2024, whereas the 5<sup>th</sup> Respondent filed written submissions dated the 4<sup>th</sup> January 2024. For coherence, the submissions by and on behalf of the 5<sup>th</sup> Respondent predated the ones filed by the Petitioner.
9. On the other hand, Learned counsel for the 4<sup>th</sup> Respondent did not file any written submissions.

#### **PARTIES' SUBMISSIONS:**

##### PETITIONER'S SUBMISSIONS:

10. The Petitioner herein filed written submissions dated the 20<sup>th</sup> February 2024; and in respect of which same has raised, highlighted and canvassed three [3] salient issues for due consideration and ultimate determination by the Honourable court.
11. Firstly, Learned counsel for the Petitioner has submitted that the Petitioner herein bought and acquired the suit property, namely, L.R No. 36/1/133 Eastleigh Section 1, from the 4<sup>th</sup> Respondent, who was hitherto the registered proprietor and/or owner of the said suit property.
12. Furthermore, Learned counsel for the Petitioner has submitted that following the sale and transfer of the suit property to and in favor of the Petitioner, the Petitioner entered upon and took possession of the suit property and thereafter commenced to and developed same culminating into the establishment of a Multi-storey building [ Complex] which currently houses assorted businesses and tenants.
13. Nevertheless, Learned counsel for the Petitioner has submitted that even though the suit property was lawfully sold and transferred to the Petitioner, the 5<sup>th</sup> Respondent herein filed and/or mounted civil proceedings vide ELC No. 1030 of 2013, as against the 4<sup>th</sup> Respondent and wherein the 5<sup>th</sup> Respondent sought to be declared as the lawful and legitimate proprietor of the suit property.



14. Be that as it may, Learned counsel for the Petitioner has submitted that as at the time when the 5<sup>th</sup> Respondent filed ELC No. 1030 of 2013, the 4<sup>th</sup> Respondent, who had been impleaded by the 5<sup>th</sup> Respondent had long sold and transferred his rights to and in respect of the suit property to and in favor of the Petitioner.
15. Notwithstanding the foregoing, Learned counsel for the Petitioner has submitted that the said suit, namely, ELC No. 1030 of 2013 proceeded for hearing and was ultimately terminated vide a Judgment which declared the 5<sup>th</sup> Respondent as the lawful owner and proprietor of the suit property.
16. Nevertheless, Learned counsel for the Petitioner has submitted that despite the fact that the Petitioner herein stakes a claim over and in respect of the suit property, same was neither afforded an opportunity to be heard or at all.
17. In any event, Learned counsel has submitted that upon realizing that a Judgment had been entered which impacted on ownership of the suit property, the Petitioner herein sought to be admitted as an interested Party in ELC No. 1030 of 2013; but the Application under reference was dismissed.
18. Arising from the foregoing, Learned counsel for the Petitioner has thus submitted that the Petitioner's rights and/or interests over and in respect of the suit property have been breached, violated and/or infringed upon, insofar as proceedings have been carried out and undertaken over and in respect of the suit property, albeit without the involvement and participation of the Petitioner.
19. Premised on the foregoing, Learned counsel for the Petitioner has therefore submitted that the proceedings which were undertaken vide ELC No. 1030 of 2013 and the consequential Judgment rendered on the 24<sup>th</sup> February 2022, have condemned the Petitioner contrary to and in violation of the rules of Natural Justice and the Right to Fair hearing in terms of Article 50(1) of [the Constitution](#) 2010.
20. In support of the foregoing submissions, Learned counsel for the Petitioner has cited and relied upon the holding in the case of Standard Chartered Financial Services Ltd versus Manchester Outfitters Ltd (2016)eKLR, where the Honorable Court of Appeal highlighted and elaborated upon the extent and scope of the right to Fair trial.
21. Secondly, Learned counsel for the Petitioner has submitted that the petitioner herein has placed before the Honorable court sufficient and credible material to demonstrate the existence of a prima facie case as pertains to ownership of the suit property.
22. Further and in addition, Learned counsel for the Petitioner has submitted that other than being the registered owner and/or proprietor of the suit property, it is the Petitioner who developed the suit property and has been in occupation and possession thereof to date.
23. On the other hand, Learned counsel for the Petitioner has also submitted that the impugned orders which were issued vide ELC No. 1030 of 2013; and wherein the Petitioner was neither joined nor impleaded, are bound to culminate into the eviction of the Petitioner and not otherwise.
24. Consequently and in the premises, Learned counsel for the Petitioner has submitted that the Petitioner has established a prima facie case as pertains to ownership of the suit property.
25. To buttress the submissions pertaining to proof of a prima facie case, Learned counsel for the Petitioner has cited and relied on the decision in the case of Naftali Ruthi Kinyua versus Patrick Thuita Gachure & Another (2015)eKLR, wherein the Court of Appeal highlighted the salient features that underpin a prima facie case.



26. Thirdly, Learned counsel for the Petitioner has submitted that contrary to the contention by and on behalf of the 5<sup>th</sup> Respondent, the Petition beforehand does not constitute and/or amount to an abuse of the due process of the court or at all.
27. In particular, Learned counsel for the Petitioner has submitted that the crux/substratum of the Petition before the court touches on and concerns the manner in which the Petitioner's rights to and/or interests over the suit property are bound to be impacted on, albeit without the Petitioner being afforded an opportunity to be heard.
28. At any rate, Learned counsel for the Petitioner has submitted that same filed an Application in respect of ELC No. 1030 of 2013; and wherein same sought to be admitted as an Interested Party, but the application for such admission was dismissed. Furthermore, Learned counsel for the Petitioner has submitted that thereafter the Petitioner filed an appeal pertaining to and concerning the dismissal of the Application for joinder as an Interested Party.
29. Be that as it may, Learned counsel has clarified that the issues that were raised vide the Application for joinder do not concern the infringements, violation and/or breach of his [Petitioner's constitutional rights].
30. In a nutshell, Learned counsel for the Petitioner has submitted that the subject Petition does not constitute and/or amounts to an abuse of the due process of the court.
31. To buttress the foregoing submissions, Learned counsel for the Petitioner has cited and relied on the holding in the case of Muchanga Investment Ltd vs Safaris Unlimited Africa Ltd & 2 Others (2009)eKLR, wherein the Court of Appeal elaborated upon the concept of abuse of the due process of the court.
32. Premised on the foregoing, Learned counsel for the Petitioner has invited the Honourable court to find and hold that the Petitioner has placed before the Honorable court cogent, plausible and credible evidence to warrant a finding that the Petition beforehand is meritorious.

#### **5<sup>TH</sup> RESPONDENT'S SUBMISSIONS:**

33. The 5<sup>th</sup> Respondent filed written submissions dated the 4<sup>th</sup> January 2024; and in respect of which same has raised, highlighted and canvassed three [3] salient and pertinent issues for consideration by the court.
34. First and foremost, Learned counsel for the 5<sup>th</sup> Respondent has submitted that the 5<sup>th</sup> Respondent filed civil proceeding vide ELC No. 1030 of 2013, wherein the 5<sup>th</sup> Respondent impleaded the 4<sup>th</sup> Respondent as the Defendant.
35. Furthermore, Learned counsel for the 5<sup>th</sup> Respondent has submitted that subsequently the suit which was filed against the 4<sup>th</sup> Respondent was heard and disposed of vide Judgment rendered on the 24<sup>th</sup> February 2022; and in respect of which the Honorable court declared the 5<sup>th</sup> Respondent as the lawful and legitimate proprietor of the suit property.
36. On the other hand, Learned counsel has also pointed out that following the delivery and rendition of the Judgment by the court, the Petitioner herein filed an Application wherein same sought to be admitted as an Interested Party in ELC No. 1030 of 2013. However, Learned counsel has averred that the Application by and on behalf of the Petitioner was dismissed.
37. Additionally, Learned counsel for the 5<sup>th</sup> Respondent has also submitted that following the dismissal of the Application by and on behalf of the Petitioner to be joined as an Interested Party, the Petitioner



herein felt aggrieved and thereafter proceeded to and filed an appeal vide Court of Appeal Civil Appeal No. E225 of 2023.

38. Furthermore, Learned counsel has submitted that the said appeal which was filed by and on behalf of the Petitioner is still pending hearing and determination before the Honourable Court of Appeal.
39. Premised on the foregoing, Learned counsel for the 5<sup>th</sup> Respondent has therefore contended that the filing of the subject Petition constitutes and/or amounts to an abuse of the Due process of the court.
40. Secondly, Learned counsel for the 5<sup>th</sup> Respondent has submitted that the claim by and on behalf of the Petitioner herein as pertains to ownership of the suit property is based on a fraudulent indenture of conveyance, which ought not to be relied upon in pursuit of the ownership of the suit property.
41. Furthermore, Learned counsel for the 5<sup>th</sup> Respondent has submitted that wherever there is a claim pertaining to ownership of a property, it is incumbent upon the Party laying a claim to the property to place before the Honourable court credible material demonstrating the process culminating into the acquisition and/or issuance of the certificate of title alluded to and/or being relied upon.
42. In support of the submissions that it behooved the Petitioner to place before the court credible material to justify the root of his title to the suit property, Learned counsel for the 5<sup>th</sup> Respondent has cited and relied on, inter-alia, the case of Bank of India Ltd vs Prime Bank Ltd & 2 Others (2008)eKLR; Kamau James Njendu vs Sera Wanjiru & Another (2018)eKLR, Hubert L Martine & 2 Others vs Margaret J Kamar & 5 Others (2016)eKLR, Wambui vs Mwangi & 3 Others [Civil Appeal No. 465 of 2019] [2021] KECA 144 (KLR) [Judgment].
43. Thirdly, Learned counsel for the 5<sup>th</sup> Respondent has submitted that the Petitioner herein has neither placed before the Honorable court nor tendered any credible evidence to demonstrate that same is the lawful and legitimate proprietor as pertains to the suit property.
44. In any event, Learned counsel for the 5<sup>th</sup> Respondent has submitted that the documents being relied upon by and on behalf of the Petitioner are contrived and fraudulent and hence same cannot underpin the issuance of the reliefs sought at the foot of the Petition.
45. To support the submissions that the Petitioner has not placed before the court credible evidence to warrant the grant of the orders sought, Learned counsel for the 5<sup>th</sup> Respondent has cited and relied upon inter-alia the case of Susan Wambui Kaguru & 4 Others vs Attorney General & Another (2012)eKLR and Gitarau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (2014)eKLR.
46. In view of the foregoing, Learned counsel for the 5<sup>th</sup> Respondent has implored the Honourable court to find and hold that the Petitioner has neither established nor proved his claim to the requisite standard.
47. Consequently and in the premises, Learned counsel for the 5<sup>th</sup> Respondent has implored the Honourable court to find and hold that the Petition beforehand is bereft of merits and ought to be dismissed with costs.

#### **4<sup>TH</sup> RESPONDENT'S SUBMISSIONS:**

48. Though the 4<sup>th</sup> Respondent filed a Replying affidavit to and in respect of the Petition and thereafter attended court during the taking of directions, same however failed to file written submissions.
49. Furthermore, when the instant matter came up for Mention on the 21<sup>st</sup> February 2024, Learned counsel for the 4<sup>th</sup> Respondent intimated to court that same would not be filing any written submissions.



## **ISSUES FOR DETERMINATION:**

50. Having reviewed and evaluated the Petition beforehand and the Responses filed thereto; upon consideration of the evidence [affidavit and documentary evidence] and finally upon taking into account the submissions filed by the respective Parties, the following issues do arise and are thus worthy of determination;
- i. Whether the Petitioner's Constitutional Rights and Fundamental Freedoms and essentially the right to fair hearing has been breached, violated and/or infringed upon and if so, whether the Petitioner is entitled to protection under the law.
  - ii. Whether the instant Petition constitutes and/or amounts to an abuse of the due process of the court or otherwise.
  - iii. What reliefs, if any ought to be granted, taking into account the circumstances attendant to and surrounding the dispute beforehand.

## **ANALYSIS AND DETERMINATION:**

### ISSUE NUMBER 1

Whether the Petitioner's Constitutional Rights and Fundamental Freedoms and essentially the right to fair hearing has been breached, violated and/or infringed upon and if so, whether the Petitioner is entitled to protection under the law.

51. The gravamen and/or substratum of the Petition by and on behalf of the Petitioner herein touches on and/or concerns the protection of his [Petitioner's] right to property in accordance with the provisions of Article 40(3) of *the Constitution*; right to Fair Administrative Action in terms of Article 47 of *the Constitution* 2010 and right to Fair Hearing in terms of Article 50(1) of *the Constitution* 2010.
52. Suffice it to point out that the Petitioner contends that same is the lawful and legitimate proprietor over and in respect of the suit property, which was the subject of court proceedings vide ELC No. 1030 of 2013.
53. Furthermore, the Petitioner has contended that even though same is the legitimate owner and/or proprietor of the suit property, the proceedings vide ELC No. 1030 of 2013, were however mounted, prosecuted and thereafter determined vide Judgment rendered on the 24<sup>th</sup> February 2022, albeit without his [Petitioner] involvement, participation or at all.
54. Additionally, the Petitioner herein has also contended that same only discovered the existence of ELC No. 1030 of 2013 in the year 2023, whereupon same [Petitioner] filed an Application seeking to be joined in ELC No. 1030 of 2013, as an Interested Party and with a view to propagating his [Petitioner's] grievances.
55. Be that as it may, the Petitioner has contended that his Application seeking joinder as an Interested Party was declined and or better still, dismissed.
56. From the foregoing position, the Petitioner contends that the dispute pertaining to ownership of the suit property has been adjudicated upon and or determined, albeit without his involvement and participation. Consequently and in this regard, the Petitioner avers that his property rights to and in respect of the suit property have been infringed upon, violated and/or otherwise breached.



57. Pertinently, there is no gainsaying that the Petitioner herein, who claims to be the lawful and registered proprietor of the suit property, ought to have been afforded an opportunity to be heard, prior to and before a determination was made, as pertains to the ownership of the suit property.
58. Suffice it to point out, that the Petitioner may or may not be able to demonstrate the legitimacy of his title, but the fundamental principle which underpins the Doctrine of Natural Justice, is to the effect that Every person, the Petitioner not excepted, is entitled to be granted an opportunity to be heard before a court of law can make a proclamation.
59. Furthermore, it is important to underscore that the essential tenets, which underpins the Doctrine of Natural Justice have since been codified into *the constitution* and are now entrenched in Article 47 and 50 of *the Constitution*, 2010.
60. Quiet clearly, where the rights and interests of the Petitioner were bound to be impacted upon and/or affected by any court proceedings, then it behooved the concerned court to afford the Petitioner an opportunity to ventilate his position.
61. Notwithstanding the foregoing, it is not lost on this court that ultimately the Petitioner may or may not prove his claim to the suit property, but the right to Fair hearing envisages an opportunity to hear all and sundry, the Petitioner not excepted, before rendering a decision.
62. To this end, it is important to take cognizance of the holding of the Court of Appeal in the case of *Onyango vs Attorney General (1987)*eKLR, where the court of appeal stated and held thus;
- “A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at: *De Souza v Tanga Town Council [1961] E A 377* at page 338, letter E-G. In *Associated Provincial Picture Houses Limited v Wednesbury Corporation, [1948], KB 223* (a decision which was cited by both parties) at page 228-229, Lord Greene MR distinguished judicial acts from an executive act, such as the act of the Commissioner in this case.”
63. Additionally, the importance of the Doctrine of Natural Justice, which has since been codified and is now entrenched in the provisions of Article 50(1) of *the Constitution* 2010; was also highlighted and underscored by the Court of Appeal in the case of *The Speaker, County Assembly of Kisumu & 2 others versus The Clerk, Kisumu County Assembly Service Board & 6 others [2015] eKLR*, where the court held thus;
1. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.
    1. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is



entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in *Kanda v. Government of Malaya*

“If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”

1. What amounts to sufficient notice also varies from case to case. But as stated, the notice must contain substantial information with sufficient details to enable the person charged to ascertain the nature of the allegations made against him. The notice must also comply with any statutory requirements where the same are provided.

64. More recently, the significance of the Doctrine of Natural Justice; Due process and the right to Fair hearing was re-visited by the Court of Appeal in the case of *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others* [2016] eKLR, where the court held as hereunder

(62) Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal declaration of Human rights (UDHR), and Article 6 of the International Convention on Civil and Political Rights (ICCPR) among other International conventions, which this country has ratified. Article 25(c) of *the Constitution* 2010 elevates it to an inderogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of Law and public faith in the justice system would inevitably collapse. A fair trial has many facets, and includes the right to have one’s case heard by an independent, impartial and unbiased arbiter or judge. The facet of fair trial we are dealing with here is that of bias or perceived bias on the part of the judge or the court.

65. Arising from the foregoing, there is no gainsaying that the right to fair hearing and fair trial, is a fundamental right which cannot be restricted, limited and otherwise, ousted in any manner whatsoever.

66. Further and in addition, it can also not be contended that because the Party in question has an apparent [sic] weak case or better still, a case that is bound to fail at the tail end, then such a Party ought not to be heard. To the contrary, the right to fair hearing entails an opportunity being availed to each and every Party, irrespective of the strength or weakness of the Party’s case.

67. In this regard, it is worth reiterating, that a decision arrived at in contravention of the rules of Natural Justice is vitiated to the core and no arguments can be generated that the court would still have arrived at the same conclusion, even if the Party in question had been heard.



68. To my mind, such an argument is a dangerous one and cannot be countenanced and/or sanctioned, whatsoever.
69. In view of the foregoing, my answer to issue number one [1] is threefold. Firstly, the Petitioner herein who [sic] claims to be the registered owner of the suit property ought to have been afforded an opportunity and/or latitude to be heard in respect of the matter, namely, ELC NO. 1030 f 2013, wherein the ownership of the suit property was being adjudicated upon and/or addressed.
70. Secondly, that the hearing and determination of the dispute pertaining to ownership of the suit property, at the instance of the 5<sup>th</sup> Respondent, albeit without the involvement and participation of the Petitioner, who lays a claim thereto constituted a breach, violation and/or infringement of the Petitioner's right, inter-alia, in respect of Articles 27(1), 40(3), 47 and 50(1) of the Constitution 2010.
71. Thirdly, the Petitioner, just like any other citizen of the Republic of Kenya, is obliged to partake of and/or benefit from the protection granted by the Constitution, without any discrimination and/or unfair differentiation.

ISSUE NUMBER 2:

Whether the instant Petition constitutes and/or amounts to an abuse of the due process of the court or otherwise.

72. The 5<sup>th</sup> Respondent herein in the course of his submissions has contended that the Petition beforehand constitutes an abuse of the due process of the court and thus the Petitioner is not entitled to the reliefs sought at the foot of the Petition.
73. To highlight the contention that the subject Petition constitutes and/or amounts to an abuse of the due process of the court, Learned counsel has provided a brief background pertaining to and concerning the dispute in respect of the suit property.
74. Firstly, Learned counsel for the 5<sup>th</sup> Respondent has submitted that the suit vide ELC No. 1030 of 2013, was filed in the year 2013 and thereafter same was disposed of vide Judgment rendered on the 24<sup>th</sup> February 2022.
75. Furthermore, Learned counsel for the 5<sup>th</sup> Respondent has submitted that subsequent to the delivery of the Judgment, the Petitioner herein filed and/or lodged an Application vide ELC No. 1030 of 2013, wherein same sought to be joined as an Interested Party.
76. Be that as it may, Learned counsel for the 5<sup>th</sup> Respondent has submitted that the Application for Joinder as an Interested Party was heard and thereafter dismissed by the Honorable court [ differently constituted].
77. Further and in any event, the 5<sup>th</sup> Respondent has contended that upon the dismissal of the named application, the Petitioner herein proceeded to and filed an Appeal against the ruling of the court that dismissed the application for joinder.
78. On the other hand, Learned counsel for the 5<sup>th</sup> Respondent pointed out that the Appeal against the dismissal of the Application for joinder, is still pending hearing and determination.
79. Based on the fact that the Petitioner had endeavored to be joined into ELC No. 1030 of 2013; as an Interested Party and thereafter filed an appeal, it has been contended that the issues raised at the foot of the current Petition constitutes and amounts to an abuse of the Due process of the court.



80. Other than the foregoing, the 5<sup>th</sup> Respondent has also contended that to the extent that the subject Petition constitutes an abuse of the Due process of the court, then the Petitioner is not entitled to the reliefs sought at the foot thereof.
81. Having reviewed the submissions by and on behalf of the Parties and essentially, the contention by the 5<sup>th</sup> Respondent, it is the finding and holding of the court that the arguments pertaining to abuse of the court process are misleading; and in any event misconceived.
82. To start with, it is not lost on this Honourable court that the issue of abuse of the due process of the court had hitherto been raised and canvassed by the 5<sup>th</sup> Respondent whilst arguing the application for conservatory orders.
83. Subsequently, the Honorable court considered the question on whether or not the subject Petition and the previous application for conservatory orders constituted an abuse of the due process of the court; and thereafter the court rendered a ruling dated the 21<sup>st</sup> September 2023.
84. To the extent that the issue of abuse of the court process was canvassed and entertained by the court at the foot of the previous Ruling, the said issue cannot now be re-agitated afresh.
85. Secondly, the invitation pertaining to the question of abuse of the court process, [if at all], shall amount to inviting the court to sit on an appeal in respect of own decision. Quite clearly, such an invite is inimical to the Rule of Law and hence cannot be entertained by the Court.
86. Lastly, there is no gainsaying that the Petition beforehand touches on and concerns breach, violation and/or infringement of the Petitioner's constitutional rights and fundamental freedoms, which are issues that can only be canvassed vide a Petition and not otherwise. [ See the Provisions of Articles 22, 23 and 258 of *the Constitution*, 2010].
87. Arising from the foregoing, my answer to issue number two [2] is thus twofold. Firstly, this court is devoid and divested of Jurisdiction to re-engage with and/or re-agitate the question of abuse of the due process of the court.
88. Secondly, any attempt to reconsider the issue of abuse of the due process of the court and to deploy same for purposes of discerning whether the reliefs at the foot of the Petition can be granted, shall amount to sitting on appeal on the courts own decision.

### ISSUE NUMBER 3

What reliefs, if any, ought to be granted, taking into account the circumstances attendant to and surrounding the dispute beforehand.

89. Having contended that same is the registered owner and/or proprietor over and in respect of the suit property and for which proceedings were undertaken, albeit without his participation and/or involvement, the Petitioner herein has sought a plethora of reliefs, [whose details are contained at the foot of the Petition].
90. Pertinently, the Petitioner herein has sought for inter-alia a declaration that same is entitled to due protection and benefit of the law pursuant to and in terms of the provisions of Article 27(1) and (2) of *the Constitution*.
91. On the other hand, the Petitioner herein has also sought for a declaration that the proceedings which were carried out and undertaken vide ELC No. 1030 of 2013, pertaining to and concerning the suit property have indeed breached, violated and/or infringed upon his property rights as espoused vide Article 40(3) of *the Constitution*.



92. Furthermore, the Petitioner has also sought for an order of Judicial review in the nature of prohibition to bar the implementation of the impugned proceedings; and in particular, the Judgment which impacts upon and/or affects the Petitioner's right to and in respect of the suit property.
93. Upon evaluating the evidence that was tendered by and on behalf of the Petitioner herein, it is common ground that the Petitioner herein, who lays a claim to and in respect of the suit property, which was the subject of the said proceedings in respect of ELC No. 1030 of 2013, was never heard and or afforded any opportunity to be heard.
94. To my mind, without having been afforded an opportunity to be heard so as to ventilate his grievance over and in respect of the suit property, the Petitioner herein was certainly condemned unheard, contrary to and in contravention of the provisions of Articles 47 and 50 of *the Constitution* 2010.
95. Other than the foregoing, the Petitioner herein has also invited the Honourable court to find and hold that same is the lawful and legitimate proprietor over and in respect of the suit property.
96. However, there is no gainsaying that the question as to the ownership of the suit property was the subject of ELC No. 1030 of 2013, wherein evidence was duly tendered.
97. Even though the Petitioner herein was not a Party, it is important to observe that the question of ownership of the suit property is a matter that can only be gone into vide ELC No. 1030 of 2013, [subject to an opportunity being granted to and in respect of the Petitioner], to participate in the said proceedings.
98. Consequently, even though the Petitioner has implored the Honourable court to find and hold that same is the lawful and legitimate proprietor of the suit property and thereafter to proceed and revoke the certificate of title/indenture of conveyance in favor of the 5<sup>th</sup> Respondent, such an order may not be lawfully tenable; and in any event, may culminate into two parallel decisions being issued as pertains to the ownership of the suit property.
99. To my mind, the most appropriate and suitable relief that ought to issue and/or be granted, is a relief that would facilitate the inclusion of the Petitioner in ELC No. 1030 of 2013; and thereafter same shall be at liberty to tender and produce evidence thereunder.
100. In addition, it is also worth recalling that the Petitioner herein had also sought for an alternative relief as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, on the basis of indemnity in the sum of Kes.130, 000, 000/= only. Nevertheless, there is no gainsaying that despite claiming such indemnity, no valuation report was ever tendered and/or produced before the court.
101. Arising from the foregoing, it is difficult to discern and or decipher on what basis the sum of Kes.130, 000, 000 /= Only, was anchored and/or predicated.
102. Finally, the Petitioner herein also sought for a further alternative relief whose import is to procure and obtain refund of the purchase price which was paid to and in favor of the 4<sup>th</sup> Respondent.
103. Be that as it may, the court has found and held that the question of ownership of the suit property can only be effectually and effectively be determined in a plenary hearing vide ELC No. 1030 of 2013. Instructively, it is only then that the court would be able to ascertain the propriety and/or validity of the Petitioner's claim to the suit property and subject to the outcome, a suitable order for refund, [ if any], may issue and/or be granted.
104. Arising from the foregoing, it is therefore my finding and holding that even though the Petitioner has sought for a plethora of reliefs, some of the reliefs that have been sought for at the foot of the Petition



are clearly not tenable and in any event, would be dependent upon the adduction of oral evidence and not otherwise.

105. Save for the foregoing, there is no gainsaying that the Petitioner herein has indeed demonstrated and established a basis that his [Petitioner's] constitutional rights and or fundamental freedoms have been breached.
106. In any event, Article 10(1) of *the Constitution*, 2010 obliges all state organs, body and/or persons to observe, respect and comply with *the Constitution*.
107. To my mind, the import and tenor of Article 10(1) of *the Constitution* as read together with Article 19(1) and 20(1) of *the Constitution*, 2010; enjoins the Environment and Land court; as well as the Judges of the said court to uphold the Constitutional/ National values and principles of governance.
108. Essentially, I therefore come to the conclusion that the Petitioner herein has substantially proved and/or demonstrated that same is entitled to, inter-alia, equal protection and benefit of the law.
109. Consequently and in this regard, the petition dated the 21<sup>st</sup> June 2023 is substantially meritorious.

**FINAL DISPOSITION:**

110. Having reviewed the various issues which were highlighted and enumerated in the body of the Judgment herein, it is evident and apparent that the Petitioner has indeed proved his claim on a number of items.
111. Consequently and in the premises, I proceed to and do hereby make the following orders;
  - i. Declaration be and is hereby issued to the effect that the Petitioner is entitled to due protection and benefit of the law pursuant to and in accordance with the Human Rights and Fundamental Freedoms contained at the foot of *the Constitution*, 2010.
  - ii. Declaration be and is hereby issued to the effect that the Petitioner's rights and fundamental freedoms, have been breached, violated by the Respondents herein.
  - iii. Declaration be and is hereby issued to the effect that the proceedings which were carried out and undertaken vide ELC No. 1030 of 2013, between the 5<sup>th</sup> and the 4<sup>th</sup> Respondents, respectively, albeit without the involvement of the Petitioner, who [sic] claims to be the lawful owner of the suit property were illegal, unconstitutional and thus a nullity.
  - iv. An order of Judicial Review in the nature of Prohibition to bar the implementation of the impugned proceedings and in particular the Judgment which shall affect and negate the Petitioner's rights to the suit property be and is hereby issued.
  - v. Consequent to the foregoing, the Petitioner herein is at liberty to file a suitable application for review in respect of ELC No. 1030 of 2013, premised on the Judgment herein for purposes of attracting joinder into the said suit and thereafter placing before the designated court the relevant evidence, if any, pertaining to the ownership of the suit property.



- vi. The Honorable court seized of the proceedings, namely, ELC No. 1030 of 2013 shall be at liberty to take cognizance of the import and tenor of the provisions of Article 10, 27, 40, 47 and 50(1) of *the Constitution* and thereafter make appropriate orders as may be deemed just and expedient in the circumstances.
- vii. Costs of the Petition shall be borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents jointly and/or severally.
- viii. Any other Relief[ s] not expressly granted is hereby declined.

112. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>th</sup> DAY OF FEBRUARY 2024.

**OGUTTU MBOYA,**

**JUDGE.**

**In the Presence of:**

*Benson - Court Assistant.*

*Ms. Rachael Njoroge for the Petitioner.*

*Ms. Masinde for the 2<sup>nd</sup> Respondent.*

*Mr. Moses N. Siagi for the 4<sup>th</sup> Respondent.*

*Mr. Mr. J. K Maruja and Mr. Chriswa for the 5<sup>th</sup> Respondent.*

*N/A for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.*

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