



**North Coast Development Company Limited v County Government of Mombasa & 2 others
(Constitutional Petition 54 of 2021) [2024] KEELC 1268 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1268 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 54 OF 2021**

LL NAIKUNI, J

FEBRUARY 26, 2024

**IN THE MATTER OF: THE JURISDICTION OF THE SUPERIOR
COURT UNDER ARTICLE 23 (1), ARTICLE 162 (1), (2) (B),
ARTICLE 165 (2) (D) (II) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS AND BREACH OF ARTICLES 40, 47, 239
(3) (A), 244 AND 245 (2) (B) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: SECTION 8 OF THE NATIONAL POLICE SERVICE ACT

BETWEEN

NORTH COAST DEVELOPMENT COMPANY LIMITED PETITIONER

AND

THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

THE NATIONAL POLICE SERVICE 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgment of this court pertains the filed Constitution Petition dated 8th December, 2021 by North Coast Development Company Limited, the Petitioner herein against the County Government of Mombasa, the Inspector General of Police, the National Police Service and the Hon. Attorney General, the Respondent herein. [The Constitution](#) Petition is brought under the dint of the provisions



of Articles 23(1), 40, 47, 162 (1) (2) (b), 165 (2) (d) (ii), 239 (3) (a), 244 and 245 (2)(b) of *the Constitution* of Kenya 2010.

2. Despite of the service having been effected, apart from the 1st Respondent who made replies but only to the interlocutory application, none of the Respondents nor any other concerned part file any responses nor submission controverting the issues raised from the filed Petition by the Petitioners. Resultantly, the Honorable Court has proceeded to render the Judgement on its merit whatsoever.

II. The Petitioner's Case

3. The Petitioners sought for the following orders:-
 - a. A declaration be and is hereby issued that the Respondents herein, jointly and severally, have breached the Petitioner's constitutional right to acquire and own property as guaranteed by Article 40 of *the Constitution* of Kenya, 2010.
 - b. A declaration be and is hereby made that the Petitioner is the legal and rightful owner of the property known as Mombasa/blockXLVI/138 and has all the rights to occupy, develop and use the same without any interference from the Respondents.
 - c. There be and is hereby issued an order of permanent injunction to restrain the Respondents jointly and severally, their agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, stepping onto, visiting vandalizing, demolishing, and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as Mombasa/blockXLVI/138.
 - d. A declaration be and is hereby issued that the failure by the 2nd Respondent and the police in general to act on the reports lodged to the police by the Petitioner is in contravention of Articles 47, 239 (3) (a), 244 and 245 (2) (b) of *the Constitution* of Kenya, 2010.
 - e. There be and is hereby issued an order of mandatory injunction to compel the 2nd Respondent to act on the reports made to the police by the Petitioner through its officers or authorised agents OB No. 13 dated 29th May 2020; OB No. 80 of 15th October 2020; OB No. 11 dated 27th February 2021; OB No. 18 of 19th July 2021; OB No. 19 of 22nd September 2021; OB No. 29/30/9/2021 of 30th September 2021; OB No. 15 of 2021 of 11th November 2021; and OB No. 16 of 17th November 2021 all made at Tononoka Police Station in Mombasa by carrying out investigations, arrests and forwarding the files to the Director of Public Prosecutions.
 - f. A declaration be and is hereby issued that the County Government of Mombasa, the 1st Respondent herein illegally took away the Petitioner's Container Number MSKU 9887463 45G1 and illegally demolished and destroyed the Petitioner's wall erected on the property known as Mombasa/block XLVI/138.
 - g. There be and is hereby issued an order of mandatory injunction to compel the County Government of Mombasa, the 1st Respondent herein, to pay compensation to the Petitioner for:
 - i. Kshs. 1,000,000.00 being the value Container Number MSKU 988746345G1 and the contents thereof.
 - ii. Kshs. 15,000,000.00 being the value of the wall of the property known as Mombasa/blockXLVI/138 demolished and destroyed by the 1st Respondent, its officers and employees.



- iii. Kshs. 5,000,000.00 being the value of the staircase erected on the property known as Mombasa/blockXLVI/138 demolished and destroyed by the 1st Respondent, its officers and employees.
- iv. General damages for trespass on the property known as Mombasa/blockXLVI/138.
 - a. The costs of this Petition be paid by the Respondents jointly and severally.
 - b. Any further relief or order that this Honourable Court shall deem just and fit to grant.

III. The Legal foundation of the Petition

4. The Petition was founded on the following legal provisions:

- a. Under Article 40 of *the Constitution* of Kenya, 2010 (hereinafter "*the Constitution*"), the Petitioner has a right to acquire and own property. The said right includes the right to occupy, use and develop such property. The 1st Respondent has breached the Petitioner's right to acquire and own property under Article 40 of *the Constitution* of Kenya 2010 by interfering with the Petitioner's property and making it impossible for the Petitioner to access and occupy the suit property and by literally curtailing the Petitioner's ability to freely use and enjoy the property without any interference, intimidation and general threats. The Respondent's officers (including police officers), employees and county askaris have been storming the suit causing commotion therein, harassing, intimidating and threatening the Petitioner's officers, employees and agents. As a consequence, the Petitioner's ability and rights to access, occupy and use the suit property have been completely impeded contrary and in breach of Article 40 of *the Constitution*. The 1st Respondent has been using the police to perpetrate its illegal activities on the suit property and against the Petitioner as demonstrated hereunder:
 - i. The police accompanied the 1st Respondent's employees and officers when the latter stormed the suit property, caused chaos and carted away Petitioner's container and the items stored inside the container.
 - ii. On numerous other occasions, the police had accompanied the 1st Respondent's officers to visit the suit property and commit acts of illegalities against the Petitioner.
- b. Under Article 245 (2)(b) of *the Constitution* and section 8 (1) of the *National Police Service Act*, the 2nd Respondent is mandated to exercise independent command over the National Police Service. The 2nd Respondent violated Article 245 (2)(b) of *the Constitution* and the provision of Section 8 (1) of the *National Police Service Act* by allowing the 1st Respondent to give command and direct the police to help the 1st Respondent in committing illegalities on the suit property.
- c. Under Article 239 (3)(a) of *the Constitution*, the National Police headed by the 2nd Respondent herein must not act in a partisan manner. The 2nd Respondent breached Article 239 (3)(a) of *the Constitution* by acting in a partisan manner or permitting the National Police Service to act in a partisan manner by doing the following:
 - i. Ignoring and deliberately failing to act on the criminal reports made by the Petitioner against the 1st Respondent and its officers as well as other persons who had committed criminal acts against the Petitioner.
 - ii. Taking a partisan approach in the dispute between the Petitioner and the 1st Respondent by ignoring the criminal reports made by the Petitioner while aiding the



1st Respondent to commit illegalities against the Petitioner by causing and permitting police officers to accompany the 1st Respondent's employees, officers and county askaris to invade and raid the suit property and cart away items therefrom.

- d. The 2nd Respondent, being a public officer, was enjoined by Article 47 of *the Constitution* of Kenya, 2010 to observe fairness in his actions. The 2nd Respondent had failed to observe fairness because he had permitted and caused the National Police Service to be abused and misused by the 1st Respondent in an unfair manner with a view to committing illegalities on the suit property and denying the Petitioner its constitutional rights.
- e. The 1st and 2nd Respondents' actions as pleaded herein were in breach of Article 3 of *the Constitution* of Kenya which mandates them to respect, uphold and defend *the Constitution*. The Respondents never respected, upheld and defended *the Constitution* when they breached and violated Articles 40, 47, 239 (3) (a), 244 and 245 (2) (b) of *the Constitution*.
- f. Under Article 244 of *the Constitution*, the 2nd Respondent was mandated to strive for the highest standard of professionalism, to comply with constitutional standards and to be of highest possible standards of competence while discharging the duties of his office. The 2nd Respondent violated Article 244 of *the Constitution* by:
 - i. Failing to act on criminal reports made by the Petitioner.
 - ii. Taking a partisan approach by siding with the 1st Respondent and against the Petitioner by inter alia, accompanying the 1st Respondent's officers to the suit property to commit illegalities thereon, steal the Petitioner's properties (container and its contents), to destroy the Petitioner's wall, harass the Petitioner's officers and agents and generally interfere with the Petitioner's rights, occupation and use of the suit property.
- g. The Respondents had generally abused the powers bestowed upon them as government agencies/officers to violate the Petitioner's rights, take away the Petitioner's property and to do acts which were not permitted by the law so as to achieve ulterior motive of taking away the Petitioner's property or denying the Petitioner the right to own and use the suit property.

IV. Replying Affidavit of the 1st Respondent

5. As noted above, although the 1st Respondent never replied to the main Petition but filed replies to the Notice of Motion Application dated 8th December, 2021 by the Petitioner herein. Thus, in the given circumstances, and in all fairness and in interest of Justice, the Honourable decided to consider the said issues raised from the said 22 Paragraphed Replying Affidavit. The said 21 Replying Affidavit was sworn by Paul Ogweno Manyala of National Identification Number 2230734 stated as follows:
 - a. He was a Director of County Physical and Land Use Planning Department of the 1st Respondent's establishment. He was familiar with the facts of this case and hence duly authorized to swear this affidavit on behalf of the Defendant/Applicant. Annexed hereto and marked as "POM – 1" was a copy of the Letter of authority.
 - b. He had read the contents of the Petitioner's Notice of Motion Application dated 8th December, 2021 and wished to respond to it accordingly.
 - c. The Petitioner had pending suits and applications in other Courts being "MSA CMCC No.E1466 of 2021(Northcoast Development Company Limited – versus - Mombasa County– Versus - M Government) and CMCC No.E264 of 2020 (Northcoast Development Company Limited – Versus - Mombasa County Government, Madubaha



Beach **TED – Versus – C** landing Self-help Group, Beach Management Unit (bmu) Mombasa County & Fibre Boat Builders) wherein the Petitioner had raised similar issues over the same subject matter in dispute. In the said Applications the Petitioner had sought for injunctive orders as in the present Application. This was a clear abuse of the Court process. He annexed hereto and mark as “POM – 2” a bundle of pleadings in the respective cases.

- d. Through forum shopping and use of unorthodox means the Petitioner was filing numerous suits in order to obtain injunction orders aimed at unlawfully alienating a property set for public utility at the detriment of the residents of the County of Mombasa and the public at large.
- e. The Petitioner was using the orders obtained herein, albeit unprocedurally and unlawfully, to perpetrate illegalities as they had proceeded to evict the members of the public carrying out fishing economic activities as an organized group known as Madhubaa Beach Landing Site Self - Help Group which has been in existence for over 60 years, and was formally registered in the year 2019.
- f. Fishing being the major economic activity of the people of the coastal region, their fundamental rights as set out in *the Constitution* and various international instruments ratified by Kenya were being infringed and unless this Honourable Court comes to their aid, they would suffer irreparable harm as they had been unable to provide for their families and/ or pay school fees for their children noting the drastic and tough economic times perpetuated by the Covid-19 pandemic. He annexed hereto and mark as “POM – 3” a copy of photographic evidence of the beehive of activities by the Public along the foreshow.
- g. The orders of injunction and or Conservatory in nature sought are aimed at perpetuating illegalities and the Ex - Parte orders obtained herein were being misused by the Petitioner to engage in illegal activities on the riparian area and/or fore shore to wit:-
 - i). Back-filling all the way into the ocean waters.
 - ii). Illegal reclamation of the ocean.
 - iii). Illegal construction on the foreshore stretching into the 60 meters mark between the high water mark onto the foreshore in contravention of the clear provisions of the *Survey Act* and the Regulations thereof.
- h. Preventing members of the public from accessing the public beach.
- i. Depriving of the fishermen of the right to anchor their boats at the foreshore/riparian area and/ or access the ocean waters for their fishing activities from the shore.
- j. Besides the photographic evidence in item 13 above, he annexed hereto and mark as follows the following documents:-
 - i. “POM – 4” - Letter dated 16th October 2020 indicative of blockage of access road by the Plaintiff besides other acts of encroachment including backfilling of the ocean amongst others.
 - ii. “POM – 5” - Survey report.
- k. “POM – 6” - Photographic evidences as advised by his Advocates on record that the law being the *Survey Act* Section 45 thereof as read together with the Survey regulations 110 (2) vis-a-



vis demarcation of land for allocation clearly require the Commissioner of lands to maintain a reserve land of at least 60 meters between the High-water Mark and the littoral lands.

To this end, it follows that: -

- l. The land in question and in particular 60 meters thereof receding from the High-water mark was never available for allocation to the Petitioner.
 - i. In the event that allocation was done encroaching on the Subject portion of the foreshore, such allocation cannot entitle the allottee to any right capable of superseding or overriding the rights of the members of the public who were entitled to equal rights of access to the foreshore and ocean waters through the riparian area.
 - ii. The right of access to the ocean by members of the public or any other owner of land along the Coast whether for economic recreational or aesthetic reasons was a public right secured by a public easement.
 - iii. It therefore followed that a person or private entity who had encroached on a foreshore cannot interfere with or limit the enjoyment of a public easement through acts of commission or omission.
 - iv. The Petitioner thus could not engage in acts of commission or omission such as developments which disenfranchises members of the public of their littoral rights to the foreshore /reserve area in question.
- m. Even the Notification of approval /or development permission issued to the Petitioner in respect of prior development on the suit land way back in the year 1996 enjoined the Plaintiff to make the following provision on the disputed area which the Defendant failed to adhere to:-
 - a. Provision of separate water connection.
 - b. Construction of steps and ramp for the public to access the beach.
- n. It was noteworthy that any development improvement or structure on the Subject Parcel of land which included amongst others backfilling of the sea and or construction thereof requires mandatory consents and or approvals from the following bodies which the Plaintiff had failed to seek nor obtain: -
 - i. The physical planning department of the County Government of Mombasa.
 - ii. Kenya Ports Authority.
 - iii. Kenya Maritime Authority.
 - iv. Kenya Forests Service. SUBPARAGRAPH v.
Kenya Marine and Research Institute.
 - vi. National Environment Management Authority.
- o. The above approvals went hand in hand in a conjoint fashion and not in isolation and as it stood no approval had been obtained by the Petitioner to entitle it to the use of the property contrary to the law in the manner envisaged.
- p. The suit property was a government land meant for public use which was unlawfully leased out to the Petitioner with the National Government as the head Lessor.



- q. The title held by the Petitioner was null and void ab initio and the Petitioner had no right whatsoever over the said property.
- r. They were advised by their Advocates on record that the Petitioner's suit was fatally defective and the same ought to be dismissed.
- s. The 1st Respondent had raised a notice of preliminary objection on the following grounds:-
 - i. This Honourable Court lacked jurisdiction to determine or make any orders thereof in regard to the suit against the 1st Respondent for the reasons that the suit herein is null and void ab initio as there exists a similar suit to the present suit being MSA CMCC No. E264 of 2020 and MSA CMCC No.1466. Both suits raised the same issues over the same subject matter in dispute.
 - ii. This suit was incurably defective and it was repugnant to the provisions of the Law and ought to be struck out.
- t. The Petitioner was seeking to play to the gallery by misdirecting the court and casting red herrings as to the true nature of what transpired and it was indeed unjustifiably and regrettably so to deceive the court in the hopes of obtaining a favourable outcome by claiming that the perimeter wall was demolished, yet no such action ever took place, and/or is taking place.
- u. There existed a perimeter wall which separated the Petitioner's land (part of which encroaches the beach and falls within a riparian land) and the beach area.
- v. The Petitioner was well aware that the wall was still intact, and there had been no act from the 1st Respondent, its representatives, agents and/or himself towards the demolition of it, yet the Petitioner was still emphatic on persuading the Court to determine the suit on an act that was never undertaken. He annexed hereto and marked as "POM – 7" was a photographic presentation of the current status of the wall.
- w. Thus, the Petitioner was willing to concoct any allegation to cause confusion with the hopes of misguiding the Court into believing that it was the victim and possibly have the Court issue Orders against the Respondent.
- x. He was advised by the 1st Respondent's Advocates on record that it had extensively been litigated upon and resultantly courts had held that where an Affidavit contains misleading, falsified and/or doctored information, the Court should strike it out on the basis of abuse of the Court process.
- y. Hence, he urged this Court to follow the footsteps of its predecessors and shun away from condoning actions that were meant to cause disrepute to the justice system and embarrass the Court through the adduction of evidence that was meant to lead it astray from the actual situation. He dissuaded this Honourable Court from falling into the trap of the Petitioner, which was to obtain a favourable outcome by all means even at the expense of justice.
- z. He was further advised by the 1st Respondent's Advocates on record that the Petitioner was precluded from claiming the right to the enjoyment of peaceful and quiet possession since the area in which such enjoyment was supposedly meant to happen never belonged to the Petitioner on the basis that it fell within public land, which was not subject of exclusive possession of any person.



- aa. The disputatious space happened to be the buffer zone and/or a reserve land, which was not capable of being owned, between the ocean and the inhabitable land, and thus, the Petitioner was beseeching this Honourable Court to give recognition to an illegal right which was not subject of being enjoyed by anyone. He annexed hereto and marked as “POM – 8” was a copy of a photograph showing the area in dispute.
- ab. He urged this Honourable Court to exercise its discretion in favour of the Defendants Applicants and not shut its eyes to an injustice that may be occasioned owing to the action of the unscrupulous Petitioner.

V. Brief Facts

6. The brief facts of the case are that the Petitioner is the registered owner of the property known as Mombasa/blockXLVI/138 (hereinafter “The Suit Property”) situate in Mombasa County in an area commonly known as Mudhubaha. The suit property abuts the Indian Ocean. On 8th September 2021, the 1st Respondent’s officers led by the County Executive Committee Member for Transport, Infrastructure & Public Works, Taufiq Balala visited the suit property and addressed a group of youth thereon and promised to construct a public road cutting across the suit property to the beach.
7. Thereafter, the 1st Respondent through its officers, employees, agents and county askaris accompanied and aided by police officers have interfered with the Petitioner’s ownership, occupation, use and rights over the suit property and have made it impossible for the Petitioner to own, occupy, use, develop and enjoy the suit property by doing the following actions:
 - a. On 22nd September 2021 the 1st Respondent’s officers and employees accompanied by about 100 county askaris and police officers visited the suit property with a huge bulldozer and demolished part of the suit property including the perimeter wall and staircase.
 - b. On 15th September 2021, the 1st Respondent served upon the Petitioner through the Petitioner’s sister business known as Fayaz Bakers a “Notice to Remove Abandoned Containers Structures and vehicle on the Road/Public Pavement” dated 14th September 2021. The said Notice alleged that the Petitioner had abandoned containers, structures and vehicles at Mudhubaha Street/Road contrary to the County Government By-Laws 1968 and ordered the Petitioner to remove the same within 7 days. The 1st Respondent never specified the nature and the exact item which had allegedly been abandoned and where exactly it was abandoned.
 - c. On 22nd September 2021, the 1st Respondent through its authorized employees and officers accompanied by about 100 county askaris and police officers visited the suit property and forcefully removed therefrom and carted away the Petitioner’s Container Number MSKU 9887463 45G1 together with the contents of the said containers. The Petitioner had stationed and kept on the said container on suit property and was using it for storage purposes.
 - d. On various dates thereafter the 1st Respondent through its employees, officers and county askaris have frequently and on many occasions visited the suit property accompanied by police officers and caused commotion and disruption thereon and made it impossible for the Petitioner to quietly and peacefully occupy and use the suit property.
8. The different acts of illegalities committed by the 1st Respondent through its employees and officers have been reported to the police but the police headed by the 2nd Respondent had deliberately refused, declined and neglected to take any action. Further and in addition to the 1st Respondent’s illegal activities, there had been other illegalities committed by different persons on the suit property



including trespass which have been reported to the police but the police headed by the 2nd Respondent had adamantly refused and declined to take any action. It was manifestly clear that the 2nd Respondent was either working jointly with the 1st Respondent to frustrate the Petitioner and/or was deliberately aiding the 1st Respondent and other persons in the ill-intended quest to illegally take over the suit property from the Petitioner and/or make it impossible for the Petitioner to own, occupy, use and develop the suit property in a manner that is in breach the Petitioner's constitutional rights. The 1st Respondent had alleged that the Petitioner's property had encroached on the 60-meter portion from the High-Water Mark and had impeded easement rights of the members of the public contrary to the [Survey Act](#) and the Regulations thereunder, which is not true. The Petitioner's property never encroached on the 60 meters High Water Mark. The allegation by the 1st Respondent that the Petitioner's property had encroached on the High-Water Mark was not true and had been made maliciously to justify the 1st Respondent's illegal activities on the suit property because:

- a. The frontage of the suit property abutting the Indian Ocean was infamous for criminal activities and had become a den of thieves, robbers and drug dealers. To stem the crime, the Petitioner proposed to develop the said frontage of the suit property by constructing a religious mosque, a restaurant and a recreational facility which proposal was duly approved by the 1st Respondent.
 - b. The Petitioner embarked on the construction of the said facilities in 2017 with the full approval and consent of the 1st Respondent but in October 2017 the 1st Respondent abruptly stopped the development on the basis that the same was on public land.
 - c. Thereafter, there had been many attempts to resolve the dispute whereby the officers of the Petitioner and the 1st Respondent had held several meetings.
 - d. The 1st Respondent's allegation that the Petitioner had extended its property to include the 60-meter-High Water Mark was discriminatory because there were several developments along the Indian Ocean in the same area/locality and even beyond which extended up to the Ocean because they front the creek and not the beach. Therefore, it was very malicious and discriminatory for the 1st Respondent to single out the Petitioner's property.
9. The Petition was presumed on the grounds, testimonies and the averments on the 27th paragraphed affidavit in support of Swaleh Awadh Hemed, sworn and dated on December 8, 2021 and the twelve (12) annexures marked as "SAH – 1 to 12" annexed thereto. He averred that:-
- a. The Petitioner is the registered owner of the leasehold interest of the suit property situate in Mombasa County in an area commonly known as Mudhubaha from the Government of Kenya for a term of 99 years with effect from 20th June 1993.
 - b. The suit property abuts the Indian Ocean.
 - c. On 8th September 2021, the 1st Respondent's officers led by the County Executive Committee Member for Transport, Infrastructure & Public Works. Taufiq Balala visited the suit property and addressed a group of youth thereon and promised to construct a public road cutting across the suit property to the beach.
 - d. Thereafter, the 1st Respondent through its officers, employees, agents and county askaris accompanied and aided by police officers had interfered with the Petitioner's ownership, occupation, use and rights over the suit property and have made it impossible for the Petitioner to own, occupy, use, develop and enjoy the suit property by doing the following actions:



- i. On 22nd September 2021, the 1st Respondent's officers and employees accompanied by about 100 county askaris and police officers visited the suit property with a huge bulldozer and demolished part of the suit property including the perimeter wall and the external staircase leading from the house on the suit property to the beach.
 - ii. On 15th September 2021, the 1st Respondent served upon the Petitioner through the Petitioner's sister business known as Fayazvehicle on the Road/Public Pavement" dated 14th September 2021. The said Notice alleged that the Petitioner had abandoned containers, structures and vehicles at Mudhubaha Street/Road contrary to the County Government By-Laws 1968 and ordered the Petitioner to remove the same within 7 days. The 1st Respondent never specified the nature and the exact item which had allegedly been abandoned and where exactly it was abandoned.
 - iii. On 22nd September 2021, the 1st Respondent through its authorized employees and officers accompanied by about 100 county askaris and police officers visited the suit property and forcefully removed therefrom and carted away the Petitioner's Container Number MSKU 9887463 45G1 together with the contents of the said containers. The Petitioner had stationed and kept on the said container on suit property and was using it for storage purposes.
 - iv. On 13th October 2021, the Chief Magistrate's Court in ELC Civil Case No.466 of 2021 ordered the 1st Respondent herein to return the said Container. The Container was returned but the 1st Respondent through its authorized officers took it back again on 17th November 2021.
 - v. On various dates thereafter the 1st Respondent through its employees, officers and county askaris had frequently and on many occasions visited the suit property accompanied by police officers and caused commotion and disruption thereon and made it impossible for the Petitioner to quietly and peacefully occupy and use the suit property.
- e. The different acts of illegalities committed by the 1st Respondent through its employees and officers had been reported to the police but the police headed by the 2nd Respondent had deliberately refused, declined and neglected to take any action. Specific reports were made to Tononoka Police Station vide;
- i. OB No.13 dated 29th May 2020.
 - ii. OB No.80 of 15th October 2020.
 - iii. OB No.11 dated 27th February 2021.
 - iv. OB No.18 of 19th July 2021.
 - v. OB No.19 of 22nd September 2021.
 - vi. OB.No.29/30/9/2021 of 30th September 2021.
 - vii. OB No.15 of 2021 of 11th November 2021.
 - viii. OB No.16 of 17th November 2021.
- f. Further and in addition to the 1st Respondent's illegal activities, there had been other illegalities committed by different persons on the suit property including trespass which had been



reported to the police but the police headed by the 2nd Respondent had adamantly refused and declined to take any action.

- g. It was manifestly clear that the 2nd Respondent was either working jointly with the 1st Respondent to frustrate the Petitioner and/or was deliberately aiding the 1st Respondent and other persons in the ill-intended quest to illegally take over the suit property from the Petitioner and/or make it impossible for the Petitioner to own, occupy, use and develop the suit property in a manner that was in breach the Petitioner's constitutional rights.
- h. The 1st Respondent had alleged that the Petitioner's property has encroached on the 60-meter portion from the High Water Mark and has impeded easement rights of the members of the public contrary to the *Survey Act* and the Regulations thereunder, which was not true.
- i. The Petitioner's property never encroached on the 60 meters High Water Mark.
- j. The allegation by the 1st Respondent that the Petitioner's property has encroached on the High Water Mark is not true and had been made maliciously to justify the 1st Respondent's illegal activities on the suit property because:
 - i. The frontage of the suit property abutting the Indian Ocean was infamous for criminal activities and had become a den of thieves, robbers and drug dealers. To stem the crime, the Petitioner proposed to develop the said frontage of the suit property by constructing a religious mosque, a restaurant and a recreational facility which proposal was duly approved by the 1st Respondent.
 - ii. The Petitioner embarked on the construction of the said facilities in 2017 having received the full approval and consent of the 1st Petitioner but in October 2017 the 1st Respondent abruptly stopped the development on the basis that the same was on public land.
 - iii. Thereafter, as could be seen in the letters referred to above, there had been many attempts to resolve the dispute whereby the officers of the petitioner and the 1st Respondent had held several meetings but nothing tangible had come out of it.
 - iv. The 1st Respondent's allegation that the Petitioner had extended its property to include the 60-meter-High Water Mark was discriminatory because there were several developments along the Indian Ocean in the same area/locality and even beyond which extended up to the Ocean because they front the creek and not the beach. It was therefore very malicious and discriminatory for the 1st Respondent to single out the Petitioner's property.
- k. The Respondents' actions were in breach of the Petitioner's constitutional rights and were in violation of *the Constitution* of Kenya and statute as pleaded in the Petition.
- l. The main issue in dispute in this Petition was that the Respondents' actions as described in this Petition are in breach of *the Constitution* and the law and was in breach and violation of the Petitioner's constitutional rights.
- m. The 1st Respondent had breached the Petitioner's right to acquire and own property under Article 40 of *the Constitution* of Kenya 2010 by interfering with the Petitioner's property and making it impossible for the Petitioner to access and occupy the suit property and by literally curtailing the Petitioner's ability to freely use and enjoy the property without any interference, intimidation and general threats.



- n. The Respondent's officers (including police officers), employees and county askaris had been storming the suit causing commotion therein, harassing, intimidating and threatening the Petitioner's officers, employees and agents. As a consequence, the Petitioner's ability and rights to access, occupy and use the suit property have been completely impeded contrary and in breach of Article 40 of *the Constitution*.
- o. The 1st Respondent had been using the police to perpetrate its illegal activities on the suit property and against the Petitioner as demonstrated hereunder:
 - i. The police accompanied the 1st Respondent's employees and officers when the latter stormed the suit property, caused chaos and carted away Petitioner's container and the items stored inside the container.
 - ii. On numerous other occasions, the police have accompanied the 1st Respondent's officers to visit the suit property and commit acts of illegalities against the Petitioner.
- p. Under Article 245(2)(b) of *the Constitution* and section 8 (1) of the *National Police Service Act*, the 2nd Respondent is mandated to exercise independent command over the National Police Service. The 2nd Respondent violated Article 245(2)(b) of *the Constitution* and section 8 (1) of the *National Police Service Act* by allowing the 1st Respondent to give command and direct the police to help the 1st Respondent in committing illegalities on the suit property.
- q. Under Article 239 (3)(a) of *the Constitution*, the National Police headed by the 2nd Respondent herein must not act in a partisan manner. The 2nd Respondent breached Article 239(3) (a) of *the Constitution* by acting in a partisan manner or permitting the National Police Service to act in a partisan manner by doing the following:
 - i. Ignoring and deliberately failing to act on the criminal reports made by the Petitioner against the 1st Respondent and its officers as well as other persons who had committed criminal acts against the Petitioner.
 - ii. Taking a partisan approach in the dispute between the Petitioner and the 1st Respondent by ignoring the criminal reports made by the Petitioner while aiding the 1st Respondent to commit illegalities against the Petitioner by causing and permitting police officers to accompany the 1st Respondent's employees, officers and county askaris to invade and raid the suit property and cart away items therefrom.
- r. The 2nd Respondent, being a public officer, was enjoined by Article 47 of *the Constitution* of Kenya, 2010 to observe fairness in his actions. The 2nd Respondent had failed to observe fairness because he had permitted and caused the National Police Service to be abused and misused by the 1st Respondent in an unfair manner with a view to committing illegalities on the suit property and denying the Petitioner its constitutional rights.
- s. The 1st and 2nd Respondents' actions as pleaded in the Petition were in breach of Article 3 of *the Constitution* of Kenya which mandated them to respect, uphold and defend *the Constitution*. The Respondents did not respect, uphold and defend *the Constitution* when they breached and violated Articles 40, 47, 239 (3) (a), 244 and 245(2)(b) of *the Constitution*.
- t. Under Article 244 of *the Constitution*, the 2nd Respondent is mandated to strive for the highest standard of professionalism, to comply with constitutional standards and to be of highest possible standards of competence while discharging the duties of his office. The 2nd Respondent violated Article 244 of *the Constitution* by:



- i. Failing to act on criminal reports made by the Petitioner.
- ii. Taking a partisan approach by siding with the 1st Respondent and against the Petitioner by inter alia, accompanying the 1st Respondent's officers to the suit property to commit illegalities thereon, steal the Petitioner's properties (container and its contents), to destroy the Petitioner's wall, harass the Petitioner's officers and agents and generally interfere with the Petitioner's rights, occupation and use of the suit property.
- u. The Respondents had generally abused the powers bestowed upon them as government agencies/officers to violate the Petitioner's rights, take away the Petitioner's property and to do acts which were not permitted by the law so as to achieve ulterior motive of taking away the Petitioner's property or denying the Petitioner the right to own and use the suit property.
- v. As a result of the Respondents' actions as described herein, the Petitioner had suffered loss particularized as follows:
 - i. A sum of Kenya Shillings One Million (Kshs.1,000,000.00/=) being the value Container Number MSKU 9887463 45G1 and the contents thereof.
 - ii. A sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000.00/=) being the value of the wall of the property known as Mombasa/block XLVI/138 demolished and destroyed by the 1st Respondent, its officers and employees.
 - iii. A sum of Kenya Shillings Five Million (Kshs.5,000,000.00/=) being the value of the staircase erected on the property known as Mombasa/block XLVI/138 demolished and destroyed by the 1st Respondent, its officers and employees.
 - iv. General damages for trespass on the property known as Mombasa/block XLVI/138.
- w. The Petitioner filed suits against the 1st Respondent and other persons/entities being Mombasa Chief Magistrate's Civil Suit No.E264 of 2020 and Mombasa Chief Magistrate's Courts ELC Civil Suit No.1466 of 2021 which had different subject matters from this suit as they did not concern constitutional violations and breaches of the Petitioner's constitutional rights

VI. Submissions

10. On 15th May, 2023 in the presence of the Petitioners' advocate, the Honourable Court directed that the Petition be dispensed off by way of written submissions. Pursuant to that on 21st September, 2023 only the Petitioner complied by filing their written Submissions. Thus, the Honourable Court proceeded to pen off the Judgement on merit and reserved a Judgment on notice accordingly.

A. The Written Submissions by the Petitioners

11. The Petitioner through the Law firm of Messrs. Oluga & Company Advocates filed their written submissions dated 20th July, 2023. Mr. Oluga Advocate started submitting by providing a brief background of the case. He stated that before this Honourable Court was a Petition dated 8th December 2021 which was filed together with the application for conservatory orders under certificate of urgency. The Petition was at the end of the Petitioner's bundle of documents from page 80 onwards. The orders sought in the Petition were as stated above. According to the Learned Counsel, the Petition was supported by the Affidavit of Swaleh Awadh Hemed, the Human Resource and Administration Officer of the Petitioner (hereinafter simply "the Supporting Affidavit") which was in support of both Petition and application for conservatory orders.



12. The Respondent never filed a response to the Petition. The 1st Respondent filed a Replying Affidavit sworn by Paul Ogweno Manyala on 1st February 2022 and filed on 2nd February 2022. However, as clearly pleaded in the heading of the said Replying Affidavit, the same was in response to the Petitioner's application for conservatory orders which is spent having been ruled on by the court. The 2nd and 3rd Respondents did not file any response at all despite being served. Therefore, it was clear that the Petition was unopposed and they proceeded to submit on the Petition on that basis.
13. Fundamentally, the Petitioner is the registered owner of the property known as Mombasa/blockXLVI/138 (hereinafter "the suit property") situate in Mombasa County in an area commonly known as Mudhubaha. On 8th September 2021, the 1st Respondent's officers led by the County Executive Committee Member for Transport, Infrastructure & Public Works, Taufiq Balala visited the suit property and addressed a group of youth and promised to construct a public road cutting across the suit property to the beach. Thereafter, the 1st Respondent through its officers, employees, agents and county askaris accompanied and aided by police officers interfered with the Petitioner's ownership, occupation, use and rights over the suit property making it impossible for the Petitioner to own, occupy, use, develop and enjoy the suit property.
14. On 22nd September 2021 the 1st Respondent's officers and employees accompanied by about 100 county askaris and police officers visited the suit property with a huge bulldozer and demolished part of the suit property including the perimeter wall and staircase. On 15th September 2021, the 1st Respondent served upon the Petitioner through the Petitioner's sister business known as Fayaz Bakers a "Notice to Remove Abandoned Containers Structures and vehicle on the Road/Public Pavement" dated 14th September 2021. The said Notice alleged that the Petitioner had abandoned containers, structures and vehicles at Mudhubaha Street/Road contrary to the County Government By - Laws 1968 and ordered the Petitioner to remove the same within 7 days. The 1st Respondent never specified the nature and the exact item which had allegedly been abandoned and where exactly it was abandoned.
15. According to the Learned Counsel, the 1st Respondent through its authorized employees and officers accompanied by about 100 county askaris and police officers visited the suit property and forcefully removed and carted away the Petitioner's Container Number MSKU 9887463 45G1 together with the contents of the said containers. The Petitioner had stationed and kept the said container on the suit property and was using it for storage purposes. On various dates thereafter the 1st Respondent through its employees, officers and county askaris have frequently and on many occasions visited the suit property accompanied by police officers and caused commotion and disruption making it impossible for the Petitioner to quietly and peacefully occupy and use the suit property. The different acts of illegalities committed by the 1st Respondent through its employees and officers have been reported to the police but the police headed by the 2nd Respondent had deliberately refused, declined and neglected to take any action thereby necessitating the current Petition.
16. On the issues for analysis and to be determined by the Court, the Learned Counsel submitted on the following eight (8) issues. Firstly on whether the Petitioner is the legal owner of the suit property; The Learned Counsel submitted that the Petitioner pleaded that it was the legal and rightful owner of the suit property. At paragraph 3 of the Supporting Affidavit, the Petitioner pleaded as follows:

"The Petitioner is the registered owner of the leasehold interest of the property known as Mombasa/blockXLVI/138 (hereinafter "the suit property") situate in Mombasa County in an area commonly known as Mudhubaha from the Government of Kenya for a term of



99 years with effect from 20th June 1993. Annexed herewith and marked as “SAH 1” is a true copy of the Certificate of Lease.”

17. The Petitioner’s title deed to the suit property (certificate of lease) was attached and exhibited at page 23 of the Supporting Affidavit. None of the Respondents presented any evidence to challenge the Petitioner’s title. As the Learned Counsel has already stated, none of the Respondents filed responses to the Petition. The Petitioner’s evidence that it is the legal owner of the suit property was therefore not controverted.
18. In the 1st Respondent’s Replying Affidavit sworn by Paul Ogweno Manyala, without expressly pleading it, there was an attempt to allege that the suit property comprised of 60 meters from the High Water Mark “which was not available for allocation to the Petitioner.” They had pointed out that Mr. Manyala’s affidavit was in response to the application for conservatory orders and any issues raised therein are spent after the ruling and are not available for consideration now. However, even if the same were to be considered, the allegation regarding the 60 meter High Water Mark was not backed by any evidence. To the contrary, the Petitioner in the Supplementary List of Documents filed a letter dated 8th February 2022 by the Ministry of Lands and Physical Planning signed by one SAMMY W. JUMA, the Coast Regional Surveyor in which the Government wrote as follows:

“Survey records indicate that the boundaries of the above parcel extends up to the High Water Mark (H.W.M)- see line shown in yellow. This implies that at the time of survey, the 60M riparian reserve from the H.W.M was not provided for and hence the riparian reserve forms part of the title.” [underlining ours]

19. The Learned Counsel asserted that the above-quoted letter by the Ministry of Lands and authored by no smaller officer than the Coast Regional Surveyor who is conversant with the area dispels the 1st Respondent’s allegation that the suit property comprised of 60 meters from the High Water Mark which was not available for allocation to the Petitioner. In the Supporting Affidavit, the Petitioner categorically denied that the suit property never encroached on the 60M High Water Mark. They specifically refer the Honourable Court to the contents of paragraphs 10, 11 and 12 (iv) of the Supporting Affidavit. To be more specific, at paragraph 11 of the Supporting Affidavit, the Petitioner pleaded as follows:

“ 11. The Petitioner’s property does not encroach on the 60 meters High Water Mark.”

20. Based on the above express averment, it was incumbent upon the Respondents to table evidence before this court to prove their allegations of encroachment on High Water Mark. They did not. The allegation by the 1st Respondent that the Petitioner’s property encroached on the High Water Mark was made maliciously to justify the 1st Respondent’s illegal activities on the suit property. Further, at Paragraph 12 (iv) of the Supporting Affidavit, the Petitioner expressly averred and it was not controverted, that there were several developments along the Indian Ocean in the same area/locality and even beyond which extend up to the Ocean because they front the creek and not the beach. The fact that the Respondents picked on the Petitioner’s property was clear indication of malice and is discriminatory.
21. Even assuming for a moment that the Respondent’s impeachment of the Petitioner’s ownership of the suit property on the allegation that the same was part of the 60M High Water Mark and therefore unavailable for allocation to the Petitioner were correct (they are not), the Petitioner’s title/ lease had neither been cancelled nor revoked and it remained valid to date. To support his point, the



Learned Counsel relied on the case of “Evelyn College of Design Ltd – Versus - Director of Children's Department & another [2013] eKLR” where it was stated that:

“.....it is clear that even where property is said to be illegally acquired; it cannot be dispossessed without due process. Such dispossession cannot be effected by preventing the Petitioner from enjoying the incidents of ownership of the land.”

22. Therefore, the Respondents had no colour of right to prevent the Petitioner from accessing, enjoying and using the suit property without due process. All in all, they had shown that the Petitioner is the owner of the suit property and the Petitioner's ownership had not been challenged by the Respondents. In the end, the Learned Counsel humbly asked the Honourable Court to disregard any aspersion made as to the Petitioner's ownership of the suit property and to answer issue 1 in favour of the Petitioner and to grant prayer 2 of the Petition by declaring that the Petitioner is the legal and rightful owner of the suit property known as Mombasa/blockXLVI/138.
23. Secondly, on whether there was breach of the Petitioner's constitutional rights. The Learned Counsel asserted that the 1st Respondent claimed that the suit property was government land meant for public use and that the same was unlawfully leased out to the Petitioner by the National Government. As it stood, and they had shown above, it was not disputed that the Petitioner was the legal and rightful owner of the suit property. The Respondents' actions as described herein were in breach of *the Constitution* and the law and violate the Petitioner's constitutional rights as pleaded in the Petition. Under the provision of Article 40 of *the Constitution* of Kenya, 2010, the Petitioner had a right to acquire and own property. This right included the right to occupy, use and develop such property. The Respondents breached the Petitioner's right to acquire and own property under Article 40 of *the Constitution* of Kenya 2010 by constantly interfering with the Petitioner's proprietary rights and making it impossible for the Petitioner to access, occupy, freely use and enjoy the suit property due to the Respondents' interference, intimidation and general threats.
24. Further, the Respondents' officers (including police officers), employees and county askaris on several occasions stormed the suit property and caused commotion by harassing, intimidating and threatening the Petitioner's officers, employees and agents. As a consequence, the Petitioner's ability and rights to access, occupy and use the suit property were completely impeded contrary to and in breach of Article 40 of *the Constitution*.
25. The Learned Counsel submitted that the Petitioner had proved that its constitutional right to acquire and own property under Article 40 of *the Constitution* of Kenya was breached by the 1st and 2nd Respondents and urge the court to determine issue 2 in favour of the Petitioner and to grant prayer 1 of the Petition.
26. Thirdly, on whether the 2nd Respondent violated *the Constitution* and statute. The Learned Counsel submitted that the Petitioner's right to quiet possession of the suit property were interfered with by the 1st Respondent's constant harassment which was reported to the police but the police headed by the 2nd Respondent deliberately refused, declined and neglected to take any action. This in turn emboldened other persons to trespass into the suit property which the Petitioner also reported to the police but the police refused and declined to take any action at all. At paragraph 7 of the Supporting Affidavit, the Petitioner pleaded that the illegalities committed against it concerning the suit property were reported to the police and cited and exhibited a total of 8 (eight) OB Reports. The evidence presented by the Petitioner showing that the atrocities were reported to the police were not controverted. The Respondents never denied that the reports were made to the police. Yet, no action was taken by the police at all. A whopping 8 (eight) OB Reports and no action at all.



27. It was therefore manifestly clear that the 2nd Respondent was either working jointly with the 1st Respondent to frustrate the Petitioner and/or was deliberately aiding the 1st Respondent and other persons in the ill-intended quest to illegally take over the suit property from the Petitioner and/or make it impossible for the Petitioner to own, occupy, use, develop and enjoy the suit property in breach of the Petitioner's constitutional rights. The 1st Respondent used the police to perpetrate illegal activities on the suit property. On numerous occasions the police accompanied the 1st Respondent's employees and officers to storm the suit property, cause chaos and carted away the Petitioner's container and the items stored therein. As a consequence, the Petitioner's ability and rights to access, occupy and use the suit property was completely impeded contrary to and in breach of Article 40 of *the Constitution*.
28. Under the provision of Article 245 (2) (b) of *the Constitution* and Section 8 (1) of the *National Police Service Act*, the 2nd Respondent was mandated to exercise independent command over the National Police Service. The 2nd Respondent violated Article 245 (2) (b) of *the Constitution* and Section 8 (1) of the *National Police Service Act* by allowing the 1st Respondent to give command and direct the police to help the 1st Respondent in committing illegalities on the suit property. Under Article 239 (3) (a) of *the Constitution*, the National Police headed by the 2nd Respondent herein must not act in a partisan manner. The 2nd Respondent breached Article 239 (3) (a) of *the Constitution* by acting in a partisan manner or permitting the National Police Service to act in a partisan manner by doing the following:
- i. Ignoring and deliberately failing to act on the criminal reports made by the Petitioner against the 1st Respondent and its officers as well as other persons who had committed criminal acts against the Petitioner.
 - ii. Taking a partisan approach in the dispute between the Petitioner and the 1st Respondent by ignoring the criminal reports made by the Petitioner while aiding the 1st Respondent to commit illegalities against the Petitioner by causing and permitting police officers to accompany the 1st Respondent's employees, officers and county askaris to invade and raid the suit property and cart away items therefrom.
29. The 2nd Respondent, being a public officer, was enjoined by Article 47 of *the Constitution* of Kenya, 2010 to observe fairness in his actions. The 2nd Respondent had failed to observe fairness because he had permitted and caused the National Police Service to be abused and misused by the 1st Respondent in an unfair manner with a view to committing illegalities on the suit property and denying the Petitioner its constitutional rights. The 1st and 2nd Respondents' actions as pleaded in the petition and described in these submissions were in breach of Article 3 of *the Constitution* of Kenya which mandates the 1st and 2nd Respondents' to respect, uphold and defend *the Constitution*. The Respondents did not respect, uphold and defend *the Constitution* when they breached and violated Articles 40, 47, 239 (3) (a), 244 and 245 (2) (b) of *the Constitution*.
30. Under Article 244 of *the Constitution*, the 2nd Respondent was mandated to strive for the highest standard of professionalism, to comply with constitutional standards and to be of highest possible standards of competence while discharging the duties of his office. The 2nd Respondent violated Article 244 of *the Constitution* by:
- i. Failing to act on criminal reports made by the Petitioner.
 - ii. Taking a partisan approach by siding with the 1st Respondent and against the Petitioner by inter alia, accompanying the 1st Respondent's officers to the suit property to commit illegalities thereon, steal the Petitioner's properties (container and its contents), destroy the Petitioner's



wall, harass the Petitioner's officers and agents and' generally interfere with the Petitioner's rights, occupation and use of the suit property.

31. The Learned Counsel submitted that the Respondents generally abused the powers bestowed upon them as government agencies/officers to violate the Petitioner's rights, take away the Petitioner's property and to do acts which are not permitted by the law so as to achieve ulterior motive of taking away the Petitioner's property or denying the Petitioner the right to own and use the suit property. In light of the foregoing, the Learned Counsel urged the Honourable Court to find that the 2nd Respondent violated the Constitution and statute and to consequently grant prayer 4 of the Petition.
32. Fourthly, on whether an order of permanent injunction should be issued against the Respondents as sought in the Petition, the Learned Counsel contended as stated above, that they had shown that the Petitioner is the lawful and rightful owner of the suit property. They had also shown that the 1st Respondent interfered with the Petitioner's rights to the suit property. In light of the foregoing, the Learned Counsel submitted that the Plaintiff was entitled to redress to prevent further commission of the acts complained of in the Petition.
33. Therefore, The Learned Counsel urged the Honourable Court to grant an order of permanent injunction to restrain the Respondents jointly and severally from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner's ownership, rights, use and occupation of the suit property as sought in prayer 3 of the petition.
34. Fifthly, on whether an order of mandatory injunction should be issued to compel the 2nd Respondent to act on the reports made to the police by the Petitioner. The Learned Counsel averred that as stated above they had shown that the police deliberately failed to act on the reports made by the Petitioner, a total of eight (8) reports. The 2nd Respondent's actions in that regard were in breach and violation of the Constitution and statute.
35. In light of the foregoing, the Learned Counsel urged the Honourable Court to grant prayer 4 of the Petition by issuing a declaration that the failure by the 2nd Respondent and the police in general to act on the reports lodged to the police by the Petitioner was in contravention of Articles 47, 239 (3) (a), 244 and 245 (2) (b) of the Constitution and to also issue an order of mandatory injunction to compel the 2nd Respondent to act on the reports made to the police by the Petitioner by carrying out investigations, arrests and forwarding the files to the Director of Public Prosecutions.
36. Sixthly, on whether the 1st Respondent illegally took away the Petitioner's Container and illegally demolished the Petitioner's perimeter wall; and whether the 1st Respondent should be ordered to pay compensation to the Petitioner as prayed in the Petition. The Learned Counsel submitted that they wished to address these two issues together because they were intertwined. The Petitioner pleaded how its container was taken away by the 1st Respondent under the supervision of the 2nd Respondent's police officers. At paragraph 6 (ii), (iii) and (iv) of the Supporting Affidavit, it averred as follows:
 - “ ii. On 15th September 2021, the 1st Respondent served upon the Petitioner through the Petitioner's sister business known as Fayaz Bakers a “Notice to Remove Abandoned Containers Structures and vehicle on the Road/ Public Pavement” dated 14th September 2021. The said Notice alleged that the Petitioner had abandoned containers, structures and vehicles at Mudhubaha Street/Road contrary to the County Government By-Laws 1968 and ordered the Petitioner to remove the same within 7 days. The 1st Respondent did not specify the nature and the exact item which had allegedly been abandoned and where exactly it was abandoned. (See exhibit marked “SAH 3” which is a true



copy of the “Notice to Remove Abandoned Containers Structures and vehicle on the Road/Public Pavement” dated 14th September 2021 at page 27 of the Petitioner’s Bundle of Documents).

- iii. On 22nd September 2021, the 1st Respondent through its authorized employees and officers accompanied by about 100 county askaris and police officers visited the suit property and forcefully removed therefrom and carted away the Petitioner’s Container Number MSKU 9887463 45G1 together with the contents of the said containers. The Petitioner had stationed and kept on the said container on suit property and was using it for storage purposes. (See exhibits jointly marked as “SAH 4” which are photographs and video showing the removal of the container which are at pages 28 to 32 of the Petitioner’s Bundle of Documents.
 - iv. On 13th October 2021, the Chief Magistrate’s Court in ELC Civil Case No.466 of 2021 ordered the 1st Respondent herein to return the said Container. The Container was returned but the 1st Respondent through its authorized officers took it back again on 17th November 2021. (See exhibit at page 35 of the Petitioner’s Bundle of Documents marked as “SAH 6” which is a true copy of the court order and at pages 36-37 thereof and marked as “SAH 7” which are photographs showing the container being taken away for the second time).
37. The above averments were neither challenged nor controverted by the Respondents. At paragraph 17 (i) of the Supporting Affidavit, it is averred as follows:-
- “The police accompanied the 1st Respondent’s employees and officers when the latter stormed the suit property, caused chaos and carted away Petitioner’s container and the items stored inside the container.”
- The above averments were also neither challenged nor controverted by the Respondents. The Petitioner had proved, not just by word of mouth but by documentary, photographic and videography evidence that the Respondents took away the Petitioner’s container, not once but two times. The Respondents never countered the Petitioner’s evidence.
38. Seventhly, on whether the 1st Respondent should be ordered to pay compensation to the Petitioner as prayed in the Petition. The Learned Counsel urged the Honourable Court to determine these issues in favour of the Petitioner by finding that the 1st Respondent illegally took away the Petitioner’s Container Number MSKU 9887463 45G1 and illegally demolished and destroyed the Petitioner’s wall erected on the suit property and proceed to grant a declaration to that effect as sought in prayer 5 of the Petition as well as to compel the 1st Respondent to compensate the Petitioner in terms of prayer 7 of the Petition.
 39. Finally, on who should bear the costs herein. The Learned Counsel contended that it was well settled that costs follow the event. The Respondents subjected the Petitioner to great atrocities and breaches. The Respondents blocked and impeded the Petitioner from using, occupying and developing its property. The Respondents forced the Petitioner to seek refuge and redress in this court, an action which would not have been taken if the Respondents never misconducted themselves. Thus, the Learned Counsel urged the Honourable Court to award the costs of this Petition to the Petitioner to be paid by the Respondents jointly and severally as sought in prayer 8 of the Petition.
 40. Additionally, and in order to comprehensively cover all the aspects of his submissions, the Learned Counsel intimated the Honourable Court that while the 2nd and 3rd Respondents in the first place, never filed response to the main Petition, the 1st Respondent did file some replies. Notably, the said



replies by the 1st Respondent was through a Replying Affidavit of Paul Ogweno Manyala which was in response to the application for interlocutory orders but none to the main Petition. Nonetheless, assuming that the issues raised in the said Replying Affidavit were to be taken as responses to the Petition, he submitted that the same could not help the Respondents. In saying so, he tendered the following reasons:-

- a. The 1st Respondent contended that the Petitioner was guilty of filing multiplicity of suits. However, the 1st Respondent only exhibited documents relating to CMCC No. E264 of 2020 and not any other suit. The said suit (CMCC No. E264 of 2020) was however not a bar to the granting of the orders sought in this application because:
 - i. The issues raised in this Petition were breaches of constitutional rights of the Petitioner which were not pleaded in CMCC No. E264 of 2020 and which in any event never fell within the jurisdiction of the magistrate's court.
 - ii. The issues pleaded in this Petition including police harassment were not pleaded in CMCC No. E264 of 2020.
 - iii. Other than the 1st Respondent herein, the County Government of Mombasa, the rest of the parties in this Petition were not parties to CMCC No. E264 of 2020 and similarly the 2nd, 3rd and 4th Defendants in CMCC No. E264 of 2020 were not parties herein.
 - iv. The issues in the two cases were totally different.
 - v. The issues pleaded in this Petition occurred after the filing of CMCC No. E264 of 2020.
- b. The 1st Respondent alleged that the Petitioner's intention was to evict members of Madhubaa Beach Landing Site Self – Help Group. The documents filed by the 1st Respondent however betray that allegation. The Ground Status Report dated 22nd December 2020 by Teddy M.mulusa (Exhibit “POM - 5” attached Replying Affidavit) was inadmissible in this Court because it was prepared for purposes of CMCC no. E264 of 2020 as clearly indicated in its heading. This Honourable could not and should not admit evidence prepared for another case as doing so would embarrass the hearing and fair trial of CMCC no. E264 of 2020 where the evidence was meant for. If this Court accepted the Ground Report and made a finding of facts on it, the Magistrate's Court would be highly prejudiced because the Magistrate's court was bound by the decision of this court. The Magistrate would not be able to make an independent decision based on the Report. Further, this Honourable Court was the right court that was intended to hear appeals from the magistrate's court touching on land matters. If this court accepted the Ground Report and uses it to make a finding in this case, the court would be highly embarrassed should an appeal be preferred to this court emanating from the magistrate's decision in CMCC No. E264 of 2020 because this Court's position shall have been known. The Learned Counsel therefore urged the Court to reject and the Ground Report and not rely on it.



- c. Despite its inadmissibility, the Ground Report contradicted the 1st Respondent's allegation that the Petitioner's intention was to evict members of Madhubaa Beach Landing Site Self - Help Group. The Ground Report said as follows at Item 4 Bullet Number 3:-

“The Madubaha BMU area hosts a fish landing (jetty) and vessels anchorage area as well as a beach. It is accessible via an existing road along the western boundary of parcel 138/XLVI/MN

- d. The content of the Ground Report highlighted above showed the following:
- i. There existed a fish landing jetty and vessels anchorage area as well as a beach. Members of Madhubaa Beach Landing Site Self - Help group were at liberty to use those existing facilities without any hindrance.
 - ii. There existed a road along the boundary wall of the suit property. Again, members of Madhubaa Beach Landing Site Self - Help Group were at liberty to use the access road without any hindrance.
- c. Further, it was contradictory for the 1st Respondent to allege that the Petitioner evicted fishermen and prevented them from undertaking their economic activity yet at paragraph 7 of his Replying Affidavit expressly averred that there was a “beehive of activities by the public along the foreshow” and attached photographic evidence to confirm the beehive of activities. There could be no beehive of activities if the Petitioner had prevented members of the public from undertaking activities along the shoreline as alleged by the 1st Respondent. On the allegation at under the contents of Paragraphs 8 and 9 of the Replying affidavit that there were illegal activities, he relied on the letter by the Ministry of Lands (Coast Regional Surveyor) dated 8th February 2022 contained in the Petitioner's Supplementary List of Documents which clearly showed at Paragraph 1 thereof that the Petitioner's suit property extended up to the High Water Mark and that the riparian reserve formed part of the Petitioner's property. The Petitioner could not therefore be accused of back-filling and reclaiming up to the ocean (60 meters high water mark) because the Petitioner's property extended all the way to the High Water Mark.

41. The Learned Counsel argued that it was interesting that the 1st Respondent alleged that the Petitioner had no rights over the suit property (See the contents of Paragraphs 13 and 14 of Replying Affidavit). The Petitioner's title had never been challenged by the 1st Respondent and had never been declared illegal. Therefore, the Petitioner had the constitutional right to own, occupy and use its property without any hindrance from the Respondents.

42. In conclusion, the Learned Counsel submitted that the orders sought were intended to protect the Petitioner and its property from the acts of lawlessness committed by the Government officers. If the orders were not granted, the Respondents would be more emboldened in their actions and would further perpetrate their acts of lawlessness against the Petitioner. The abuse and blatant disregard of the law would simply not stop. The Learned Counsel sought guidance from the case of:- “Law Society of Kenya – Versus - Officer of the Attorney General & another; Judicial Service Commission (Interested Party)[2020]eKLR” in granting the orders sought said:

“it is clear that every member of the public whether individually or collectively is enjoined to respect, uphold and defend *the Constitution* and any alleged violation of *the Constitution* by any individual is a very serious matter and an affront to the Constitutionalism, and sets a dangerous precedent in the violation of *the constitution*; which can, if not checked,



result in serious harm to the country and every citizen. It is therefore proper and prudent for the Courts to act in public interest and consider granting the appropriate reliefs in the circumstances where such orders are deserved.”

43. The Learned Counsel urged the Honourable court to stop the acts of lawlessness by the Respondents by holding the Respondents accountable for their actions and grant the orders sought in the Petition. He informed Court that the cases cited in these submissions were filed together with their submissions on the interlocutory application for conservatory orders.

VII. Analysis and Determination

44. I have carefully considered all the filed pleadings pertaining to *the Constitution* Petition dated 8th December, 2021, the Supporting affidavit and, the cited authorities provisions of Constitution of Kenya and the Provisions of the law.
45. To reach an informed, just and fair decision, the Honourable Court crystalized the subject matter into the following six (6) salient issues for it determination. These were:-
- a. Whether this Court lacks Jurisdiction to hear and determine this matter.
 - b. Whether the Petitioner has met the threshold of a Constitution Petition dated 8th December, 2021;
 - c. Whether or not the title of the suit land held by the Petitioner is valid and lawful;
 - d. Whether the Petitioners’ fundamental rights and freedoms have been infringed upon;
 - e. Whether the Petitioner is entitled to Compensation; and
 - f. Who should bear the costs of the Petition dated 8th December, 2021?

ISSUE No. a). Whether this Court lacks Jurisdiction to hear and determine this matter.

46. Prior to embarking on any other issue, its imperative that the Honourable Court deals with the issue of its Jurisdiction though raised in such a thin veil and in passing by the 1st Respondent herein. Despite of that circumstance, it is an issue that the Honourable Court cannot out rightly brush aside nor ignore. Essentially, the 1st Respondent contended that the Petitioner was guilty of filing multiplicity of suits. However, I took judicial notice to the effect that the 1st Respondent only exhibited documents relating to CMCC NO. E264 OF 2020 and not any other suit. To them this suit was frivolous, mischievous, scandalous and an abuse of the due process and hence it should be struck out with costs.
47. Fundamentally, the centrality of the concept of jurisdiction in Kenya’s legal system cannot be gainsaid. Nyarangi JA outlined the significance of jurisdiction in the adjudication of civil disputes in “Owners of Motor Vessel “Lillian S” – Versus - Caltex Oil (Kenya) Ltd (Supra) in the following words:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 at the moment it holds the opinion that it is without jurisdiction.”



48. The Supreme Court of Kenya pronounced itself on the concept of jurisdiction in “Samuel Kamau Macharia & ano – Versus - Kenya Commercial Bank Limited & 2 others [2012] eKLR” as follows:

“ A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in In the Matter of Interim Independent Electoral Commission (Applicant), Constitution Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

49. The broad jurisdiction of this Honourable Court is set out in Article 162 (2) of *the Constitution* as follows:

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:

- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.”

50. Additionally, the Court seeks its original and unlimited legal mandate to execute its functions from the provisions of Sections 3 and 13 of the *Environment and Land Court Act*, No. 19 of 2011; Sections 101 of the *Land Registration Act*, No. 3 of 2012 and Sections 150 of the *Land Act*, No. 6 of 2012.

51. Now turning to the instant case, the 1st Respondent has pointed to court though from an affidavit responding to an interlocutory application that there exists another suit in the lower Court filed by the Petitioner over the same subject matter. This is CMCC NO. E264 OF 2020. This Honourable Court has keenly and thoroughly assessed the attached documents pertaining to this case and based on the strong submissions tendered by the Learned Counsel for the Petitioner I am fully persuaded that there is no legal basis from the raised objections by the 1st Respondent and that the suit would not be a bar to the granting of the orders sought by the 1st Respondent ideally contrary to the known legal Doctrines of “Sub Judice” and “Res Judicata” under the provisions of Sections 6 and 7 of the *Civil procedure Act*, Cap. 21 of the Laws of Kenya. In saying so, I rely and adopt the following reasoning:-

- a. The issues raised in this Petition were breaches of constitutional rights of the Petitioner which were not pleaded in said suit before the lower court and which in any event never fell within the jurisdiction of the Magistrate's court.
- b. The issues pleaded in this Petition including police harassment were not pleaded in the suit before the lower court.



- c. Other than the 1st Respondent herein, the County Government of Mombasa, the rest of the parties in this Petition were not parties to the suit in the lower court. Similarly the 2nd, 3rd and 4th Defendants in the lower court suit were not parties herein.
 - d. The issues in the two cases were totally different.
 - e. The issues pleaded in this Petition occurred after the filing of lower court case.
52. For these reasons, therefore, the Honourable Court finds that the objections raised by the 1st Respondent calling for such a drastic and draconian action of striking out this Petition are baseless, unfounded and without any firm legal stand. Thus, I proceed to outrightly decline granting the prayers sought.

ISSUE No. b). Whether the Petitioner has met the threshold of a Constitution Petition dated 8th December, 2021;

53. Under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a Petitioner must disclose facts relied upon, constitutional rights and freedoms violated, nature of injury caused, capacity to bring the petition, details relating to related civil/criminal matter and the reliefs sought.
54. As a matter of course, *the Constitution* of Kenya under 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.....”
55. 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.
56. Under the contents of Paragraphs 1 to 4 of the Petition dated 8th December, 2021 describes the parties to the Petition, whereas paragraphs 5 to 14 are the brief facts of the claim as per the Petitioner stating that on 8th September 2021, the 1st Respondent’s officers led by the County Executive Committee Member for Transport, Infrastructure & Public Works, Taufiq Balala visited the suit property and addressed a group of youth thereon and promised to construct a public road cutting across the suit property to the beach. Thereafter, the 1st Respondent through its officers, employees, agents and county askaris accompanied and aided by police officers have interfered with the Petitioner’s ownership, occupation, use and rights over the suit property and have made it impossible for the Petitioner to own, occupy, use, develop and enjoy the suit property.



57. The Petitioner contended that on the Respondents violated Article 40 of *the Constitution* of Kenya, 2010 (hereinafter "*the Constitution*"), the Petitioner has a right to acquire and own property. The said right includes the right to occupy, use and develop such property. The 1st Respondent has breached the Petitioner's right to acquire and own property under Article 40 of *the Constitution* of Kenya 2010 by interfering with the Petitioner's property and making it impossible for the Petitioner to access and occupy the suit property and by literally curtailing the Petitioner's ability to freely use and enjoy the property without any interference, intimidation and general threats. The Respondent's officers (including police officers), employees and county askaris have been storming the suit causing commotion therein, harassing, intimidating and threatening the Petitioner's officers, employees and agents. As a consequence, the Petitioner's ability and rights to access, occupy and use the suit property have been completely impeded contrary and in breach of Article 40 of *the Constitution*. The 1st Respondent has been using the police to perpetrate its illegal activities on the suit property and against the Petitioner as demonstrated hereunder:
- a. The police accompanied the 1st Respondent's employees and officers when the latter stormed the suit property, caused chaos and carted away Petitioner's container and the items stored inside the container.
 - b. On numerous other occasions, the police have accompanied the 1st Respondent's officers to visit the suit property and commit acts of illegalities against the Petitioner.
58. Under the provision of Article 245 (2) (b) of *the Constitution* and Section 8 (1) of the *National Police Service Act*, the 2nd Respondent is mandated to exercise independent command over the National Police Service. The 2nd Respondent violated Article 245 (2) (b) of *the Constitution* and Section 8 (1) of the *National Police Service Act* by allowing the 1st Respondent to give command and direct the police to help the 1st Respondent in committing illegalities on the suit property. Under Article 239 (3) (a) of *the Constitution*, the National Police headed by the 2nd Respondent herein must not act in a partisan manner. The 2nd Respondent breached Article 239 (3) (a) of *the Constitution* by acting in a partisan manner or permitting the National Police Service to act in a partisan manner by doing the following:
- i. Ignoring and deliberately failing to act on the criminal reports made by the Petitioner against the 1st Respondent and its officers as well as other persons who had committed criminal acts against the Petitioner.
 - ii. Taking a partisan approach in the dispute between the Petitioner and the 1st Respondent by ignoring the criminal reports made by the Petitioner while aiding the 1st Respondent to commit illegalities against the Petitioner by causing and permitting police officers to accompany the 1st Respondent's employees, officers and county askaris to invade and raid the suit property and cart away items therefrom.
59. The 2nd Respondent, being a public officer, is enjoined by the provision of Article 47 of *the Constitution* of Kenya, 2010 to observe fairness in his actions. The 2nd Respondent has failed to observe fairness because he has permitted and caused the National Police Service to be abused and misused by the 1st Respondent in an unfair manner with a view to committing illegalities on the suit property and denying the Petitioner its constitutional rights.
60. The 1st and 2nd Respondents' actions as pleaded herein are in breach of the provision of Article 3 of *the Constitution* of Kenya which mandates them to respect, uphold and defend *the Constitution*. The Respondents did not respect, uphold and defend *the Constitution* when they breached and violated the provision of Articles 40, 47, 239 (3) (a), 244 and 245 (2) (b) of *the Constitution*. Under the provision



of Article 244 of *the Constitution*, the 2nd Respondent is mandated to strive for the highest standard of professionalism, to comply with constitutional standards and to be of highest possible standards of competence while discharging the duties of his office. The 2nd Respondent violated the provision of Article 244 of *the Constitution* by:

- a. Failing to act on criminal reports made by the Petitioner.
- b. Taking a partisan approach by siding with the 1st Respondent and against the Petitioner by inter alia, accompanying the 1st Respondent's officers to the suit property to commit illegalities thereon, steal the Petitioner's properties (container and its contents), to destroy the Petitioner's wall, harass the Petitioner's officers and agents and generally interfere with the Petitioner's rights, occupation and use of the suit property.

61. Under the contents made under Paragraph 24, the Petitioner contended that the Respondents have generally abused the powers bestowed upon them as government agencies/officers to violate the Petitioner's rights, take away the Petitioner's property and to do acts which are not permitted by the law so as to achieve ulterior motive of taking away the Petitioner's property or denying the Petitioner the right to own and use the suit property.

62. The Petitioner sought for 9 (nine) key prayers. The threshold of what amounts to Constitutional Petition was set out in the now famous cases of:- "Anarita Karimi Njeru – Versus - Republic [1979]eKLR" and "Trusted Alliance Society of Human Rights – Versus - Attorney General & 5 Others [2013] eKLR". Trevalyan J (as he then was) and Hancox J (as he then was) stated as follows:

“We would however again stress that if a person is seeking redress from 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/her 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.” 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.....”

63. Further, in the case of:- “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”.

In other words, cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assists in that regard and are a tenet of substantive justice, as they give fair notice to the other party.....”

64. In the case of:- “Meme – Versus - Republic [2004] 1 E.A. 124”, the court held a petitioner must set out with reasonable degree of precision the complaint and the manner in which the rights have been infringed with clear focus on fact, law and *the Constitution*. This was the same position in the case of:-



“Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & Others [2013] eKLR” and “John Mbogua Getao – Versus - Simon Parkoyiet Mokare & 4 others [2017] eKLR”.

65. The Petitioner is required to demonstrate that an impugned decision or action violates or threatens to violate the bill of rights or *the Constitution* for that matter. The test is whether the decision, act or omission complained about falls within the ambit of an administrative action in line with Section 2 of the *Fair Administrative Action Act*, 2015.
66. In direct application of these set out principles for filing a Constitutional Petition to this case, the Honorable Court wishes to address itself on two broad issues. Firstly, has the Petition filed by the Petitioners herein pleaded with reasonable precision as founded in the “Anarita Karimi (Supra)”. To respond to this query and the Petitioner has made allegations of the Respondents contravening under the dint of the provisions of Articles 23(1), 40, 47, 162(1)(2)(b), 165 (2) (d) (ii), 239 (3) (a), 244 and 245 (2)(b) of *the Constitution* of Kenya 2010.
67. Fundamentally, and based on the foregoing, this Honourable Court is completely satisfied that the Petitioner has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and for the prayers sought. On that end, the Petition must succeed.

ISSUE No. b.) Whether or not the title of the suit land held by the Petitioner is valid and lawful;

68. Under this sub – heading, before embarking on the analysis herein, it is imperative that the Honourable Court first and fore most extrapolate on the brief facts of the case. Thus, the facts are that the Petitioner is the registered owner of the property known as MOMBASA/BLOCK XLVI/138 (hereinafter “the suit property”) situate in Mombasa County in an area commonly known as Mudhubaha. The suit property abuts the Indian Ocean. On 8th September 2021, the 1st Respondent’s officers led by the County Executive Committee Member for Transport, Infrastructure & Public Works, Taufiq Balala visited the suit property and addressed a group of youth thereon and promised to construct a public road cutting across the suit property to the beach. According to the Petitioner, it obtained a lease from the Government of Kenya for a term of 99 years with effect from 20th June, 1993. The suit property abuts the Indian Ocean. This was evidenced by annexure SAH 1 which is a copy of the certificate of lease for MOMBASA/BLOCK XLVI/138 for the rent of Kshs 36,000/- per annum (revisable), the lease was given under the hand and seal of the Mombasa District Registry on 14th February, 1990.
69. It is trite that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that they are the absolute and legal owner of the property. In so doing, based on the provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012, the owner attains indefeasible rights, title and interests on the land vested in him/her by the law. The provision of Section 24 of the *Land Registration Act* provides:-

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

70. While the provision of Section 25 states as follows:-

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and



appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

71. However, the registration of such title is not absolute as the same maybe impeached under certain circumstances as provided by the provision of Section 26(1) of the [Land Registration Act](#) which states as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

72. The provisions of law are very clear on the circumstances under which a title of land issued to a proprietor of property can be impeached. In this instant suit as already stated above, the evidence of the Petitioner remain uncontroverted. Being the title holder of the said property, therefore it is this Honourable Court’s considered view that unless its title to the suit property is impeached and or revoked, the Petitioner remains the lawful owner of the suit property and therefore is entitled to enjoy all the rights and privileges that appertain to it.

73. Without any evidence to contradict the evidence of the Petitioner and taking into account the exhibits provided before his Court, this court finds and holds that the Petitioner is the absolute and lawfully registered owner to all the suit property. The certificate of lease in this case is deemed as prima facie evidence that the Petitioner is the bona fide owner of the suit land.

ISSUE No. c). Whether the Petitioners’ fundamental rights and freedoms have been infringed upon

74. The Petitioner has sought for various orders amongst them a declaration that it is the legal and rightful owner of the property known as MOMBASA/ BLOCK XLVI/138, secondly the Petitioner has sought for an order of permanent injunction to restrain the Respondents jointly and severally, their agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, stepping onto, visiting vandalizing, demolishing, and generally interfering with the Petitioner’s ownership, rights, use and occupation of the property known as MOMBASA/BLOCK XLVI/138 and also compelling the 2nd Respondent to act on the reports made to the police by the Petitioner through its officers or authorized agents OB No. 13 dated 29th May 2020; OB No. 80 of 15th October 2020; OB No. 11 dated 27th February 2021; OB No. 18 of 19th July 2021; OB No. 19 of 22nd September 2021; OB. No.29/30/9/2021 of 30th September 2021; OB No.15 of 2021 of 11th November 2021; and OB No. 16 of 17th November 2021 all made at Tononoka Police Station in Mombasa by carrying out investigations, arrests and forwarding the files to the Director of Public Prosecutions.



75. The Court has already held and found that the Petitioner is the Lawful registered proprietor of the suit land. The petitioner has sought for quashing of the alterations made in the Register and Order of Prohibition.
76. Since the Petitioner is the lawful owner of the suit property, its rights are protected by Article 40 of *the Constitution* and Section 24 of the *Land Registration Act*, and therefore no any other person has authority to claim over the suit land and that no one should deal with the suit land in a manner that is contrary to its interests and without the Petitioner's express authority and or consent. According to the Petitioner the 1st Respondent has breached the Petitioner's right to acquire and own property under Article 40 of *the Constitution* of Kenya 2010 by interfering with the Petitioner's property and making it impossible for the Petitioner to access and occupy the suit property and by literally curtailing the Petitioner's ability to freely use and enjoy the property without any interference, intimidation and general threats. The Respondent's officers (including police officers), employees and county askaris have been storming the suit causing commotion therein, harassing, intimidating and threatening the Petitioner's officers, employees and agents. As a consequence, the Petitioner's ability and rights to access, occupy and use the suit property have been completely impeded contrary and in breach of Article 40 of *the Constitution*. The 1st Respondent has been using the police to perpetrate its illegal activities on the suit property and against the Petitioner as demonstrated hereunder:
- i. The police accompanied the 1st Respondent's employees and officers when the latter stormed the suit property, caused chaos and carted away Petitioner's container and the items stored inside the container.
 - ii. On numerous other occasions, the police have accompanied the 1st Respondent's officers to visit the suit property and commit acts of illegalities against the Petitioner.
77. According to the Petitioner, Article 245(2)(b) of *the Constitution* and section 8 (1) of the *National Police Service Act*, the 2nd Respondent is mandated to exercise independent command over the National Police Service. The 2nd Respondent violated Article 245 (2) (b) of *the Constitution* and section 8 (1) of the *National Police Service Act* by allowing the 1st Respondent to give command and direct the police to help the 1st Respondent in committing illegalities on the suit property.
78. According to the Petitioner, further and in addition to the 1st Respondent's illegal activities, there have other illegalities apart from county officers frequently and on many occasions visiting the suit property accompanied by police officers and causing commotion and disruptions, the 1st Respondent through its agent has trespassed into the suit property which trespass had been reported to the police but being that the police were under the 2nd Respondent have adamantly refused and declined to take any action. The 1st Respondent has alleged that the Petitioner's property has encroached on the 60-meter portion from the High-Water Mark and has impeded easement rights of the members of the public contrary to the *Survey Act* and the Regulations thereunder, which is not true. The Petitioner's property does not encroach on the 60 meters High Water Mark. The allegation by the 1st Respondent that the Petitioner's property has encroached on the High-Water Mark is not true and has been made maliciously to justify the 1st Respondent's illegal activities on the suit property because:
- a. The frontage of the suit property abutting the Indian Ocean was infamous for criminal activities and had become a den of thieves, robbers and drug dealers. To stem the crime, the Petitioner proposed to develop the said frontage of the suit property by constructing a religious mosque, a restaurant and a recreational facility which proposal was duly approved by the 1st Respondent.



- b. The Petitioner embarked on the construction of the said facilities in 2017 with the full approval and consent of the 1st Petitioner but in October 2017 the 1st Respondent abruptly stopped the development on the basis that the same was on public land.
 - c. Thereafter, there have been many attempts to resolve the dispute whereby the officers of the petitioner and the 1st Respondent have held several meetings.
 - d. The 1st Respondent's allegation that the Petitioner has extended its property to include the 60-meter-High Water Mark is discriminatory because there are several developments along the Indian Ocean in the same area/locality and even beyond which extend up to the Ocean because they front the creek and not the beach. It is therefore very malicious and discriminatory for the 1st Respondent to single out the Petitioner's property.
79. It is trite that under Article 40 of *the Constitution*, the Petitioner has the right to property, which right includes the use of the suit property. The Provision of Article 40 of *the Constitution* provides as follows:

“ 40.

- (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.”
80. The Petitioner has prayed for a permanent injunction restraining the Respondents jointly and severally, their agents, assigns, employees, officers and any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, stepping onto, visiting vandalizing, demolishing, and generally interfering with the Petitioner’s ownership, rights, use and occupation of the property known as MOMBASA/BLOCK XLVI/138. The Petitioner has sought for a declaration that its rights to property under Article 40 of *the Constitution* has been contravened by the Respondents. Having cited the provisions of Article 40 of *the Constitution*, and having shown how he has been deprived the use of the suit property by the Respondents, the Petitioner has particularized the provisions of *the Constitution* which have been allegedly contravened by the Respondents.
81. In the case of “Trusted Society of Human Rights Alliance – Versus - Attorney General & 2 Others Civil Appeal No. 290 of (2012) eKLR”, the Court of Appeal held as follows:
- “However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”
82. The Petition clearly brings out the complaint that the Petitioner has as against the Respondents, that is the breach of the Petitioner’s right to not only own the suit property, but also to use the property. Consequently, the Petition is validly before this court.
83. The Petitioner has particularized its compensation in the Petition as follows:
- i. A sum of Kenya Shillings One Million (Kshs. 1,000,000.00/=) being the value Container Number MSKU 988746345G1 and the contents thereof.
 - ii. A sum of Kenya Shillings Fifteen Million (Kshs.15,000,000.00/=) being the value of the wall of the property known as MOMBASA/BLOCK XLVI/138 demolished and destroyed by the 1st Respondent, its officers and employees.



- iii. A sum of Kenya Shillings Five Million (Kshs. 5,000,000.00/=) being the value of the staircase erected on the property known as MOMBASA/BLOCK XLVI/138 demolished and destroyed by the 1st Respondent, its officers and employees.
- iv. General damages for trespass on the property known as MOMBASA/BLOCK XLVI/138.
84. From the facts of the case, the Respondents had no qualms about destroying the Petitioner's property contrary to the provisions of *the Constitution*. The Respondents' constant invasion and trespass on the suit property and the removal of the container therefrom had occasioned the Petitioner loss particularized as above. It is the Petitioner's contention that the Respondents had blocked and impeded the Petitioner from using, occupying and developing its property resulting into irreparable harm. The Respondents' actions as pleaded in the Petition and application are not only illegal but simply amount to hooliganism and utter lawlessness. It was ironical that the police who should be protecting the Petitioner were the ones who was perpetrating illegalities against the Petitioner. The conservatory order sought are intended to protect the Plaintiff from the acts of lawlessness committed by the Government officer. In the case of "Law Society of Kenya – Versus – Officer of the Attorney General & Another Judicial Service Commission (Interested Party) [2020] eKLR" in granting conservatory orders said:
- “is clear that every member of the public whether individually or collectively is enjoined to respect, uphold and defend *the Constitution* and any alleged violation of *the Constitution* by any individual is a very serious matter and an affront to the Constitutionalism, and sets a dangerous precedent in the violation of the constitutions which can, if not checked, result in serious harm to the country and every citizen. It is therefore proper and prudent for the Courts to act in public interest and consider granting the appropriate relief in the circumstances where such orders are deserved”
85. The provision of Section 3 (1) of the *Trespass Act*, Cap 294 provides that:-
- “Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
86. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. According to the Petitioner, on 22nd September 2021 the 1st Respondent's officers and employees accompanied by about 100 county askaris and police officers visited the suit property with a huge bulldozer and demolished part of the suit property including the perimeter wall and staircase. The same day, the 1st Respondent through its authorized employees and officers accompanied by about 100 county askaris and police officers visited the suit property and forcefully removed therefrom and carted away the Petitioner's Container Number MSKU 9887463 45G1 together with the contents of the said containers. The Petitioner had stationed and kept on the said container on suit property and was using it for storage purposes.
87. On 15th September 2021, the 1st Respondent served upon the Petitioner through the Petitioner's sister business known as Fayaz Bakers a “Notice to Remove Abandoned Containers Structures and vehicle on the Road/Public Pavement” dated 14th September 2021. The said Notice alleged that the Petitioner had abandoned containers, structures and vehicles at Mudhubaha Street/Road contrary to the County Government By-Laws 1968 and ordered the Petitioner to remove the same within 7 days. The 1st Respondent did not specify the nature and the exact item which had allegedly been abandoned and where exactly it was abandoned.



88. From the averions in the Petition it is clear that the Respondents through its agents trespassed the suit property and there was no proof that the entry was authorized in any way. All in all, the Respondents have failed to act in an accountable manner so as to ensure that it does not interfere with the Petitioner's property rights guaranteed under Article 10, 40 and 47 of *the Constitution* of Kenya, 2010.
89. The Honourable court is of the opinion that a public authority must act within the four corners of the law wherever it takes any administrative or executive action. Every action must be anchored in the law and it must have a lawful justification or excuse. No action should be taken capriciously, arbitrarily and without due process. That is what the rule of law is all about.
90. In the case of “Republic – Versus - Kombo and 3 Others ex-parte Waweru [2008] 3 KLR (EP) 478” which was cited by the Petitioner it was held, inter alia, that:
- “The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man’s land), or which infringes a man’s liberty (as by refusing him planning permission), must be able to justify its action as authorized by law and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can safely disregard.”
91. This Honourable Court is of the opinion that the Petitioner has demonstrated a violation of his legal and constitutional rights, and it is entitled to all the reliefs sought. In application of these set out principles for filing a Constitutional Petition to this case, the Honourable court is fully satisfied that the Petitioner herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondent and pleading for the prayers sought. Once more on this front, the Petition must succeed.

ISSUE No. d). Whether the Petitioner is entitled to Compensation

92. Under this sub title the Honourable Court has already discussed and concluded that the Petitioner was the bona fide owner of the lease. Thus, they are entitled to compensation arising from the acts by the Respondents herein. As regards relief, under Article 23 of *the Constitution* the court may grant appropriate relief to indicate the right so infringed. As I have stated, this case is about due process rights and I shall therefore grant orders necessary to secure these rights. The Petitioner is entitled to a nominal award and costs of the suit to vindicate its rights.
93. The Petitioner has sought for special damages for the value of Container numberMSKU 9887463 45G1 together with the contents of the said containers, for the value of the wall of the property known as MOMBASA/BLOCK XLVI/138 for a wall that has been demolished and destroyed by the 1st Respondent and the value of the staircase which was erected on the property that had been demolished by the 1st Respondent’s officers. The Petitioner also sought general damages for the trespass of the suit property.
94. For special damages, the Petitioner has claimed a sum of Kenya Shillings One Million (Kshs 1,000,000/-) for the container and its contents, a sum of Kenya Shillings Fifteen Million (Kshs 15,000,000/-) being the value of the wall and a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) for the value of the staircase destroyed in the suit property. Unfortunately, the Petitioner has not



provided any receipts or valuation report of the said special damages. It is trite law that special damages require to be specifically pleaded and proved. In the instant case, although the Petitioner has pleaded but not proved this claim by not producing any documentation to support the amounts they were claiming. Suffice it to quote from the decision of the Court of Appeal in the case of:- “Hahn – Versus - Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721” where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

95. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. (See “Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited – Versus - Janevams Limited [2015] eKLR”; “Zacharia Waweru Thumbi – Versus - Samuel Njoroge Thuku [2006] eKLR”; “Sanya Hassan – Versus - Soma Properties Ltd”.) The Petitioner has not attached receipts for the special damages as sought. Hence, as my hands are tied on law, I decline to compensate the Petitioner on the special damages sought.

96. On the issue of general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of “Philip Ayaya Aluchio – Versus - Crispinus Ngayo [2014]eKLR” where it was held as follows:

“The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).

97. In this case, the Petitioner has not provided the Honourable Court with the value of the suit property before and after the trespass. This makes it difficult to assess the general damages. In the case of:- “Nakuru Industries Limited – Versus - S S Mehta & Sons [2016] eKLR” where the court faced such a similar situation it was held as follows:

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Kshs. 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

98. In the case of “Willesden Investments Limited – Versus - Kenya Hotel Properties Limited NBI H.C.C. NO. 367 of 2000”, the court stated that;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10 000 000 is a reasonable award for general damages”.



99. I have taken into account the fact that the damages occurred in a rather expansive chunk of land. Furthermore, the suit land is situated within an urban area. This Honourable Court is of the view that an award of a sum of Kenya Shillings Twenty Five Million (Kshs 25,000,000/-) as general damages is sufficient in the given circumstances herein.
100. On the prayers for permanent injunction, this Honourable Court has already opined itself above that the Petitioner by virtue of the certificate of lease had 99 years from 20th June, 1993 which is a clear indication that the Petitioner was the registered and legal proprietor of the suit property until 19th June, 2092, therefore the Respondent had no legal mandate to get into the land or use the said land in any manner. As such, I discern that this prayer is meritorious and thus granted whatsoever.

ISSUE No. e.) Who will bear the Costs of the Petition dated 8th December, 2021.

101. The issue of Costs is the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any legal action or proceedings. 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”.
102. The provisions of Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013 the award of costs is at the discretion of the Court, In exercising the discretion the Court shall take appropriate measures to ensure that every person has access to Court to determine their rights and fundamental freedoms. Whilst the provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. 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.....”
103. From the provisions of the law, it means the whole circumstances and the results of the Petition where a party had won the case. The events in the instant Petition are that the Petitioner has succeeded in its claim. Therefore this Honourable Court awards the costs to the Petitioner.

VIII. Conclusion and Disposition

104. In the long run, having caused an intensive and elaborate deliberation and analysis on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioner has succeeded in all the prayers sought from their filed Petition. For avoidance of doubt, I specifically grant the following orders:-
- a. That the Petition dated 8th December, 2021 be and is found to be meritorious and hence hereby allowed in its entirety.
- b. That a declaration be and is hereby issued That the Respondents herein, jointly and severally, have breached the Petitioner’s constitutional right to acquire and own property as guaranteed by Article 40 of *the Constitution* of Kenya, 2010.



- c. That a declaration be and is hereby made That the Petitioner is the legal and rightful owner of the property known as Mombasa/Block XLVI/138 and has all the rights to occupy, develop and use the same without any interference from the Respondents.
- d. That an order of Permanent Injunction be and is hereby issued to restrain the Respondents jointly and severally, their agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, stepping onto, visiting vandalizing, demolishing, and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as Mombasa/Block XLVI/138.
- e. That a declaration be and is hereby issued That the failure by the 2nd Respondent and the police in general to act on the reports lodged to the police by the Petitioner is in contravention of Articles 47,239 (3) (a), 244 and 245 (2) (b)of the Constitution of the Constitution of Kenya, 2010.
- f. That an order of Mandatory Injunction be and is hereby issued to compel the 2nd Respondent to act on the reports made to the police by the Petitioner through its officers or authorised agents OB No. 13 dated 29th May 2020; OB No. 80 of 15th October 2020; OB No. 11 dated 27th February 2021;OB No. 18 of 19th July 2021; OB No. 19 of 22nd September 2021; OB. No.29/30/9/2021 of 30th September 2021; OB No.15 of 2021 of 11th November 2021; and OB No. 16 of 17th November 2021 all made at Tononoka Police Station in Mombasa by carrying out investigations, arrests and forwarding the files to the Director of Public Prosecutions.
- g. That a declaration be and is hereby issued That the County Government of Mombasa, the 1st Respondent herein illegally took away the Petitioner's Container Number MSKU 9887463 45G1 and illegally demolished and destroyed the Petitioner's wall erected on the property known as Mombasa/Block XLVI/13.
- h. That an order of mandatory injunction be and is hereby issued compelling the 1st Respondent to ensure That the suit property is in the condition they found it in That is, the perimeter wall That its agents destroyed, the staircase That was demolished by the agents and the Petitioner to assess the value of all the property destroyed by the 1st Respondent's agents and present it before the 1st Respondent for compensation. In furtherance to That the 1st Respondent be and is hereby compelled to pay the Petitioner herein compensation for:-
 - i. A sum of Kenya Shillings Twenty-Five Million (Kshs. 25,000,000/-) as general damages for trespass on the property known as Mombasa/Block XLVI/138.
 - i. That the costs of the Petition to be awarded to the Petitioner to be borne by the 1st, 2nd & 3rd Respondents jointly and severally.

it is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 26TH DAY OF FEBRUARY 2024.

HON. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.



b. M/s. Machogu holding brief for Mr. Oluga Advocates for the Petitioner

c. No appearance for the 1st, 2nd & 3rd Respondents.

