Githukurio v Mungai (The Legal Representative of Stephen Mungai Waita) & 3 others (Civil Appeal 75 of 2019) [2025] KECA 1277 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1277 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 75 OF 2019

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

JULY 11, 2025

BETWEEN

SAMUEL WAIYA GITHUKURIO ..... APPELLANT

AND

NAOMI NJOKI MUNGAI (THE LEGAL REPRESENTATIVE OF STEPHEN MUNGAI WAITA) ..... 1ST RESPONDENT

LAND REGISTRAR NYANDARUA DISTRICT ..... 2ND RESPONDENT

DISTRICT SURVEYOR NYANDARUA ..... 3RD RESPONDENT

HON ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an Appeal from the ruling of the Environment and Land Court at Nyahururu (M. C. Oundo, J) delivered on 25th June 2019 in ELC Petition No. 20 of 2017)

JUDGMENT

1. This appeal arises from the ruling and orders of the ELC at Nyahururu [M. C. Oundo, J] delivered on 25th June 2019 in Nyahururu Environment and Land Court Petition No. 20 of 2017. By that decision, the learned Judge allowed the preliminary objection raised by the 1st respondent and struck out the petition.

2. By his petition dated 2nd March 2017 the appellant, Samuel Waiya Githukurio, sued Stephen Mungai Waita [deceased], the Land Registrar Nyandarua District [the 2nd respondent herein], District Surveyor Nyandarua [3rd respondent] and Hon Attorney General [4th respondent] in which he claimed: that he was the sole and absolute proprietor of L.R Nos Nyandarua/Kiambaga/1339 and L.R Nyandarua/Kiambaga/1340 [the suit properties] having been registered as such on 26th September 2005 and 11th August 2005 respectively; that sometimes in 2004, the deceased instituted a Land Disputes Case before the then Ol Kalou Division Land Disputes Tribunal against one Kiarie Githikurio over a

dispute concerning the acreage and extent of LR Nos. Nyandarua/Kaimbaga/315 and Nyandarua/Kiambaga/316 upon which, after hearing, an award was given; that Nyandarua/Kiambaga/316 ceased to exist on 20th September 1999 and instead gave rise to LR. Nos Nyandarua/Kiambaga/811, 812 and 813; that as such at the time of the institution of the said tribunal proceedings, there was no such land; that despite being aware of the non-existent of the said land, the said Tribunal proceeded to adjudicate on matters touching on it; that on 11th August 2005, LR. No Nyandarua/Kiambaga/812 ceased to exist and gave rise to the suit properties; that as such when the Tribunal delivered its award on 24th October 2005, the appellant was the registered proprietor of the said parcel of land; that an appeal was lodged against the said award and after its hearing, the Provincial Land Disputes Tribunal gave its award and forwarded it to Nyahururu Magistrate's Court for adoption as the judgement of the court in Land Disputes Case No. 45 of 2009, Kiarie Githikurio Wangaruiro v Stephen Mungai Waita; that the said award decreed that the Nyandarua District Land Registrar and District Surveyor cancels the 11th edition of R.I.M and includes a portion bordering LR No. Nyandarua/Kaimbaga/480 into Nyandarua/Kaimbaga/315; that part of the said portion that was to be included in Nyandarua/Kaimbaga/315, as per the said decree, formed part of the suit properties; that the appellant was not a party to the proceedings before the Tribunals and the Nyahururu Magistrate's Court, but his interests in the suit properties were adversely affected without being given a chance to be heard; that neither the Ol Kalou Division Land Disputes Tribunal nor the Provincial Land Disputes Tribunal had the jurisdiction to deliver such an award, which had the effect of cancelling RIM edition and as a result, affect the acreage and boundaries of the suit properties; that the adoption of the said award and its implementation perpetuated an illegality thereby adversely affecting the appellant's proprietary rights over the suit properties; that the appellant became aware of the said proceedings when he was served with the 1st respondent's pleadings in Nyahururu CMCC No. 228 of 2015, in which the aforesaid proceedings were relied on; that the proceedings before the said Ol Kalou Division Land Disputes Tribunal, the Provincial Land Disputes Tribunal and the Nyahururu Land Disputes Case No. 45 of 2009 contravened the provisions of Article 75[9] of *the Constitution*.

3. The Petitioner explained that he could not challenge the decision of the Tribunals or the decree because by the time he came to know of the proceedings he was time barred. Consequently, the appellant sought the following orders:

    i. A declaration that the proceedings before the said Ol Kalou Division Land Disputes Tribunals, the Provincial Land Disputes Tribunal and Nyahururu Land Disputes Case No. 45 of 2009, Kiaire Githikurio Wangaruro v Stephen Mungai Waita contravened the Petitioner's rights under Articles 75 and 77 of the former Constitution of Kenya.

    ii. A declaration that the award of Ol Kalou Division Land Disputes Tribunal No. 28 of 2004 and the award of Nyeri Provincial Land Disputes Tribunal in Appeal No. 31 of 2005, and the decree given on 28th October, 2009 in Nyahururu Land Disputes Case No. 45 of 2009 are null and void and of no effect.

    iii. Nullification of all the orders issued pursuant to the decree given on 28th October 2009, in Nyahururu Land Disputes Case No.45 of 2009 and all other proceedings instituted in furtherance thereof, and for reinstatement of the 11th edition of the R.I.M.

    iv. Nullification of all the proceedings and actions taken pursuant to the decree given on 28th October 2009 in Nyahururu Land Disputes Case No. 45 of 2009 that affected the acreage and boundaries of LR Nyandarua/Kaimbaga/1339 and L.R. Nyandarua/Kaimbaga/1340.

    v. Costs of the petition.

vi. Any other or further relief that the court may deem fit and just to grant.

4. Before the petition could be heard, the 1st respondent raised a preliminary objection, to the effect that despite being served with the pleadings in Nyahururu CMCC No.228 of 2015, the appellant failed to exhaust all legal avenues and procedures to upset the said award and or decree so as to address his grievance even after he became to know of the proceedings before the Tribunal.

5. In her determination, the learned Judge cited the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited [1969] EA. 696 on when to take up preliminary objections and noted that the 1st respondent was challenging the appellant's petition on the basis that the issues therein were heard and determined both in the Olkalou Division Land Dispute Tribunal, the Nyeri Provincial Land Dispute Tribunal and in the Nyahururu Magistrate's Land Disputes Case No 45 of 2009; that the respondents attacked the petition for failing to exhaust all legal avenues pursuant to the decree issued by the Magistrate's Land Disputes Case No 45 of 2009; and that from the Tribunal's award what was adopted was to the effect that:

> " The Nyandarua District Land registrar and District Surveyor do cancel the 11th edition of RIM and the portion bordering land parcel No Nyandarua/Kaimbaga/480 to be combined with the land parcel no. Nyandarua/Kaimbaga 315."

6. According to the learned Judge, from a reading of section 3 of the repealed Land Disputes Tribunal Act [the repealed Act] the Tribunal exceeded its mandate; that whereas the court had jurisdiction to nullify an award of a tribunal, if such an award was made outside the tribunal's jurisdiction, that jurisdiction was only exercisable where the decision of the Tribunal had not transmuted into a judicial determination, through adoption as a judgment of the court as in the present circumstance; that on the basis of the decision of this Court in the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 Others [2014] eKLR, a valid judgment of a court, unless overturned by an appellate court, remains as such and is enforceable, the issue of jurisdiction notwithstanding and that where a party sleeps on his rights until the rights of the other party crystallises, the claim for a declaratory relief to impugn a valid court judgment and decree must fail.

7. It was the finding of the learned Judge that the award of the Nyeri Provincial Land Dispute Tribunal having been adopted by the Principal Magistrate's Court at Nyahururu, it ceased to exist on its own, and thus, could not be the subject of a declaration but could only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in appropriate proceedings. Consequently, the learned Judge allowed the preliminary objection and struck out the petition with costs to the 1st respondent.

8. That decision aggrieved the appellant who lodged this appeal on the grounds that the learned Judge erred in law and in fact: by failing to find [sic] that the court lacked the jurisdiction to nullify an award of a Land Disputes Tribunal, which was adopted as a judgement of the court; by failing to find that it had the requisite jurisdiction in a petition to declare that the Land Disputes Tribunal's award and its adoption by Nyahururu Principal Magistrate's Court was a nullity; by failing to find that the appellant was not a party in the Land Disputes Tribunal and the Principal Magistrate's Court, and as such he did not have an option of lodging an appeal against the said decision or applying to set it aside; by failing to find that the right to own property and fair trial are guaranteed under *the Constitution*, and a violation of such rights would entitle the appellant to seek redress in a constitutional petition; by failing to find that the failure to afford the appellant a right to be heard violated his constitutional right to own property, which entitled him to seek remedy in a constitutional petition; and by striking out the petition with costs.

9. The appellant seeks that the ruling delivered on 25th June 2019 in Nyahururu Environment & Land Court Petition No. 20 of 2017 be set aside, that the petition be reinstated and be heard on merits and that the costs of the appeal be paid by the 1st respondent.

10. We heard the appeal on the Court's virtual platform on 8th April 2025 on which day, learned counsel, Mr Nderitu Komo, appeared for the appellant while learned counsel, Mr Gicheru, appeared for the 1st respondent. There was no representation for the other respondents despite due service on them of the hearing notice. While the respondent's submissions had been filed, there were no submissions for the appellant and Mr Nderitu addressed us orally.

11. It was reiterated by Mr Nderitu that by the time the suit before the Nyahururu Tribunal was being determined, the suit property had ceased to exist and the appellant was not a party to those proceedings; that the moment the award is adopted, the court has no jurisdiction to revisit the same and the avenue of appeal was only available if the appellant had been a party to the proceedings; and that the only available avenue was the petition.

12. The submissions filed on behalf of the respondent which Mr Gicheru adopted were: that the award was adopted pursuant to section 7 of the repealed Act and section 8 thereof provided the mechanism to be followed by a person aggrieved by the decision of the Tribunal or the Appeals Committee which is by way of an appeal to the High Court within 60 days; that by its adoption, the award became a valid judgement as held in the case of Sally Jemeli Korir & Another v William Suter & 2 Others [2020] eKLR; that going by the dissenting view of Kiage, JA in Lemita Ole Lemein v Attorney General & 2 others [2020] eKLR, constitutional petition was not the appropriate channel of challenging the judgement as adopted; that once the award was adopted, it became a valid judgement and could not be subject to declaratory orders; that the judgment having given rise to a decree, it could only be challenged in terms of the *Civil Procedure Act* and the Rules made thereunder and that the principle of constitutional avoidance ought to apply to the circumstances of the case; that the appellant moved the court under sections 75 and 77[9] of the retired Constitution which dealt with compulsory acquisition of land which was not the case before the court; that the petition was therefore not drafted with reasonable degree of precision as required in the case of Anarita Kirimi v Republic [1976-1980] KLR 1272.

13. We have considered the record of the proceedings and submissions placed before us. It is trite that a first appellate court is enjoined to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that regard. Whereas the caution in the last part of that statement does not apply where the matter proceeded by way of affidavit evidence, the duty to subject the evidence, [whether adduced by way of depositions or orally] to a fresh scrutiny applies in equal force in all cases where evidence is placed before the court in whatever form.

14. In this case, the only issue for determination is whether the court below had jurisdiction to entertain the petition challenging a judgement arising from an adoption of an award made by the Land Disputes Tribunal. The respondent's case, which the learned Judge agreed with, was that such a judgement could not be challenged by way of declaratory orders in a constitutional petition. This Court in Florence Nyaboke Machani v Mogere Amosi Ombui, Simon Tengeri Mogere & Nelson Omwenga Nyakundi [2014] KECA 384 [KLR] upheld the decision of the High Court which doubted whether the remedy of the declaration is available to the party who seeks to impugn a valid court judgment and decree other than by way of setting aside, review or an appeal. To our mind neither the High Court, which only expressed a doubt about the efficacy of that redress, nor this Court properly addressed their minds on whether a person who has no avenue of challenging a decision by invoking civil law remedies can do so in a constitutional petition.

15. The appellant's case, in summary is that he became the absolute proprietor of L.R Nos Nyandarua/Kiambaga/1339 and L.R Nyandarua/Kiambaga/1340 on 26th September 2005 and 11th August 2005 respectively. The two parcels of lands were excised from LR. No Nyandarua/Kiambaga/812 on 11th August 2005. LR. No Nyandarua/Kiambaga/812 was itself excised from LR No. Nyandarua/Kiambaga/316 on 20th September 1999. Notwithstanding the foregoing, sometimes in 2004, the deceased instituted a Land Disputes Case before the then Ol Kalou Division Land Disputes Tribunal against one Kiarie Githikurio over a dispute concerning the acreage and extent of LR Nos. Nyandarua/Kaimbaga/315 and Nyandarua/Kiambaga/316 which were then non-existent. The Tribunal delivered its award on 24th October 2005. After an appeal to the Provincial Land Tribunal, the decision was ultimately adopted as a judgement of the Court in Nyahururu Magistrate's Court for adoption as the judgement of the court in Land Disputes Case No. 45 of 2009, Kiarie Githikurio Wangaruiro v Stephen Mungai Waita on 28th October, 2009. By then LR. No Nyandarua/Kiambaga/812 was not in existent. The appellant only became aware of the foregoing upon being served with pleadings in Nyahururu CMCC No. 228 of 2015 in which the earlier proceedings were referred to. It was the appellant's case that he was neither a party to those proceedings nor was he aware of them until service of the latter proceedings by which time the period prescribed for appealing or applying for judicial review had lapsed. He was therefore left with no alternative but to seek redress from the court on the basis of violation of his rights.

16. This appeal is in the nature of an interlocutory appeal since the case before the trial court was terminated on a preliminary objection without a hearing on its merits. In those circumstances, care must be taken to avoid expressing a conclusive view of the matter in the event that the petition goes to full hearing before the trial court. The practice is and has always been that in such cases, the court may, if necessary, only express its views, on the matters in controversy, on a prima facie basis. Otherwise, a concluded view is likely to tie the hands of the Judge who may eventually hear the case and cause embarrassment to the trial court. See Mansur Said & Others v Najma Surur Rizik Surur Civil Appeal No. 186 of 2005 and Niazons [K] Limited v China Road & Bridge Corporation [Kenya] Civil Appeal No. 157 of 2000 [2001] KLR 12; [2001] 2 EA 502. A similar view was expressed by this Court in Said Almed v Mannasseh Benga & Another [2019] eKLR where it was appreciated that:

> "...this is an interlocutory appeal, and so, like the trial court, this Court cannot make conclusive finding of fact as that would prejudice the proceedings in the main trial which is still pending."

17. In her decision, which is the subject of this appeal, the learned Judge held that:

> "The award of the Nyeri Provincial Land Dispute Tribunal having been adopted by the Principal Magistrate's Court at Nyahururu ceased to exist on its own, and thus, could not be the subject of a declaration but could only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in an appropriate proceeding."

18. It was only on that basis that the preliminary objection was sustained and the petition struck out. If we understand the learned Judge correctly, the appellant's recourse lay in seeking to vary, set aside or review the decision by the same court or in appealing against it.

19. Section 8[1] of the repealed Land Disputes Tribunal Act provided that:

Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

20. That avenue was only available to parties to the dispute which the appellant was not and therefore was locked out of that process. Once the Appeals Committee determined the matter before it, section 8[8] of that Act provides that:

> " The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court."

21. Once again, the appellant could not, based on factual issues, challenge the decision in any court. We are however alive to the fact that the finality clause, while applicable to civil proceedings, could not bar a party from instituting judicial review proceedings which are special proceedings, to challenge the same. We shall deal with that avenue later in this judgement. As regards the jurisdiction of the High Court section 9 of the repealed Act provided that:

> " Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:
>
> Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law [other than customary law] is involved."

22. The appellant before us did not fall under the description "either party to the appeal" and therefore had no right of audience before the High Court. It is clear, from the provisions of the repealed Act that the appellant had no recourse either before the Appeals Committee or the High Court. As for the subordinate court, its jurisdiction was circumscribed under section 7[2] of the Act in the following terms:

> " The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*."

23. The subordinate court's jurisdiction was restricted to adoption of the award for the purposes of execution. We are persuaded by the decision of Musinga, J [as he then was], while dealing with section 7[2] of the repealed Act, in Peter Ouma Mitai v John Nyarara [2008] KEHC 2063 [KLR] that:

> " That provision of the law does not leave any room for a magistrate to review, alter, amend or set aside the Tribunal's award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided for under section 8[1] of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review application, proceed to institute such proceedings before the High Court and not otherwise."

24. It is therefore clear that the options identified by the learned Judge as available to the appellant in challenging the decision by seeking to vary, set aside or review the decision by the same court or in appealing against it were clearly not efficacious. In this regard, the Supreme Court in Abidha Nicholus *v Attorney General & 7 others; National Environmental Complaints Committee & 5 others [Interested Parties] [Petition E007 of 2023*] [2023] KESC 113 [KLR] stated that:

> " ...where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other process known to law."

25. And at paragraph [107] of the above decision, the Supreme Court explained that:

> "...where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism."

26. In arriving at its decision, the Supreme Court relied on the decision of the African Commission of Human and People's Rights in the case of Dawda K. Jawara v Gambia ACmHPR 147/95-149/96 for the position that:

> " A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

27. Accordingly, the Supreme Court identified, as one of the exceptional circumstances, a situation where the reliefs provided by the alternative mechanism are not adequate or effective, for example where what is alleged is a violation of *the Constitution*. The alleged violation of *the Constitution* must, however, be the primary issue for consideration in the matter. The Court therefore stated:

> " That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others [Interested Parties] [2020] eKLR where the High Court [Achode [as she then was], Nyamweya [as she then was], & Ogola, JJ] stated:
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> 'In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere
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> "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.'"

28. While the respondent has taken issue with the provision under which the petition was filed, that was not the basis for striking out the appeal and the respondent did not take advantage of rule 96[1] of the Rules of this Court which provides that:

> " A respondent who desires to contend on an appeal that the decision of the superior court should be affirmed on grounds other than or additional to those relied upon by that court shall give notice to that effect, specifying the grounds of the respondent's contention."

29. Having considered the submissions made before us in this appeal, we associate ourselves with the majority decision in the case of Lemita Ole Lemein v Attorney General & 2 others [2020] eKLR in which Karanja, JA held that:

> " Having perused the 3rd respondent's petition, although on the face of it the proceedings appear to have been a land ownership dispute between private citizens, the same had fundamental implications on constitutionally protected rights as was urged before the Court. It was evident that the issues raised in the petition raised weighty constitutional issues on the right to own property as well as the right to be heard as provided for under *the Constitution*. Further, it is evident on the face of the petition that the 3rd respondent provided sufficient particulars of the infringements and the manner in which the alleged constitutional rights had been violated. I am persuaded that the 3rd respondent's claims met the threshold set out in the Anarita Karimi Njeru -v- Republic [supra].
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> On whether the 3rd respondent established a case for violation of constitutional rights in respect of the right to property, it was not disputed that the 3rd respondent was the registered proprietor of the suit property. It is not in doubt that his rights as a registered proprietor enjoyed constitutional protection and anchorage. He moved the court protesting deprivation of his proprietary interest as a result of the manner in which a dispute was lodged and determined before a tribunal without jurisdiction, and without being accorded an opportunity to be heard, his land was taken away from him. It is clear from this that his right to own property, and his right to fair hearing were violated."

30. The learned Judge was of the view that the decision amounted

> " to serious abdication of the Court's duty to dispense justice."

31. This Court in Johana Nyokwoyo Buti v Walter Rasugu Omariba [Suing through his attorney Beutah Onsomu Rasugu] & 2 others [2011] eKLR dealt with a similar appeal and held that:

> " A declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force – that is, it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the court to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter.
>
> In the present case, the 1st respondent sought a declaration in essence that the decision of the tribunal was unlawful as it was made without jurisdiction. If such a declaration is granted, the result will be that the decision of the tribunal would be a nullity. The 1st respondent was not a party to the tribunal proceedings. The decision of the tribunal came to his notice long after the 30 days stipulated by Section 8[1] of the Land Disputes Tribunal Act for

appealing to the Provincial Appeals Committee had elapsed, and, also long after the six months stipulated for seeking a judicial review remedy of order of certiorari had expired. It is true that the 1st respondent filed a judicial review application but it was dismissed on the ground that the application for leave was made outside the stipulated six months. Since the application for judicial review was not determined on the merits, the doctrine of res judicata does not apply.

Moreover, although the Resident Magistrate's court entered judgment in accordance with the decision of the tribunal such a judgment could be challenged in fresh proceedings if obtained by fraud or mistake etc – see paragraph 1210 of Halsbury's Laws of England, 4th Edition – Re- Issue page 353]. In Jonesco v Beard [1930] AC 293 the House of Lords held that the proper method of impeaching a complete judgment on the ground of fraud is by action which decision was followed in Kuwait Airways Corporation v Araqi Airways Co. & Another [No. 2] [2001] 1 WLR

429. The decision of the Tribunal has of course been merged in the judgment of the magistrate's court.

It seems to us that the 1st respondent had no other remedy. Since the superior court had jurisdiction to entertain both a declaratory suit and an ordinary suit impeaching the judgment of the magistrate's court the preliminary objection was not maintainable. It is after the hearing of the suit that the superior court can determine whether or not to grant a declaration in the circumstances of the case."

32. In this case, the appellant was alleging violation of his right to be heard. All the avenues availed by the law were not beneficial to him. The only way in which he could challenge the decision would have been by way of judicial review which, by effluxion of time, and not of his own making had become illusory. Where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50[1] are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, is achieved. We appreciate that there cannot be a gap in the application of the rule of law and that the Court must at all times embrace a willingness to refuse to countenance actions that threaten either basic human rights or the rule of law.

33. Therefore, where there is a lacuna with respect to enforcement of remedies provided under *the Constitution* or an Act of Parliament to a person who has suffered a wrong, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the supreme law of the land, the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as this Court held in M Mwenesi v Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000 and Kenya Industrial Estates Ltd v Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai.364 of 1999, a court of justice has no jurisdiction to do injustice.

34. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be taken to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See Bollinger v Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.

As was held in Chege Kimotho & Others v Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57 citing Midland Bank Trust Co. v Green [1982] 2 WLR 130:

> " The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."

35. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. The courts do recognise that unlawful interference with a citizen's rights give rise to a right to claim redress and in which event the offended person must of necessity have the means to vindicate it and a remedy if injured in the enjoyment or exercise of it. It is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. See Rookes v Barnard [1964] AC 1129 and Ashby v White [1703] 2 Ld Raym.938; 92 ER 126.

36. Just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and therefore we must uphold the jurisprudence that helps to "illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law". See Republic v Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008.

37. In the premises, we find merit in this appeal which we hereby allow. We set aside the order striking out the petition and substitute therefor an order dismissing the preliminary objection with costs. We direct that the petition be heard in the usual manner.

    We award the costs of this appeal to the appeallant.

38. It is ordered.

DATED AND DELIVERED AT NAKURU THIS 11TH JULY 2025.

J.MATIVO.

.....

JUDGE OF APPEAL

M.GACHOKA C.Arb.FCIArb.

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JUDGE OF APPEAL

G.ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original.

Signed

DEPUTY REGISTRAR