



**Rutune Limited & 3 others v Kandie & 5 others (Civil Appeal E017, 24 & 74 of 2020 (Consolidated)) [2023] KECA 376 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KECA 376 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E017, 24 & 74 OF 2020 (CONSOLIDATED)  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
MARCH 31, 2023**

**BETWEEN**

**RUTUNE LIMITED ..... APPELLANT**

**AND**

**DAVID KANDIE ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, KWALE ..... 2<sup>ND</sup> RESPONDENT**

**KADHI'S COURT KWALE ..... 3<sup>RD</sup> RESPONDENT**

**ALI HAMISI CHANDE ..... 4<sup>TH</sup> RESPONDENT**

**NASRA SHARIF MOHAMED ..... 5<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH**

**CIVIL APPEAL 24 OF 2020**

**BETWEEN**

**ALI HAMISI CHANDE ..... 1<sup>ST</sup> APPELLANT**

**NASRA SHARIF MOHAMED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DAVID KANDIE ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, KWALE ..... 2<sup>ND</sup> RESPONDENT**

**KADHI'S COURT KWALE ..... 3<sup>RD</sup> RESPONDENT**

**RUTUNE LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH**



**CIVIL APPEAL 74 OF 2020**

**BETWEEN**

**ATTORNEY GENERAL ..... APPELLANT**

**AND**

**DAVID KANDIE ..... 1<sup>ST</sup> RESPONDENT**

**ALI HAMISI CHANDE ..... 2<sup>ND</sup> RESPONDENT**

**RUTUNE LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**NASRA SHARIF MOHAMED ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal against the Judgment of the Environment and Land Court at Mombasa (A. Omollo J.) delivered on 12th May 2020 in Constitutional Petition No 11 of 2019)*

**JUDGMENT**

1. The three consolidated appeals herein were all lodged against the judgment of the Environment and Land Court at Mombasa (A Omollo J) delivered on May 12, 2020 in Mombasa ELC Petition No 11 of 2019. For ease of reference we shall refer to Rutune Ltd, the Appellant in Civil Appeal E017 of 2020, as the 1<sup>st</sup> Appellant; Ali Hamisi Chande and Nasra Sharif Mohamed, the Appellants in Civil Appeal E024 of 2020 as the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants respectively; and the Attorney General, the Appellant in Civil Appeal E074 of 2020 as the 4<sup>th</sup> Appellant. The said Appellants were Respondents and Interested Parties in the Petition in the Environment and Land Court (ELC), and the appeal by the Attorney General is in this respect brought on behalf of the Land Registrar, Kwale and Kadhi's Court Kwale who were sued in the said Petition. The common Respondent in the consolidated appeals is David Kandie, who was the Petitioner in the suit in the ELC.
2. The Respondent had filed the Petition in the ELC to challenge the constitutionality of decisions made by the Kwale Kadhi's Court in Kwale Kadhi's Court Succession Cause No 155 of 2018 that conferred ownership of the parcels of land known as Kwale/Diani Settlement Scheme /2845, Kwale/Diani Diani Settlement Scheme /2846, Kwale/Diani Diani Settlement Scheme /2847 and Kwale/Diani Diani Settlement Scheme /2848 (hereinafter "the suit properties") to the 2<sup>nd</sup> Appellant, on account of the 2<sup>nd</sup> Appellant being the administrator of the estate of one deceased Mwanajuma Hamisi Chande. The Respondent, who claimed to be the registered proprietor of the suit properties, and claimed that the Kadhi's court vested the suit properties in, and the title thereof issued to the 2<sup>nd</sup> Appellant without any proof of their ownership and without involving him in the proceedings. The Respondent subsequently filed a summons for revocation of grant in the Kadhi's Court, but that the said Court upheld a preliminary objection filed by the 2<sup>nd</sup> Appellant that the Respondent had no locus standi in view of the fact that he did not profess the Muslim faith. Therefore, that the impugned decision deprived him of his fundamental rights to be heard and protection of his property, and the Respondent sought various declarations and orders in the ELC in this respect and in relation to the suit properties.
3. The 1<sup>st</sup> Appellant's response to the suit in the ELC was that it was the bona fide purchaser and registered owner of Kwale/Diani Settlement Scheme /2848, having purchased the land from the 2<sup>nd</sup> Appellant;



that the issues raised in the petition could be ventilated in another suit filed by the Respondent being Mombasa ELC No 273 of 2018; David Kandie v Ali Hamisi Chande, Nasra Sharif Mohamed & Rutine Ltd , which was later transferred to Kwale Chief Magistrates’ Court and registered as Kwale CMCC 80 of 2018, and which suit was still pending determination.

4. The 2<sup>nd</sup> Appellant on his part responded that he was registered as the proprietor of the suit properties arising from a grant by the Kadhi’s Court at Kwale to be the administrator of the estate of the late Mwanajuma Hamisi. Further, that the late Mwanajuma Hamisi was granted the said parcels of land by the Government of Kenya through the settlement scheme as indicated in the letter of offer to the deceased dated February 2, 1978; that the Respondent forged the records in the lands office, misleading the Land Registrar that he is the registered owner based on a forged title deed for Kwale/ Diani Settlement Scheme/464 which he used to create sub-division Nos Kwale/ Diani Settlement Scheme /2845, 2846, 2847 and 2848; that the Respondent was arrested and charged in Kwale Law Courts with 5 counts of forgery; and that the Respondent had filed multiple suits on the suit properties including Kwale CMCC No 80 of 2018.
5. The 3<sup>rd</sup> Appellant on her part stated that she was the proprietor of the Kwale/ Diani Settlement Scheme /2845, having purchased it from the 2<sup>nd</sup> Appellant. Further, that the Respondent filed suits in Kwale CMCC No 80 of 2018 and JR App No 17 of 2019 seeking similar prayers as those in the petition, and had failed to annex a certificate of title for Kwale/Diani/2845.
6. The Kwale Land Registrar, who is represented by the 4<sup>th</sup> Appellant, produced certified copies of the land registers for the suit properties, indicating the history of ownership of the said parcels of land to the current registered owners. The Executive Officer of Kwale Law Court likewise filed a response to which he annexed the certified ruling delivered by the Kwale Kadhi’s Court in Succession Cause No 155 of 2018.
7. After hearing the parties, the learned trial Judge, in a judgment delivered on May 12, 2020, found firstly, that the Respondent’s Petition was properly before the trial Court, for reasons that the Kwale Chief Magistrates Court which was seized of the Respondent’s suit was of concurrent jurisdiction with the Kadhi’ s Court. Secondly, on the vesting of the suit properties in the 2<sup>nd</sup> Appellant by the Kadhi’s Court through the succession proceedings in Succession Case No 155 of 2018, that once the deceased’s title to the suit property was under challenge, the Kadhi’s court was divested of jurisdiction to make any pronouncement on the suit properties. In addition, that the 2<sup>nd</sup> Appellant did not lodge a cross- petition in the trial Court to raise the issue of forgery on the part of the Respondent therefore no findings could be made based on the documents he provided.
8. With these findings, the trial Court concluded and made final orders as follows:

“ 18. However, as things stand now I am persuaded to find merit in the petition because there is evidence presented by the petitioner to show his interest in the property. Unless the order made by the Kadhi in Kwale Succession Cause No 155 of 2018 is set aside, the petitioner’s right to defend his right to property in Kwale ELC No 80 of 2018 or any other suit will be defeated. For this reason, I do enter judgment in his favour in the following terms;

- 1) That the Honourable Court do hereby declare that the 2<sup>nd</sup> respondent failed to observe the rule of law as envisaged under the Constitution and the statues thereto in making decisions that are meant to deprive the Petitioner’s rights.



- 2) That this Honourable Court do hereby declare that all the decisions of the 2nd respondent in Kwale Kadhi's Court Succession Cause No 155 of 2018 conferring ownership of the Petitioner's property known as Title Nos Kwale/ Diani/ 2845, Kwale/ Diani/2846, Kwale/ Diani/2847 and Kwale/Diani/2848 on the 3rd respondent were unconstitutional and unlawful.
3. That this Honourable Court do hereby direct the 1st respondent to cancel all title deeds registered in the name of the 3rd respondent agents, assigns, legal representatives or whosoever claiming under him in respect of properties known as Title Nos Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 and re-register the properties in the Petitioners' name.
4. No damages was proved so none is awarded.
5. Costs of the petition is awarded to the Petitioner."

9. The 1<sup>st</sup> to 4<sup>th</sup> Appellants being aggrieved, filed the instant consolidated appeals. The 1<sup>st</sup> Appellant raised 34 grounds in its Memorandum of Appeal dated October 5, 2020 on two broad areas, the jurisdiction of the trial Court to hear issues arising from the decision of the Kwale Kadhi's Court, and its jurisdiction in light of the existence of, and decisions made in other pending matters touching on the dispute. The 1<sup>st</sup> Appellant therefore sought orders that the impugned judgement be set aside and the decision of the Kwale Kadhi's Court be reinstated; that judgement be entered in favour of the 1<sup>st</sup> Appellant; and that the 1<sup>st</sup> Appellant's title to the land parcel Kwale/Diani/2848 be reinstated.
10. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants on their part raised 13 grounds in their Memorandum of Appeal dated November 26, 2020, that challenged the legality of the nullification of their title deeds and vesting of ownership of the suit properties in the Respondent, and the jurisdiction of the trial Court to hear and determine the issues raised in the Petition. The 2<sup>nd</sup> and 3<sup>rd</sup> Appellants similarly sought orders that the impugned judgement be set aside, the decision of the Kwale Kadhi's Court be upheld and the Respondent's petition be dismissed; that the title to the land parcels Kwale/Diani/2845, 2846 and 2847 be reinstated in their names; and that the Kwale Land Registrar to effect the amendments.
11. The 4<sup>th</sup> Appellant on his part filed a Memorandum of Appeal dated September 29, 2020 in with 8 grounds challenging the legality of the trial Court's decision to cancel the title to the suit properties and vest them in the Respondent in light of the evidence adduced, and the Court's jurisdiction in light of the existence of, and decisions made in other pending matters touching on the dispute. The 4<sup>th</sup> Appellant sought orders that the impugned judgement be set aside, the Respondent's Petition dated March 13, 2019 be dismissed, and that the matter be retried with the parties giving *viva voce* evidence.
12. We held a virtual hearing of the consolidated appeals on October 26, 2022, and learned counsel Mr Moses Kinyanjui appeared for the 1<sup>st</sup> Appellant; learned counsel Mr Mungai Kamau appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants; learned counsel Ms Janet Langat appeared for the 4<sup>th</sup> Appellant; while learned counsel Mr Jason Ondabu appeared for the Respondent. Mr Kinyanjui, Ms Langat and Mr Mungai Kamau indicated that they would wholly adopt and rely on written submissions they filed in this Court dated dated October 17, 2022 and October 24, 2022 respectively. Mr Ondabu on his part orally highlighted his written submissions dated October 24, 2022.



13. This being a first appeal, the duty of this Court is reiterated as was set out in the decision of *Selle and another v Associated Motor Boat Co Ltd & others [1968]* which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja [1968] KLR 661*, or where its discretion was exercised injudiciously as held in *Mbogo & another v Shab [1968] EA*. It is evident that there is a preliminary issue raised of the trial Court's jurisdiction to hear and determine the Constitutional Petition filed by the Respondent that has been raised by all the Appellants, that needs to be addressed first. If we find that the trial Court was possessed of jurisdiction, we shall proceed to determine the main substantive issue, being whether the trial Court erred in cancelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants titles to the suit properties, and in, vesting the said titles in the Respondent.
14. On the issue of the jurisdiction of the trial Court, the 1<sup>st</sup> Appellant's counsel urged that the appropriate forum for determination of the issues raised was the ELC and not a constitutional court; that in the result relevant pertinent issues were left up leading to a judgement unsupported by the evidence on record. Further, that the judge sat on appeal on issues that were the subject of Kwale CMCC ELC 80 of 2018. That the judge also re-determined succession matters that were determined by the Kwale Kadhi's court and this was an error because the decision of the Kadhi was never the subject of an appeal. Reliance was placed on decisions in, *Tarbana Co Ltd v Harcharan Singh Sehmi & 7 Others*, Civil Appeal 463 of 2019 and *R v Hon Khamis Ramadhani*, Senior Resident Kadhi, Mombasa & Said Ahmed Jafar ex parte Jaafar Ahmed Jaafar, Mombasa ELC Judicial Review Case 4 of 2018.
15. This position was reiterated by the counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants, who submitted that by the time the 1<sup>st</sup> respondent approached the court for revocation of grant, the 1<sup>st</sup> appellant had already been registered as owner of the suit land and that the Kadhi's court was functus officio and had no jurisdiction to nullify the 1<sup>st</sup> appellant's title. Counsel added that while citing the decision in *R v Khamis Ramadban, Senior Resident Kadhi Mombasa & Others (2019) eKLR* that appeals from the Kadhi's court on matters inheritance lie to the High Court and not the ELC Court. It was therefore urged that the learned judge erred in exercising supervisory jurisdiction over the Kadhi's court.
16. The 4th Appellant's counsel on her part submitted that the trial Court proceeded with the hearing in total disregard of the provisions of the law since it did not have jurisdiction to supervise matters emanating from the Kadhi's Court, as was held in the case of *Republic v Khamisi Ramadban, Senior Resident Kadhi Mombasa [2019] eKLR*. Further, that the 1st Respondent, instead appealing the ruling delivered in Kwale Kadhi Succession Cause No 155 of 2018 proceeded to institute ELC Petition No 11 of 2019 in total disregard of the laid rules and procedures.
17. The Respondent's counsel, in reply, submitted that the Kadhi's Court had no power under the *Constitution* or any other statute to cancel title deeds held by another person, and that the said jurisdiction was the exclusive mandate of the ELC under Article 162 (2) (b). Therefore, that Constitutional Petition No 11 of 2019 was filed to challenge the irregular and illegal orders given by the Kwale Kadhi's Court in Succession Cause no 155 of 2018, given that the Respondent's right to own property under Article 40 of the *Constitution* was infringed.
18. It is necessary, in determining whether the trial Court had jurisdiction, to identify the nature of the dispute that was before it. The Respondent in this respect filed a constitutional petition alleging that the Kadhi's Court had violated his constitutional rights under Article 40, and sought the following relief:



- a) That this Honourable Court do declare that the 2<sup>nd</sup> Respondent (The Kadhi's Court Kwale) failed to observe the rule of law as envisaged under the Constitution and the statutes thereto in making decisions that are meant to deprive the Petitioner's (Respondent herein) rights.
  - b) That this Honourable Court do declare that all the decisions of the 2<sup>nd</sup> Respondent (The Kadhi's Court Kwale) in Kwale Kadhi's Court Succession Cause No 155 of 2018 conferring ownership of the Petitioner's (Respondent herein) property known as Title Nos Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 on the 3<sup>rd</sup> Respondent (2<sup>nd</sup> Appellant herein) were unconstitutional and unlawful.
  - c) That this Honourable Court do declare that the Petitioner (Respondent herein) is the owner of all that property known as Title Nos Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848.
  - d) That this Honourable Court do direct the 1st Respondent (Land Registrar, Kwale) to cancel all title deeds registered in the name of the 3<sup>rd</sup> Respondent (2<sup>nd</sup> Appellant herein) agents, assigns, legal representatives or whosoever claiming under him in respect of properties known as Title Nos Kwale/Diani/2845, Kwale/Diani/2846, Kwale/Diani/2847 and Kwale/Diani/2848 and re-register the properties in the Petitioner's (Respondent herein) name.
  - e) That this Honourable Court to grant general damages to be paid by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (The Kadhi's Court Kwale and 2<sup>nd</sup> Appellant herein) for their unconstitutional, illegal, irregular calculations and moves meant to deprive the Petitioner (Respondent herein) his rights.
19. It is notable firstly, there is no indication either in the prayers as sought or orders granted, of the constitutional provisions that were violated by the Kadhi's Court and in what manner. In this respect, it is not all litigation challenging the legality of the exercise of public power that raises constitutional questions that are worth considering, and Article 165(3)(b) and (d) of the Constitution delineates the province of constitutional questions as follows:
- “(b) the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - (d) any question respecting the interpretation of this Constitution including the determination of—
    - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
    - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
    - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - iv. a question relating to conflict of laws under Article 191”
20. Specifically on the constitutional questions that fall with the jurisdiction of the ELC, this Court (SG Kairu, P Nyamweya & JW Lessit, JJA) in Speaker of the National Assembly v Mombasa Cement Limited



§ 4 others (Civil Appeal 100 of 2019 & E021 of 2020 (Consolidated)) [2023] KECA 33 (KLR) held as follow:

“In this respect, the main determinant of whether a matter should be heard as a constitutional petition or by ordinary suit is whether there is a constitutional question raised by a dispute. A constitutional question is defined by Black’s Law Dictionary, Ninth Edition as “a legal issue resolvable by the interpretation of a constitution, rather than by statute”. Where that legal issue that requires interpretation of the Constitution is one that relates to environment and land, it follows that the ELC will have jurisdiction to entertain that constitutional question.”

21. The trial Court in this respect identified the issues for determination before it as follows:
  - a) Whether the petition is properly before this court.
  - b) Whether or not the suit title Kwale/Diani S.S/464 and the resultant sub-division titles comprised part of the estate of Mwanajuma Hamisi-deceased.
  - c) Whether the Kadhi’s Court had jurisdiction to entertain the claim before it.
  - d) What orders commends to be issued.
22. In resolving the issue of whether the petition was properly before it which was germane to its jurisdiction, the trial Court held as follows:

“Although the prayers made in this petition could have easily been determined in the existing Kwale CMC ELC No 80 of 2018, the issues cannot now be raised in it because the suit was transferred from the High Court to the magistrate’s court and is still pending determination before the Chief Magistrate’s Court. The Chief Magistrate Court share concurrent jurisdiction with the Kadhi’s court. The CM’s Court cannot therefore question the decisions made by the Kadhi’s Court.”

23. There was thus an express acknowledgment by the trial Court that the petition before it could be determined in an ordinary suit, and it then follows that it did not raise constitutional questions. In addition, it is notable that there was no analysis made by the trial Court in its judgment of the content of the constitutional rights or provisions claimed by the Respondent to have been violated and how they related to title, occupation or use of land; whether the Respondent had established the existence of rights and interests that were protected by the Constitution; the manner, if any the Respondent’s rights and interests had been violated by the Kadhi’s Court; and no application of any provision of the Constitution to the dispute that was before the Court. It is therefore not entirely surprising that the trial Court ended up making an amorphous declaration that the rule of law had been violated by the Kadhi’s Court, without specifying which specific provisions of the Constitution had been violated.
24. It was explained in The Bill of Rights Handbook, 5<sup>th</sup> Edition by Iain Currie and Johan de Waal at pages 104-105 that not every challenge to the validity of exercise of public power is a constitutional matter and susceptible to constitutional adjudication, and that the following do not qualify to be constitutional matters:

“Matters that turn purely on question of fact are not constitutional matters. Similarly matters involving a straightforward application of law that do not raise constitutional questions



about validity or the proper interpretation or development of that law are not constitutional matters.”

25. The trial Court however proceeded to determine contested questions of facts by way of affidavit evidence in a constitutional petition, and granted orders that bestowed certain private rights and benefits on the Respondent. This is illustrated by the substantive findings by the trial Court, which were as follows:

“...The second issue is whether the suit title Kwale/Diani S.S/464 and the resultant subdivision numbers comprised the estate of Mwanajuma Hamisi – deceased so as to donate jurisdiction to the Kadhi’s Court to vest the properties in the 3rd respondent through succession proceedings in Succession Case No 155 of 2018.

16. The property can only constitute the estate of a deceased person if at the time of death, the same was registered in her name. Under section 3(1) of the Law of Succession Act Cap 160, estate of a deceased person is defined as “the free property of a deceased person.” In this case, although the 3rd respondent stated that the suit titles were registered in the deceased name at the time he took out the letters of administration; once an application was taken challenging the deceased titles, the jurisdiction of the Kadhi’s court was ousted. That question ought to have been determined before they could be vested in the 3rd respondent and to allow him transmit it to other parties.”

26. It is settled that the determination of contested facts can only be by way of an ordinary claim, where parties have an opportunity to examine the witnesses and evidence that is adduced. It is therefore our finding that there was no constitutional question that was presented before the trial Court for determination, and on the contrary, the dispute revolved around questions of fact that were acknowledged by the trial Court as capable of being resolved in an existing suit namely Kwale CMCC ELC 80 of 2018. The choice of procedure employed of a constitutional petition, and the entire proceedings in the trial Court were therefore an abuse of the process of Court, as the intended outcome was not to ventilate any constitutional issues, but to unprocedurally assert private rights.

27. Secondly, it is notable that the finding by the Trial Court that the Chief Magistrate’s Court being a court of concurrent jurisdiction could not question the decisions made by the Kadhi’s Court was not supported by any examination of the nature of the dispute that was before the Kadhi’s Court, and of the one before the Chief Magistrates Court, including the parties and issues raised therein, nor any finding that they were indeed similar, and this finding was therefore not supported by any evidence. Given that the jurisdiction of the Court to hear the dispute before it had been raised, and especially in relation to the dispute before the Kadhi’s Court in Kwale Kadhi’s Court Succession Cause No 155 of 2018 and in the pending case in Kwale CMCC ELC 80 of 2018, this omission was a fatal dereliction of duty on the part of the trial Court.

28. Thirdly, the effect of the orders granted by the trial Court was that the decision of the Kadhi’s Court was set aside by declaring it unconstitutional and unlawful. Quite apart from the fact that the said finding of unconstitutionality and illegality was made without any basis as illustrated in the foregoing, section 50 (2) of the Law of Succession Act in this respect also provides that, “an appeal shall lie to the High Court in respect of any order or decree made by a Kadhi’s Court in respect of the estate of a deceased Muslim and with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.” It is trite that statutory procedures and mechanisms are required to be exhausted



before resorting to other remedies, as emphasized by the Supreme Court of Kenya in Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others [2019] eKLR.

29. Lastly, the Environment and Land Court is not clothed with jurisdiction to hear and determine matters arising from succession proceedings under Article 162(2) of the Constitution and the Law of Succession Act. The trial Court therefore clearly lacked jurisdiction to entertain the dispute that was before it, which by its own findings concerned the findings of the Kadhi's Court in succession proceedings. In addition, even though the suit before it was in the guise of a constitutional petition, it was clearly a collateral attack on the decision of the Kadhi's Court in Kwale Kadhi's Court Succession Cause No 155 of 2018.
30. Having found that the Respondent's constitutional petition was not properly before the trial Court, we shall not consider the outstanding substantive issues raised in the consolidated appeals as regards the trial Court's findings on the title to the suit properties, as they are the subject of pending litigation in the Kwale CMCC ELC 80 of 2018.
31. The consolidated appeals herein are found to have merit to the extent of our findings on the issue of the trial Court's jurisdiction, with the result that the judgment and orders by the Environment and Land Court at Mombasa delivered on May 12, 2020 in Petition 11 of 2019 are set aside in their entirety, and Petition 11 of 2020 filed in the said trial Court is hereby struck out. The titles of the parcels of land known as Kwale/Diani Settlement Scheme /2845, Kwale/Diani Diani Settlement Scheme /2846, Kwale/Diani Diani Settlement Scheme /2847 and Kwale/Diani Diani Settlement Scheme /2848 shall accordingly revert back to the persons registered as owners on May 12, 2020, being the date of delivery of the impugned judgment by the trial Court. Lastly, the Respondent shall bear the costs of the suit in the trial Court and of this appeal.
32. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 31<sup>ST</sup> DAY OF MARCH 2023.**

**S GATEMBU KAIRU (FCI Arb.)**

.....

**JUDGE OF APPEAL**

**P NYAMWEYA**

.....

**JUDGE OF APPEAL**

**G V ODUNGA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

