



**County Government of Mombasa v Kanyifa & 5 others (Civil Appeal
76 of 2020) [2023] KECA 813 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 813 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 76 OF 2020
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JULY 7, 2023**

BETWEEN

COUNTY GOVERNMENT OF MOMBASA APPELLANT

AND

EUPHORIA NYAGA KANYIFA 1ST RESPONDENT

IRENE NDUTA NJOMO 2ND RESPONDENT

**LUCY MUSINYA (ALL SUING ON BEHALF OF MEMBER OF NORTH COAST
BEACH MANAGEMENT COMMITTEE) 3RD RESPONDENT**

THE MINISTER OF NATIONAL HERITAGE & CULTURE .. 4TH RESPONDENT

CABINET SECRETARY FOR TREASURY 5TH RESPONDENT

NATIONAL LAND COMMISSION 6TH RESPONDENT

*(An appeal against the judgment of the High Court sitting in Mombasa, Ogola,
J. delivered on the 27th July 2020 in Constitutional Petition No. 16 of 2019.)*

JUDGMENT

1. The County Government of Mombasa, the appellant herein has lodged this appeal against the judgment of the High Court sitting in Mombasa, Ogola, J delivered on the July 27, 2020 in Constitutional Petition No 16 of 2019. The judgment was entered in favour of Eusophia Nyaga Kanyifa, Irene Nduta Njomo and Lucy Musinya the 1st to 3rd respondents (all suing on behalf of members of North coast beach management committee hereinafter the 1st to 3rd respondents), as against the appellant. The appellant cross petitioned as against the 1st to 3rd respondents. The cross petition was concluded in favour of the appellant. The 1st and 3rd respondent had sued the County Government of Mombasa, the appellant; the Minister of National Heritage & Culture, (the 4th



- respondent); Cabinet Secretary for Treasury, (the 5th respondent); the Commissioner for Lands, (the 4th respondent the petition) and the National Lands Commission, (the 6th respondents).
2. This is a first appeal. Our duty as the first appellate court in this respect, as set out in *Selle and Another v Associated Motor Boat Co Ltd & others* (1968) EA 123, is to reconsider the evidence, evaluate it and draw our own conclusions of facts and law. We will only depart from the findings by the trial Court if they were not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* (1968) E.A.
 3. The orders sought by the 1st to 3rd respondents as against the appellant and the other respondents in the amended petition dated October 2, 2019 were:
 - i. A declaration that by virtue of article 29 (c) of the Constitution of Kenya, the 1st to 3rd respondents are not entitled not to be subjected to any form of violence of any nature meted out by the 1st respondent, its servants, and agents on diverse dates between October 2018 and December 2018.
 - ii. A declaration that by virtue of article 27(1) of Constitution of Kenya, the 1st to 3rd respondents are entitled to equal protection and equal benefit of the Law from the caprices and whims of the appellant, its servants and agents as occasioned upon the 1st and 2nd respondents on diverse dates between October 2018 and December 2018.
 - iii. A declaration that pursuant to Article of Constitution of Kenya, the 1st to 3rd respondents are entitled to be afforded fair administrative action by the appellant, its agents, servants and employees that is lawful, reasonable and procedurally fair and to have been given written reasons prior to the appellant embarking on the actions meted on the 1st to 3rd respondent on diverse dates between October 2018 and December 2018.
 - iv. An injunction directed against the appellant, it's servants, agents and employees from in any way purporting to take administrative action of any nature against the 1st to 3rd respondents without giving the 1st to 3rd respondents written reasons for undertaking the same.
 - v. A declaration that the 1st to 3rd respondents are entitled to continue using the subject matter public property to conduct business by virtue of their unwavering efforts to preserve, protect and maintain the land as a public recreational facility.
 - vi. Against the appellant, special damages for the unlawful eviction amounting to Kenya Shillings Twenty Seven Million Eight Hundred and Eighty Nine Thousand Nine Hundred and Fifty (Kshs 27, 889,950)
 - vii. Exemplary damages.
 - viii. Costs of this petition.
 4. The 1st to 3rd respondents case was that they are members of a registered Community Based Organization (CBO) at Jomo Kenyatta public beach (known as "Pirates Beach") in Mombasa that acts as an umbrella association for work specific beach operating CBO's comprising of fishermen, beach tube renters, beach photographers, beach community traders and recreational boat owners and related



- businesses. The 1st to 3rd respondents further asserted that they are over 400 registered members of the CBO, licensed and authorized to carry on business on the public beach and their activities go way back to 1970.
5. That the plots upon which they operated the said businesses are LR No MN/17177 and LR No MN/17178 measuring 3.756 Hectares. According to the 1st to 3rd respondents, the suit property was reserved by the appellant's precursor [Municipal Council of Mombasa] in 1995 for public recreational purposes who issued a leasehold title under LR MN/1/9314 measuring 3.756 Hectares for 99 Years with effect from 1980. That however, in 1996 the land was subdivided into two plots being plot Nos 1916 and 1917 whereby parcel MN/1916 was changed to acquire designate "residential" as opposed to the "public recreational purposes" and leased to one Samu limited until a suit was filed when the 4th respondent was directed to revoke the title grant. The 1st to 3rd respondents' case was that the 6th respondent on 1st March, 2010 issued new titles in regards to the two plots being LR MN/17177 and LR MN/17178 measuring 3.367 Ha. That a dispute arose after the 1st to 3rd respondents inquired over an unexplained loss of 0.389 hectares from the original acreage.
 6. As a result, they petitioned for orders mentioned above as well as a declaration that they were entitled to continue using the suit property to conduct business by virtue of the unwavering efforts to preserve, protect and maintain the land as a public recreational facility, and for special damages suffered from the eviction amounting to Kshs 27,889,950/- and exemplary damages.
 7. The appellant's case was that sometime in 2018 it received complaints from members of the public regarding lack of space at the beach owing to the presence of traders invading the beach space, which was curtailing the ability of the public to enjoy use of the beach. After a survey, it established that there was need to protect the beach shoreline within the 60 meters High Water Boundary pursuant to article 13 of the [United Nations Convention on the Law of the Sea](#) as well as article 2(5) of [Constitution of Kenya](#). The appellant's position was that the license issued by the Tourism Regulatory Authority did not grant the traders permission to invade the beach space in the manner that they did of operating beyond the limits envisioned. It contended that the 1st to 3rd respondents were violating the law by operating within 60 meters High Water Mark boundary causing public harm, nuisance and threatening the provisions of the [United Nations Conventions on the Law of the Sea](#).
 8. That its duty was to protect the marine environment by ensuring there was no discharge of waste into the Indian Ocean. That the appellant issued verbal notices to the traders who were operating businesses in a manner that restricted access to the beach and that it is not true that the notice affected all the respondents as alleged by the 1st to 3rd respondents. That after the eviction, the affected traders caused commotion along the Mombasa-Malindi highway.
 9. The appellant contended that the 1st to 3rd respondents lacked the requisite *locus standi* to file the petition in their own behalf and on behalf of North coast beach management committee since the suit did not conform to Order 1 Rule 13 of the [Civil Procedure Rules](#) and as such, the trial court lacked jurisdiction to handle it. Further, the North coast beach management committee had not renewed the 1st to 3rd respondents' certificate of registration of self help group as at the time the cause of action arose, and as such, they did not have any legal claim against the appellant and the 4th to 6th respondents. The appellant also argued that an Environment and Land Court should have heard the issues raised in the petition as the subject matter touched on occupation and use of land.
 10. A cross petition was filed by the Attorney-General on behalf of the Minister of National Heritage and Culture, the 4th respondent; the Cabinet Secretary to the Treasury, the 5th respondent and the Commissioner for Lands (4th respondent in the petition but not a party in this appeal).



The appellant relied as the basis of the cross petition on articles 2(1), 19, 2, 20, 23, 40, 60, 62 and 165(3) of *Constitution*. They contended that the counter claim was in conformity with the *National Museums and Heritage Act* No 6 of 2006. Their position was that the suit property was gazetted vide Gazette Notice No 13562 of September 28, 2012, whereby the National Museums of Kenya under the Ministry of National Heritage and Culture was statutorily required to ensure conservation of the heritage value of the site, by ensuring that any developments in the area were in line with conservation standards. These standards were in line with the fourth schedule of *Constitution of Kenya* under which the public beaches fall under the functions of the county government. That it is in this regard that they were conducting a regeneration exercise, since the 4th respondent enjoys the title to the suit property which rights, that the 1st to 3rd respondent breached.

11. The appellant pleaded that the 1st to 3rd respondents had converted the suit properties intended for public recreational purpose to private enterprise for commercial gain. That in contravention of article 60 of *Constitution* the 1st to 3rd respondents denied the appellant his right to quiet enjoyment of the suit property by erecting market stalls without his consent. The appellant contended that the 1st to 3rd respondents had unlawfully denied him the use of the suit property by illegally encroaching and conducting trade on the suit property meant for public recreational purposes. That in contravention to article 62 (4) of constitution the 1st and 3rd respondents caused government land intended for public recreational purposes to private enterprise without following the due procedure. That the 1st and 3rd respondents have no title or property capable of protection under article 40 of *Constitution*.
12. The 4th respondent's claim under the cross petition as against the 1st to 3rd respondents was for infringement of the rights of 4th respondent over the suit property, and the prayers sought were:
 - i. A declaration that title LR No MN/17177 and LR MN/17178 is properly owned by the 4th respondent and the 1st to 3rd respondents have no rights whatsoever.
 - ii. A declaration that the cross petitioner's right to property under article 40 of *Constitution* as read together with article 60 on security of lands rights have been violated by the 1st to 3rd respondents.
 - iii. A declaration that any past, present and any dealings by the 1st to 3rd respondents with LR No MN/17177 and LR MN/17178 were unlawful and unconstitutional.
 - iv. A permanent Injunction restraining the 1st to 3rd respondents, its agents, servants, employees, assignees, successors or any person claiming under them from entering and in any other way dealing with the suit property LR No MN/17177 and LR MN/17178.
 - v. An Order dismissing the petition with costs.
 - vi. Costs of the cross petition.
 - vii. Any other order or relief as the honourable court deemed just to grant.
13. The 1st to 3rd respondents' response to the cross petition was through a replying affidavit sworn by the 2nd respondent on the November 26, 2019. It was deposed that the 1st to 3rd respondents have been in legal occupation of the suit properties with the knowledge and consent of the Tourism Regulatory Authority, which authority fell under the 4th respondent. The 1st to 3rd respondent refuted that they



denied the 4th respondent access to the suit property and contended that their only interest was to continue conducting their businesses along the suit property without interference by the 4th and 5th respondents. That the cross petition was an abuse of court process as they, the 1st to 3rd respondents were not claiming the suit property.

Submissions before the Trial Court.

14. Dr Khaminwa, filed submissions on June 18, 2019 on behalf of the 1st to 3rd respondents. The submissions addressed the PO raised by the appellant, as well as the submissions in support of the petition. He submitted that the constitutional petition was precipitated by the appellant's actions carried out on diverse dates between October 2018 and December 2018 where properties belonging to the 1st to 3rd respondents were razed down and their activities threatened.
15. In answer to the issue of *locus standi* raised by the 4th and 5th respondents, Dr Khaminwa submitted that it was no longer an issue because under Article 22 (2) of *Constitution*. He buttressed his submission with the decision of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, for the proposition the court should not place hurdles on litigants, but should instead be guided by article 258 of *Constitution*.
16. On the issue of whether the court had jurisdiction, Dr Khaminwa urged that the High Court had jurisdiction to hear and determine matters relating to enforcement of Bill of Rights as provided under article 165 of *Constitution*.
17. On the applicability of *Order* 1 Rule 8 of the *Civil Procedure Code*, Dr Khaminwa urged that the Petition was brought under provisions of *Constitution* and under the provisions of the *Protection of Rights and Fundamental Freedoms Practice and Procedure Rules* 2013 (Mutunga Rules). He urged that there were several issues arising from the Petition that required determination.
18. Regarding whether the 1st to 3rd respondents' rights were infringed, Dr Khaminwa urged that various rights were infringed by the appellant that included right to fair administrative action, right of access to information, equality and freedom from discrimination, freedom and security of the person and protection of right to property.
19. On the right to equality and freedom from discrimination, freedom and security of the person, the grounds urged in support of these rights were the same used in support of the violation to the right to fair administrative action. Dr Khaminwa submitted that the appellant and its agents blatantly violated the rights of his clients when a directive was made to unlawfully evict them from carrying their various activities along the public beach. He relied on this court's decision of *Judicial Service Commission of Kenya v Mbalu Mutava & another* [2015] eKLR, for the proposition that 'fair administrative action is wide in scope, as it encompasses several duties: the duty to act expeditiously; duty to act lawfully; duty to act reasonably; and in specified cases, duty to give written reasons for the decision.' Counsel urged that the appellant ignored the fact of the 1st to 3rd respondents' existence and interest in the said suit properties; that they had licenses issued by Tourism Regulatory Authority to operate along the beach and that the decision was made without involving any of the 1st to 3rd respondents.
20. On the right of access to information that the 1st to 3rd respondents were denied communication on planned development on the suit properties, in violation of article 35 of *Constitution* and part IX of the *County Government Act*. That instead they ambushed the 1st to 3rd respondents with threats and violence
21. Regarding violation of right to protection of right to property. Dr Khaminwa submitted that his clients' rights were violated under article 40 of *Constitution* by arbitrarily depriving them of their



- properties. That as they were licensed beach operators, they had a right to the protection of their properties.
22. The 1st to 3rd respondents made it clear that they were not claiming ownership of the suit property. Their complaint was that they were violently attacked during their operation on the beach, without notice and with the full consent of the appellant. Dr Khaminwa submitted that if it were not for the 1st to 3rd respondent the beach plot would have been grabbed. He urged that they were important stakeholders as tenants with an interest in land and as such, they are tenants protected by law and that without a court order they could not be evicted from the suit properties.
 23. Dr Khaminwa further submitted that article 47, 35, 27 and 40 were violated and that under article 62 of *Constitution*, the 1st to 3rd respondents were entitled to right to access and use of the suit premises. That, under Sections 104 and 115 of the *County Government Act* and articles 196(1)(b) and 10(2) of *Constitution*, the principle of public participation should have been upheld, where the County Government intended to commence a development project, in order for the public to be informed of its benefits and impacts. He relied on the case *British American Tobacco v Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR. Dr Khaminwa submitted that the remedies that are available for infringement are that of compensation, injunction, and conservatory orders.
 24. The appellant filed their written submissions on September 24, 2022 through Mr Tajbhai, who opposed the petition contending that the 1st to 3rd respondents failed to show any relationship between them and the Bill of Rights in Constitution or how the same were breached. He urged that there was no evidence of violence meted out on the 1st to 3rd respondents by the appellant and 4th to 6th Respondents Counsel submitted that the petition did not disclose the alleged 400 Petitioners since the documents filed in Court indicate only 7 of them.
 25. Counsel submitted that the 1st to 3rd respondents were hiding under pretext of public interest litigation to cater and protect their individual interest, especially with regard to their own economic gain and are covering up illegal presence at the beach. That according to article 13 of the *United Nations Convention on the Law of the Sea*, it is evident that the traders operating at the beach were breaching the laws such that they covered the low tide elevation which forms part of the territorial sea, therefore jeopardizing the security and safety of the general public.
 26. Mr Tajbhai submitted that the 1st to 3rd respondents did not qualify for an award of special damages as they did not specifically plead and prove the same. That the 1st to 3rd respondents merely attached some documents with lists of items that did not even have receipts to prove that they are the named individuals in the petition. Counsel submitted that the 1st to 3rd respondents could not claim what is not legally due to them and that the appellant ought to have sought compensation from the 1st to 3rd respondents for the destruction and everyday operations along the Mombasa-Malindi highway.
 27. The issues framed by the trial court for determination were;
 - i. Whether the *Civil Procedure Rules* applies to petitions.
 - ii. Whether the petitioners rights were infringed.
 - iii. Whether the petitioners are entitled to the special and general damages sought.
 28. The learned trial judge noted that the petition was accompanied by a supporting affidavit sworn by Irene Nduta Jomo, the 2nd respondent, in her capacity as the treasurer, along with a copy of the letter of



authority, as well as minutes by the North coast beach management, and the certificate of registration. the judge pursuant to order 1 Rule 13 of the *Civil Procedure Rules* found:

‘the letter of authority to sue having been signed by the chair and secretary the two may be observed as the intended representatives of the 400 members of North coast beach management and therefore the petition was not contrary to the provisions of the *Civil Procedure Rules*.’

29. The learned Judge considered that in any event, article 22 (1) and (2) of *Constitution* granted the petitioners the right to bring the petition.
30. After evaluating and analyzing the petition, the cross petition, the affidavit evidence and annexures thereto, together with the submissions of counsel the learned trial Judge concluded; That the 1st to 3rd respondents were evicted in violation of their right to fair administrative action, and in the process they needlessly lost property, which ought not to have happened. That although the 1st to 3rd respondents failed to prove that their loss amounted to the Kshs 27,889,950/=, the act of forceful and violent eviction without notice or fair administrative action was a violation of the 1st to 3rd respondents’ administrative rights under article 47 of *Constitution* for which the 1st to 3rd respondents were to be compensated.
31. In his judgment, at paragraph 30, the learned judge held that the petition partly succeeded and ordered as follows;
 - a. A declaration that by virtue of article 29 (c) of *Constitution of Kenya*, the petitioners are entitled not to be subjected to any form of violence, including that meted out by the 1st respondent, its servants, and agents on diverse dates between October 2018 and December 2018.
 - b. A declaration that by virtue of article 27(1) of *Constitution of Kenya*, the petitioners are entitled to equal protection and equal benefit of the law from the caprices and whims of the 1st respondent, its servants and agents
 - c. A declaration that pursuant to article of *Constitution of Kenya*, the petitioners are entitled to be afforded fair administrative action by the 1st respondent, its agents, servants and employees that is lawful, reasonable and procedurally fair and to have been given written reasons prior to the 1st respondent embarking on the actions meted on the Petitioners on diverse dates between October 2018 and December 2018.
 - d. Against the 1st respondent, general damages amounting to Kshs 25,000,000/= being compensation for violation of petitioners’ fair administrative action rights under Article 47 of Constitution as stated in paragraph 29 hereinabove.
 - e. Costs of this petition to be paid by the 1st Respondent.
32. The Learned Judge found in favor of the 4th Respondent’s Cross Petition as follows;
 - a. A declaration that the suit property was properly owned by the Cross Petitioner and the Respondent have no right whatsoever.
 - b. A declaration that any present and future dealings by the Respondents with the suit property is unlawful and unconstitutional



- c. A permanent injunction restraining the Respondents/employees/agents or any person claiming under them from entering and in any other way dealing with the suit property.
 - d. Costs of the Cross Petition to be paid by the 1st respondent. (The appellant herein).
33. The appeal was heard virtually before us on the 21st November 2022. Present for the appellant was learned counsel for County Attorney Mombasa Mr Murtaza Tajbhai, while for the 1st to the 3rd respondent was learned counsel Mr Edwin Yose and for the 4th and 5th respondent was learned Litigation Counsel Ms.Langat. Mr Tajbhai relied on his submissions dated 7th November 2022, which he highlighted before us. Mr Yose relied on his written submissions, which he also highlighted before us. Ms. Langat had not filed any submissions and did not wish to submit.
34. We have considered this appeal, the submissions by counsel, the law and cases cited, and have evaluated the evidence placed before the learned trial Judge. We note that the parties agreed to proceed by way of affidavit evidence and submissions. When counsel appeared before us, two preliminary issues were raised.
35. The first was by Mr Yose for the 1st to 3rd respondents. Mr Yose raised objection to the supplementary affidavit filed by the appellant before the trial court because it was filed late and after they had filed their submissions. Mr Tajbhai urged that the 1st to 3rd respondents did not challenge the supplementary affidavit at the trial and therefore they could not do so before this Court. We agree with Mr Tajbhai, that the objections, if any that the 1st to 3rd respondents had over the supplementary affidavit should have been raised before the trial court. They cannot be allowed to challenge it at this stage, as clearly it is an afterthought. More importantly, the jurisdiction of the appellate court is to look into issues that were presented and canvassed before the trial court. In that regard see [Mary Kitsao Ngowa & 36 Others v Krystalline Limited](#) [2015] eKLR and [Erad Suppliers & General Contractors Limited v National Cereals & Produce Board](#), SC. Petition No 5 of 2012.
36. The second issue raised was by Mr Tajbhai who urged that the appellant filed a preliminary objection (PO) challenging the jurisdiction of the court to hear the Petition and that the 1st to 3rd respondents even filed a replying affidavit in response thereto. That the court directed that the PO be heard together with the main Petition but apparently it was not determined. Mr Yose submitted that he had the impression that the parties agreed to do away with the PO and delve instead to the main petition. In response, Mr Tajbhai urged that the agreement was the PO be subsumed in the main petition. He urged that it was the reason both parties, in their submissions filed responses to the PO.
37. On this issue, we note that the appellants raised a PO dated March 4, 2019. The ground challenging the jurisdiction of the High Court to entertain the suit is the third ground. The 1st to 3rd respondents filed submissions dated June 18, 2019, answering this and the other grounds raised in the PO. We note from the proceedings before the learned trial Judge held on the February 21, 2019 that the court directed the respondents to, within 14 days, to file a response to the PO, and directed that the PO and the petition be heard on the 20th April 2019. On the resumed hearing on the April 30, 2019, Dr Khaminwa for the 1st to 3rd respondents [the Petitioners herein], addressed the court and stated that the parties had agreed, which Ms Kisingo for the appellant confirmed, to dispense with the 'application herein' and instead go to the petition. Thereafter, the court gave directions as to the filing of submissions for the main petition.



38. Considering the judgment of the learned Judge, it is clear that he considered at least one of the grounds of the PO raised by the appellant, the one on *locus standi* of the 1st to 3rd respondents, which he framed as the issue whether the *Civil Procedure Act* applied to the Petition. This means that the PO on the issue of the jurisdiction of the court to hear the matter was live.

39. Let us mention here a very important point. A challenge to jurisdiction of a court to hear a matter is so grave that it must be heard and determine at a preliminary stage of the proceedings, or as soon as the same has been raised. The reason for this is simple. In the now famous case of *“Owners of Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Limited* (1989) I KLR dealt with a court’s jurisdiction thus:-

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction

...where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

40. The appellant’s complaint was that the petition should have been heard by the ELC as the issues raised touched on the use and occupation of land. We have considered the submissions of Dr Khaminwa on this point, and the arguments of Mr Tajbhai. It is trite law the jurisdiction stems from *Constitution* and statute. That was the holding by the Supreme Court in the case of *Samuel Kamau Macharia & Anor v KCB* (2012) eKLR. *Constitution of Kenya* under article 165 provides:

“ 165 There is established the High Court, which—

(1)

- a. shall consist of the number of judges prescribed by an Act of Parliament; and
- b. shall be organised and administered in the manner prescribed by an Act of Parliament.

(3) Subject to clause (5), the High Court shall have—

- a. unlimited original jurisdiction in criminal and civil matters;
- b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;”

41. The *High Court [Organization and Administration] Act* under section 5 provides:

“Jurisdiction of the court



5. The court shall exercise—
 - a. the jurisdiction conferred to it by article 165(3) and (6) of Constitution; and
 - b. any other jurisdiction, original or appellate, conferred to it by an Act of Parliament.”
42. The petition sought several reliefs including declarations pursuant to articles 29 (c) that gives right to freedom and security of the person; 27(1) that deals with the right of equal protection of the law; 40 that deals with the right to protection of property; 47 deals with the right to fair administrative action, to name but a few. The reliefs sought are declaratory in nature among others. The High Court has jurisdiction to hear and determine matters relating to enforcement of Bill of Rights as provided under article 165 of Constitution. There is no doubt that the High Court had the jurisdiction to hear the petition. Nothing turns on this point.
43. We have considered the grounds raised by the appellants in their memorandum of appeal and find that what falls for our determination are four:
 1. Whether the 1st to 3rd respondents had locus standi to file the Petition;
 2. Whether the 1st to 3rd respondents proved that any of their rights were infringed;
 3. Whether the 1st to 3rd respondents were entitled to an award of damages; and,
 4. Who should meet the costs.

Whether the 1st to 3rd respondents had locus standi to file the Petition;

44. Mr Tajbhai urged that the 1st to 3rd respondents lacked the requisite *locus standi* to file the petition in their own behalf and on behalf of North coast beach management committee [CBO]. The appellant challenges the suit for non-compliance with Order 1 Rule 8 of the Civil Procedure Rules [hereinafter CPR]. He urged that the North coast beach management committee had not renewed the 1st to 3rd respondents’ certificate of registration of self help group as at the time the cause of action arose, and as such, they did not have any legal claim against the appellant and the 4th to 6th respondents.
45. Mr Yose refuted the appellant’s claim and urged that the 1st to 3rd respondents were members of a registered Community Based Organization (CBO), at Jomo Kenyatta Public Beach (known as “Pirates Beach”) in Mombasa, that acts as an umbrella association for work specific beach operating CBO’s comprising of fishermen, beach tube renters, beach photographers, beach community traders and recreational boat owners and related businesses.
46. The 1st to 3rd respondents further asserted that they are over 400 registered members of the CBO licensed and authorized to carry on business on the public beach and their activities go way back to 1970. Counsel invoked article 22 (2) of Constitution, and buttressed it with the decision of Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, for the proposition that the court should not place hurdles on litigants, but should instead be guided by article 258 of Constitution. That the petition had been brought under provisions of Constitution and under the provisions of the Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 (Mutunga Rules) and was thus competent.



47. We have read the affidavit of Mr Innocent Mugabe the chief officer, tourism, Mombasa County Government. It is dated June 3, 2019. He deposed that his office worked closely with the Tourism Regulatory Authority, whose mandate was to license traders operating at the beaches, and to ensure that there was sanity. Mr Mugabe deposed that his office, the County Government, the Tourism Regulatory Authority held stakeholder meetings with traders including CBOs. He also annexed communication between Dr Khaminwa for North coast beach management association and the National Museums of Kenya. It is clear that the appellant was aware of the existence of association to which the 1st to 3rd respondents were members, as far back as January 2018.
48. article 258 of Constitution, cited by counsel for the 1st to 3rd respondents, in its full effect empowers ‘any person’ to institute a constitutional suit, whether on their behalf, or a representative suit. It provides:

258. Enforcement of this Constitution

1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.”

49. As this petition raised issues pertaining to threat of and contravention of Bill of Rights in Constitution, we are satisfied that the 1st and 3rd respondents had the locus standi to bring it, on their own behalf, and on behalf of their membership. Nothing turns on this point.

Whether the 1st to 3rd respondents proved that any of their rights were infringed;

50. The appellant challenges the finding of the court concerning proof of infringement of rights, urging that none were proved. Mr Tajbhai in his submissions urged that the 1st to 3rd respondents claimed that they were violently evicted from the suit property, causing them loss and damage. He urged that the Sections 107 and 108 of the Evidence Act required that he who alleges bears the burden to prove, with cogent evidence.
51. Mr Mugabe in his affidavit deposed that sometime in 2018 the appellant received complaints from members of the public regarding lack of space owing to the presence of traders invading the beach space, which was curtailing the ability of the public to enjoy use of the beach. After a survey, it was established that there was need to protect the beach shoreline within the 60 meters High Water Boundary pursuant to Article 13 of the United Nations Convention on the Law of the Sea as well as Article 2(5) of Constitution of Kenya.
52. The appellant’s position was that the License issued by the Tourism Regulatory Authority did not grant the traders permission to invade the beach space in the manner that they did of operating beyond



- the limits envisioned. It contended that the 1st to 3rd respondents were violating the law by operating within 60 meters High Water Mark boundary causing public harm, nuisance and threatening the provisions of the [United Nations Conventions on the Law of the Sea](#).
53. Mr Mugabe, in his affidavit of June 2019 explains the role of the appellant and Tourism Regulatory Authority, and that the latter licenses beach business operators, including for the operators of the Jomo Kenyatta Public Beach. It was their evidence that some of the operators, including those represented by the 1st to 3rd respondents had not renewed their licenses at the time the cause of action arose. That the license did not give them right to invade beach space not meant for them beyond the limits envisioned under the licenses, and that some without licenses had no authority to conduct business along the beach.
 54. The second deposition in Mr Mugabe's affidavit was that none of the traders on the suit property, including the 1st and 3rd respondents were taken by surprise. He deposed that the appellant held meetings at Jomo Kenyatta Public beach, including the one held on November 23, 2018, that were consultations with stakeholders. Part of the purpose of the consultations was to inform the stakeholders to cease operations on the beach pave ways, shoreline and areas where the license did not permit, and too give them notice when they should move. That it was only after expiry of notice did officers from department of inspectorate enforce the notice to move, and then only on those who were guilty of violation. It was denied that any violence or unreasonable force was used.
 55. Mr Yose maintained that there was violation of the 1st to 3rd respondents' constitutional rights that led to great loss and damage. We read the affidavit sworn by the 2nd respondent dated October 2, 2019, in support of the Petition. In the beginning paragraphs, she gives the chronology of the registration of the suit property that took place in the 1980's and 1990's. It is deposed that some portion of the land could not be accounted for, and when their counsel wrote to the appellant for information in that regard, problems started over their presence at the Jomo Kenyatta Beach.
 56. The 2nd respondent then made a sweeping statement that their membership is over 400, and that they were all licensed. She then attached a sample of the licenses usually issued to them. It is then deposed at paragraph 13, that on various dates between October 2018 and December 2018, the appellant, in the company of hooligans and county askaris, violently raided and attacked their membership.
 57. At paragraph 14, the 2nd respondent attached a handsome bundle of documents, deposing that it was in support of their claim or special damages amounting to Kshs. 27, 889, 950/-
 58. In his judgment the learned trial Judge, several observations and conclusions were made in regard to whether the rights of the 1st to 3rd respondents were infringed. The following are excerpts of the Judge's analyses and findings: The learned Judge found that "their grievances translated to an alleged infringement of the social economic right'. He noted that 'the 1st to 3rd respondents had not pleaded infringement of that right. [social economic rights]. He however observed that, 'it is the economic and social rights under article 43 of [Constitution](#) that would appear to entitle the petitioners to protection of opportunity to earn a living and protection of the right to be free from hunger and to social security'.
 59. The trial court noted that the appellant did not deny violently evicting the 1st to 3rd respondents. That there is 'no law in this country which allows anybody to violently evict people whose occupational permit have expired. More so, there is no law that allows physical violence or destruction of property of such occupants. That the law allows an aggrieved person to seek a court order to effect an eviction. Such court order cannot entertain violence on evictees or destruction of their property. The trial court was 'satisfied that the appellant violated the 1st to 3rd respondents' right to a fair administrative action contrary to article 47 of [Constitution](#). No court order obtained.'



60. As a result, the trial court found that indeed the 1st to 3rd respondents were evicted in violation of their right to fair administrative action, and in the process they needlessly lost property, which ought not to have happened. That although the 1st to 3rd respondents failed to prove their loss amounted to the Kshs. 27,889,950/=, and could be compensated for that, the act of forceful and violent eviction without notice or fair administrative action a violation of the 1st to 3rd respondents' administrative rights under article 47 of Constitution for which the 1st to 3rd respondents were to be compensated.”
61. We have analyzed and evaluated afresh the evidence and have considered the learned trial Judge's judgment in that regard. It is trite law that he who alleges must prove. The burden lay on the 1st to 3rd respondents to prove that they were evicted, violently, without notice, denied fair administrative action and that they suffered loss. The evidence before the court shows clearly that there were conversations going on between the appellant and its officers and the 1st to 3rd respondents' membership.
- There is proof that there were stakeholder meetings held, the discussions which included requirement to respect the license issued to the membership, in terms of respecting the places that they could set up their businesses. It is clear to us that there was no evidence of a surprise element or of lack of notice. The 1st to 3rd respondents received fair administrative action, information and notice having been freely given to them before the event(s).
62. Regarding the eviction, contrary to the learned Judge's finding, the appellant contests that any eviction, in the manner alleged in the Petition or at all ever took place. The 1st to 3rd respondents have the burden of proof. The learned trial Judge in his judgment correctly found that proof of eviction and of loss and damage was not availed in evidence. The learned Judge went to the extent of stating what kind of evidence could have sufficed such as including pictures showing the evidence of eviction and loss. None was availed.
63. Regarding the fact that the evictions were effected, the 2nd respondent in her affidavit in support of the petition deposed that the evictions took place between October and December 2019. That is rather vague. Further, no evidence was adduced to prove that the 1st to 3rd respondents suffered any loss. The learned Judge was right when he found that damage and loss was not proved.
64. Where a party claims redress for violation of their constitutional rights, it is trite that the specificity test established by the authority of *Anarita Karimi Njeru v Republic* (No 1) [1979] 1 KLR 154 is met. The test was stated thus;
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to Constitution, it is important (if only to ensure that justice is done to his 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. We find that the 1st to 3rd respondents did not.”
65. The 1st to 3rd respondents were specific in regards to the pleading the constitutional violations they were seeking redress for. We do not need to rehash the learned Judge's finding, which we agree with, that the said respondents failed to prove violation of what was pleaded. In answer then to this issue, the 1st to 3rd respondents did not prove infringement of the constitutional violations pleaded in their petition.

Whether the 1st to 3rd respondents were entitled to an award of damages

66. The appellant's complaint was that the learned trial Judge failed to consider the facts before it and overreached its mandate. The appellant urged that the 1st to 3rd respondents prayed for a declaration



not damages the alleged breaches to their constitutional rights. The judge ventured into alleged infringement of rights that was not the cornerstone of the 1st to 3rd respondents' pleadings and/or prayers and awarded Kshs. 25,000,000/-. The appellant submitted that the 1st to 3rd respondents were not entitled to the special and general damages sought, or awarded. That the trial court observed that the 1st to 3rd respondents claimed an award of Kshs. 27,889,950 as damages for losses they suffered, but that they did not establish that claim.

67. Mr Tajbhai relied on *Tamara Merson v Drexel Cartwright and Ag* (Bahamas) Privy Council Appeal No 61 of 2003 for the proposition that in some cases, a suitable declaration may suffice to vindicate the right that has been breached. He also relied on Court of Appeal decision in *Butt v. Khan* (1981) KLR 349 for the proposition that the appellate court should not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate.
68. The learned Judge found that their grievances by the 1st to 3rd respondents translated to 'an alleged infringement of the social economic right'. He noted that the 1st to 3rd respondents had not pleaded infringement of that right. He however observed that, 'it is the economic and social rights under article 43 of *Constitution* that would appear to entitle the petitioners to protection of opportunity to earn a living and protection of the right to be free from hunger and to social security'.
69. The trial court observed that 1st to 3rd respondents neither specifically pleaded nor proved the damages suffered in the alleged eviction. According to the trial court, they should have produced as proof receipts, or photographs after the alleged eviction exercise or any invoices to show that the liquidated losses were incurred as a result of violations of their constitutional rights.
70. The learned judge continued to state that 'Alternatively, that the 1st to 3rd respondents could have called viva voce evidence of the losses they individually suffered. There was not a little attempt to prove the alleged losses suffered. In this case, I find the particulars lacking and as such I am not able to make any orders with regard to Special and General Damages on account of alleged losses.' He then cited a *South African Case of Dendy v University of Witwatersrand, Johannesburg & others* - [2006] 1 LRC 291, the Constitutional Court of South Africa held that:

"The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

"...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

71. The learned trial Judge was clear on the evidence and arguments made before him. He was very clear on the applicable principles. The difficulty was in the application of these principles to the facts of the case. We shall cite this Court's decision in *Provincial Insurance Co. EA Ltd v Mordekai Mwangi Nandwa*, KSM CACA 179 of 1995 (ur) where the court was emphatic that:

"... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ..." [See *National Social Security*



Fund Board of Trustees v Sifa International Limited (2016) eKLR, Macharia & Waiguru v Muranga Municipal Council & Another (2014) eKLR]”

72. The learned trial Judge was right to decline to award the special damages pleaded for loss and damage, as it was not proved. As for the award made for violation of fair administrative action, the 1st to 3rd respondents not having proved breach of the right to fair administrative action, we find that this award should not be allowed to stand.

Who should meet the costs.

73. Mr Tajbhai faulted the learned trial judge for condemning the appellant to meet the costs of the cross petition yet it was not a party in the cross petition. We need not say much on this aspect as the costs follow the event. The order condemning the appellant in the cross-petition in which it was not a party was in error. The parties in the cross-petition were the 4th, 5th and 6th respondents were the cross petitioners and the respondents were the 1st to 3rd respondents.

74. We have come to the end of this appeal. The order that commends itself to us is as follows:

1. The appellant’s appeal against the judgment of the High Court [Ogola, J] dated 27th July 2020 is allowed.
2. Declarations and orders numbers (a) to (e) of the judgment are set aside.
3. The order condemning the appellant to meet the costs for the cross-petition is set aside.
4. As this was a public interest litigation, we make no order as to costs.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

