



REPUBLIC OF KENYA



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**Musyemi & 3 others v Mwarogo & 3 others (Environment & Land Petition
22 of 2021) [2025] KEELC 1183 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 1183 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION 22 OF 2021

LL NAIKUNI, J

FEBRUARY 21, 2025

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL
UNDER ARTICLES 40, 47 & 50 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ADJUDICATION COMMITTEE AND ARBITRATION BOARD
AND OBJECTION IN LAND COMMITTEE CASE NO. 232, ARBITRATION CASE NO. 125**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY
JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS & FREEDOMS
OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES AND 2013**

AND

**IN THE MATTER OF: PLOT NOS. 2147 AND 3016
MWANDA/ MBALAMWENI ADJUDICATION SECTION**

AND

**IN THE MATTER OF: ARTICLES 20, 21, 22, & 23 OF THE KENYA CONSTITUTION OF
KENYA, THE ENVIRONMENT & LAND COURT ACT NO 19 OF 2011, SECTIONS 13,19, 20,
21, 22, 26, 27, 28 AND 29 OF THE LAND ADJUDICATION ACT CAP 284 LAWS OF KENYA,
THE LAND ACT NO. 6 OF 2012 AND THE LAND REGISTRATION ACT NO. 3 OF 2012**

BETWEEN

SAMMY ALEX MUSYEMI 1ST PETITIONER

DANIEL MUSYEMI ALEX 2ND PETITIONER

WAMBUA MUMO MUSYEMI 3RD PETITIONER

ROBERT MUSYOKA MWAMBUA 4TH PETITIONER



AND

MASHA MRAMBA MWAROGO 1ST RESPONDENT
LAND ADJUDICATION OFFICER, KILIFI COUNTY 2ND RESPONDENT
THE LAND REGISTRATION OFFICER, KILIFI COUNTY .. 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to the filed Constitution Petition dated 25th May, 2021 by Sammy Alex Musyemi, Daniel Musyemi Alex, Wambua Mumo Musyemi and Robert Musyoka Mwambua, the Petitioners herein. It was against the Masha Mramba Mwarogo , Land Adjudication Officer, Kilifi Count, the Land Registration Officer, Kilifi County and Attorney General, the Respondents herein. *The Constitution* Petition was brought under the dint of the provisions of Articles 20, 21, 22, 23, 40, 47 and 50 of *the Constitution* of Kenya 2010, the *Environment and Land Court Act*, No 19 of 2011, Sections 13,19, 20, 21, 22, 26, 27, 28 and 29 of the *Land Adjudication Act*, Cap. 284 Laws of Kenya, the *Land Act* No. 6 of 2012 and the *Land Registration Act* No. 3 of 2012. The Petition was accompanied by an affidavit in support.
2. Upon service of the Petition, the 1st Respondent entered their appearance through a Memorandum of Appearance and responded through a replying affidavit dated 9th February, 2022, the 1st Respondent filed a further Replying Affidavit sworn on 2nd August, 2022. Further the 1st Respondent filed a supplementary affidavit sworn on 28th April, 2023.
3. It is instructive to note that during the Pre – Trial conference parties agreed that the Petition be canvassed by way of adducing “Viva Voce” evidence. Further, in the pendency of the proceedings, on the request by parties herein the Court conducted an elaborate site visit (“Locus in Quo”) and a comprehensive report was prepared and it is attached to this Judgement for ease of reference.

II. Description of Parties

4. The Petitioners were described as male adults of sound minds residing at Kawala Village within Kaloleni Sub-County in Kilifi County; the Petitioners present this Petition in their interest and as the sons of the Respondent in the case of:- “Land Case No. 232 Masha Muramba Mwarogo – Versus - Cholu Musyemi Mbumbu”. The 1st Respondent was described as an adult male of sound mind residing at Kaloleni within Kilifi County in the Republic of Kenya and who at all material times herein was the Plaintiff in Land Committee case No. 232 referred to Paragraph 2 above. The 2nd Respondent was described as a public officer appointed pursuant to Section 4 of the *Land Adjudication Act*, Cap. 284 Laws of Kenya in whose jurisdiction the adjudication section herein falls.
5. The 3rd Respondent was described as a public officer appointed under the provision of Section 12 of the *Land Registration Act* No. 3 of 2012 and is responsible for the Kilifi Land Registry in whose jurisdiction the suit property is situated and is the Officer who was mandated to cause the registration on ownership of the suit property to be effected upon completion of the Adjudication Register as provided for in Sections 28 & 29 of the *Land Adjudication Act* aforesaid.



6. The 4th Respondent was described as the Principal Legal Officer of the Government of Kenya whose office is established under Article 156 (1) of *the Constitution* of Kenya and is being sued on behalf of the 2nd and 3rd Respondents.

III. Court directions before the hearing

7. Nonetheless, on 28th June, 2022, the Honourable Court fixed the hearing dated on 5th December, 2022 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 and as already indicated the matter proceed for hearing by way of adducing “viva voce” evidence with the Petitioners’ witnesses testifying in Court on 5th December, 2022 after which they marked their case closed and the Respondents called their witness RW 1 on 20th February, 2024 they marked their case closed on the same day.

IV. The Petitioners’ case

8. The brief facts of the case were as follows. This Petition was in in respect of Land Committee case No. 232 and Arbitration case No. 125 which concerned a parcel of land plot No. 2147 and 3016 Mwanda/Mbalamweni Adjudication Section respectively (Hereinafter called “The Suit Property”). At all material times herein, the Petitioner had been beneficial owners entitled to possession of the said suit properties. They claim to have acquired the suit properties from the Petitioners' father namely CHOLU MUSYEMI MBUMBU (Hereinafter referred to as “The Deceased”). When the area in which the suit property was declared an adjudication section the 1st Respondent was documented as owner of the suit property pending a land Committee case despite objection by the Petitioner's father.
9. The case was heard and decided in favour of the Respondent. Being aggrieved by the Committees decision, the Petitioners filed a case before the Arbitration being “Arbitration Board Case no. 125 - Daniel Musyemi Alex – Versus - Masha Muramba Mwarogo” pursuant to the provisions of Sections 21 & 22 of the *Land Adjudication Act* Chapter 284 of the Laws of Kenya. However, the case never got to be heard nor determined. In the year 1968 there was a dispute between the 1st Respondent’s paternal uncle Tsofa Mwarogo and one Musyoki Chalo and the decision was that Tsofa Mwarogo lost the case but was allowed by Musyoki to stay on Musyoki'S land.
10. Later on in the year 1986, there was another land case between Chemu Tsanga and Kulwa Chalowhich case was decided in favour of Kulwa Chalo. The decision by a panel of elders was confirmed and adopted as a Judgment of the Court in Mombasa RMCC No. 19 of 1986 between Chemu Tsanga and Kulwa Chalo. At the same time, the elders determined the boundary dispute between one Betti Dilojiand Kulwa Chalo in land case No. 10 of 2001. The award was entered as a Judgment of the Court in Kaloleni SRM’s Court on 10th April, 2001.
11. From the case held between Chemu Tsanga and Kulwa Chalo in land case No. LND/KAL/14/1982 marked the boundaries between the two parties. During the hearing of the case, although Cholu, Musyemi Mbumbuadduced evidence in support of his case including the said cases but it was unknown to the Petitioners and their father that evidence was neither recorded nor considered at the time the 2nd Respondent was analysing the evidence. Instead the decision by the 2nd Respondent was based on extraneous evidence that had not been tendered by either party during the hearing. The 2nd Respondent held that the deceased neither knew how his grandfather got the plot nor the size of the plot yet the 2nd Respondent partly allowed the case and ordered that the deceased to retain 3 acres.
12. During the hearing before the Land Committee the 1st Respondent gave evidence that he had a case with Kulwa Chalo which was not true. The 2nd Respondent considered this evidence but neglected to



consider that of the deceased. Pursuant to the Land Committee in years 1968, 1986 and 2001 it was manifest that the 1st Respondent had lost all legal rights and interest to the suit property but the 2nd Respondent deliberately omitted to consider that evidence. The deceased duly disclosed the said cases and even produced copies of proceedings but the 2nd Respondent for reasons unknown failed to record or take regard of these facts.

13. The Petitioners maintained that had all the evidence been taken into consideration and not the extraneous evidence relied upon by the 2nd Respondent a different decision on the issue of the ownership of the suit property would have been made. All along it had been the expectation of the Petitioners that all that evidence would be considered during the hearing of the appeal. However, that was not the case. It was the Petitioners' case the 2nd Respondent failed to consider the evidence adduced by the Petitioners' father and the parties. Instead, the 2nd Respondent based his decision on extraneous evidence not adduced by either party and proceeded to allow the case. As a result, the Petitioners' right to a fair hearing enshrined in Article 50 of *the Constitution* of Kenya was violated.
14. Additionally, this action by the 2nd Respondent amounted to an unreasonable and unfair procedural administrative action by the 2nd Respondent. It violated the Petitioners' right to a reasonable and procedurally fair administrative action as enshrined in the provision of Article 47 of *the Constitution* of Kenya, 2010.
15. It was also the Petitioners' case that the decision by the 2nd Respondent to allow the case based on extraneous evidence violated the Petitioners just expectation to a fair hearing and that since the decision remains in force this state of affairs has continued to infringe upon the Petitioners' rights to a fair hearing as enshrined in the provision of Article 48 of *the Constitution* of Kenya. Pursuant to the decision of the 2nd Respondent, the 3rd Respondent was now set to register the 1st Respondent as the absolute owner of the suit property and issue him with Title Deeds to the that effect. It was the Petitioners' case that this threatened to further violate the Petitioners' right to own property as enshrined in the provision of Article 40 of *the Constitution* of Kenya.
16. Additionally, it was the Petitioners' case that the issuance of Title Deed to the 1st Respondent for land acquired pursuant to a flawed decision perpetrated by the 2nd Respondent would also contravene the provision of Articles 47 and 50 of *the Constitution* of Kenya. There was no remedy more suitable for the purposes of dealing with this situation than by way of this Petition since the 2nd Respondent had stated in writing that the case before the Arbitration Board could not be heard. The cause of action arose was within the jurisdiction of this Honourable Court.
17. In the long run, the Petitioners prayed for the following reliefs:-
 - a. A declaration that the decision by the 2nd Respondent to allow the 1st Respondent's case on extraneous evidence not adduced by either party is against the just expectation of the Petitioners and amounts to a denial of the Petitioners' right to a fair hearing and to a reasonable and procedurally fair administrative action as enshrined in Article 47 & 50 of *the Constitution* of Kenya.
 - b. A declaration that the action of the 2nd Respondent in not recording all the evidence tendered by the Petitioners' father is an infringement of the Petitioners' right to a fair hearing and to a reasonable and procedurally fair administrative action as enshrined in Articles 47 and 50 of *the Constitution* of Kenya.
 - c. A declaration that the issuance of a title deed to the 1st Respondent for the suit property pursuant to a flawed decision will further violate the Petitioners' right to fair hearing and a fair



administrative action as well as to the Petitioners' right to property as enshrined under Articles 40, 47 &, 50 of *the Constitution* of Kenya.

- d. And Order of Certiorari quashing the decision of the 2nd Respondent made on 12th November, 2015 that allowed the 1st Respondent's case to the Land Committee plot No. Mwanda/Mbalamweni and also quashing the Order of even date that plot No. 3016 Mwanda/Mbalamweni Adjudication Section be registered in the name of the let Respondent.
 - e. An order substituting the decision of the 2nd Respondent with a Judgment of this Court in favour of the Petitioners and against the 1st Respondent with an Order directing the 3rd Respondent to register the Petitioners as the proprietors of parcel No. 3016 Mwanda/Mbalamweni Adjudication Section.
 - f. Costs of this Petition.
 - g. Any other relief that this Honourable Court deem just to grant so as to meet the end of justice and the protection of the Petitioners Constitutional rights.
18. The Petition was premised on the testimonial facts and averments made out under a 21 Paragraphed affidavit sworn by Sammy Alex Musyemi, the 1st Petitioner herein sworn on the same date as the Petition together with three (3) annexures marked as "SAM - 1 to 3". He averred that: -
- a. His father – the deceased had a case with Masha Mramba, the 1st Respondent herein in case No. 125 before Land Committee Mwanda/Mbalamweni Adjudication Section.
 - b. The said Cholu Musyemi Mbumbuhad since died. Annexed in the affidavit and marked as "SAM - 1" was a copy of the Certificate of Death.
 - c. There were cases involving different persons in respect of the land in question. Annexed in the affidavit and marked as "SAM - 2 (a), (b) and (c)" were copies of proceedings, decisions and orders in Land Civil Case No.15 of 1961, Land Award No. 23 of 1992, Land Case No. 19 of 1986, and Land Case No. Lnd/Kal/14/1982.
 - d. Chemu Tsanga who was the Plaintiff in Land Case No. Lnd/Kal/14/1982.
 - e. The said Chemu Tsanga sued Kulwa Chalo was his neighbour and the step brother to Kulwa Chalo.
 - f. The decision in the case referred to in paragraph (c) above stated that the road from Batani to Kibao Kiche formed a permanent boundary between the land belonging to Chemu Tsanga and Kulwa Chalo.
 - g. His family's parcel of land which the 1st Respondent claims belonged to him bordered the land belonging to Kulwa Charo. As the land belonging to the 1st Respondent's family was before the road from Batani to Kibao Kiche.
 - h. The Respondent herein and his family members namely Emmanuel Charo Tembo, Pius Kazungu and Sofia Charo were members of the Land Committee who sat during the hearing of the case before the Committee.
 - i. The composition of the said committee was skewed against his family and in particular the deceased. He was legally advised that the said composition never complied with the requirements of *the Constitution* of Kenya, 2010.



- j. Despite the fact that the dispute over the parcel of land belonging to his family having been decided in and/or by various tribunals and/or Courts, the Land Committee went ahead to determine the same despite the fact that the deceased informed them of the same.
- k. The Land Committee refused to accept production of the decisions referred to in Paragraph (b) above.
- l. The Land Committee ought to have accepted the production of the decisions/ruling/orders/awards referred to Paragraph 4 above in order to make a decision having taken/considered all facts presented by both sides.
- m. He filed an objection in in respect of plot No. 3016 Mwanda/Mbalamweni Adjudication Section but the Land Adjudication and Settlement Officer, Kilifi, Kaloleni, Rabai and Ganze Sub - Counties wrote to him stating that he should seek Court redress in Court once title deeds were out the reason being that the Act did not give a provision for late objection. Annexed in the affidavit and marked as "SAM – 3" were copies of his letter and the said Officer's letter.
- n. The law was not cast in stone for his objection not to be allowed though filed alter and he had no option but to approach this Honourable Court.
- o. The issues addressed by the Land Committee leading to the decision they made on 12th November, 2015 were issues which had been dealt with by various Court/tribunals as evidenced by the decisions/rulings/award/orders referred to above.
- p. The sketch plan in the lands office stated that the 1st Respondent's plot was number 3017 on the map sheet No. 13 yet in the said office's book (record) it was indicated plot Number 3016.
- q. The sub – division done on 17th November, 2020 was contrary to the Land Committee decision.
- r. The 2nd Respondent had no right to possess, occupy and use plot No. 168 and the 3rd Respondent erred in determining the objection in favour of the 2nd Respondent.
- s. The Affidavit in support of the Petition.

19. The Petitioners called their witnesses on 5th December, 2022 who testified as follows:-

A. Examination in Chief of PW - 1 by Mr. Odhiambo Advocate:-

20. PW - 1 was sworn and testified in Swahili language. He identified himself as Sammy Alex Musyimi. He was a Citizen of Kenya bearing all the particulars stated in the national identity card shown to court. He was born in the year 1983 and lived at Kaloleni, Sub- County area called Kawala. He was a businessman. There was an affidavit he signed on 25th May, 2021 which he adopted as his evidence in chief. There were documents which he produced as evidence 1, 2, 3 – being:-

- a. Petitioner Exhibit – 1 – Certificate of Death.
- b. Petitioner Ex. – 2 (a) Proceedings in Civil Court No. 5/1968.
- c. Petitioner Exhibit No. 2(b).
 - i. A land Award No. 23 of 1997.
 - ii. Land Case No. 19 of 1986 – 14th August, 2014 2(c).
 - iii. A land Award No. 1982 2(d).



- iv. A letter dated 14.8.2019 2(e).
 - d. Petitioner Exhibit 3 – Letter dated 30th July, 2019 and 3(a) a document from the Ministry of Land dated 20th September, 2017 – 3(b).
 - e. A letter dated 14th August, 2019 3(c).
21. There was an affidavit by Marsha Mramba Mwarugo the Respondent. He had filed a deed plot No. 3017. The case in Court was Plot 2447 and 3016 respectively. Hence Plot No. 3017 had no connection with this case. He was here to get his land; Mr. Marsha Mramba Mwarugo had their land while they had theirs. Their area was declared Land Adjudication section they were awarded Plot 2747 to their father - Cholo Musyimi. Thereafter Masha Mramba lodged a complaint.
 22. Their evidence was never recorded by the Committee and the decision made was a mollified order for the case of 23 of 1993, the case was the Complaint. He filed the case at the tribunal and it favoured him. The case of the year 1986, the case decide and there was common boundaries between the two boundaries. There were sketch map which he had produced as exhibit their land was divided by a road which was the boundaries. They gave evidence being court documents but they were disregarded.
 23. There were the documents which they had produced here. His father got the land as inheritance from his family. That was where there were grave yards and plantation and homestead. The Masha Mramba Mwarugo in the proceedings in case No. 23 of 1997 were brothers with the one he sued. On page No. 50 there was an award/ order for 11th March, 1998 was different from the one issued by the Respondent. He had noted order No. (b) was what had been altered.
 24. This case they were not involved as a family. With reference to the Judgmentin Page 90 Case No. 19 of 1986 – Judgment of 14th January, 1987. With reference to the grounds of opposition, ground no. 2 – he took his case to the Arbitration Board, they never heard him. They told him to come on another day. Petitioner Exhibit No. 2 a letter from the Land Adjudication Committee Kilifi. The process of the land adjudication was not complete. He asked the Court for an order to have the two parcels to be registered to him i.e. Parcels No. 2747 and 3016 into his names.

B. Cross examination of PW - 1 by Mr. Mutubia Advocate.

25. PW - 1 stated that his father died on 19th August, 2017 as per the Certificate of Death. By the time of hid death, he was 18 years thus an adult. By then they had not proceeded the Grant Letter of Administration. To date they had not processed. Upon filing this case he had not obtained the Grant Letters nor Ad Litem. By the time he was given the land. The committee decided the land belonged to Masha. His father filed an appeal/Arbitration. But the arbitration was never held/ heard. But according to the Kilifi Land Adjudication Claim that had arbitration was conducted and completed. i.e. on 5th November, 2014 the arbitration decided the land belonged to Masha.
26. On being referred to the letter of 30th July, 2019, according to him one would lodge objection – would pay and was issued with an official receipt and hence he was summoned to the tribunal. He had three (3) summons for 5th March, 2017 for case No. 125 of 2017 pertaining to parcel No. 3016.
27. The date for the appeal was meant to be 14 days after the Ruling of the Committee. There was a relationship between the two plots. The plot no. 2747 was the initial one but later on it became number 3016. Plot No. 2747 was given to Cholu. He had not complain over Plot No. 2747. He was only after Plot No. 3016. He was aware that Masha was issued with the title Plot No. 3016. By that time his father had not been given the title deed. When the committee came to ground his father was given Plot No.



2747 and Masha Mramba was given Plot No. 3016 as it was theirs. They wanted to have parcel No. 3016 to be reverted back to them as it was their land.

28. PW - 1 told the court that he was from the Kamba ethnic background. They lived in an area domiciled by the Giriama people – the place was Mwanda Mbalamwezi Kibaukiche Sub Location, Kaloleni. However, there were also people from the Akamba, Duruma, Taita etc. He told the court that his father came from Ukambani. There was no grave yard for his grandfather. He never saw it.

C. Cross examination of PW - 1 by Mr. Waga Advocate.

29. PW - 1 confirmed that his claim against the 1st, 2nd and 3rd Respondents was because his complaint was never recorded well by the Land Adjudication and Settlement Committee. It was his father who filed the case. The Arbitration was No. 125 of 2017. He had a problem with the committee. It composed of relative's brothers, sisters and in-law. They were from family of Mramba – but Masha was not among them. After that they lodged an Appeal. He only had summons. He was referred to the Petitioner Exhibit 3. He told the court that it was a letter dated 30th July, 2019 written by his brother. Alex Musyimi was waiting to lodge complaint.
30. His father died on 19th August, 2017. Taking that he did not have a Grant Letters of Administration he decided to file a Petition which he was advised by his advocate. He filed the appeal at the Tribunal. According to him the case had not been heard. In other words, the arbitration had never been heard. He came to court to seek his rights. In other words, he confirmed that there were two parallel processes. They never involved a Land Surveyor to show how the two plots were interlinked as that exercise was done using the Land Adjudication process.

D. Re – examination of PW - 1 by Mr. Odhiambo Advocate.

31. On being referred to the letter dated – Exhibit 2, the witness told the court that the two plots were Plot No. 2747 and 3016. He came to Court pursuant to the letter of 14th August, 2019 written by DLASO (He read the whole letter). He filed Arbitration and received summons. There was connection between Plot 2747 as the original plot. His father never lost the case because he was of a Kamba ethnic. Masha Mramba was in the parcel but for those who had the case.
32. On 2nd November, 2023 the Petitioners called PW - 2 and testified as follows:-

A. Examination in Chief PW - 2 by Mr. Odhiambo Advocate.

33. PW - 2 was sworn and testified in Swahili language. He identified himself as MR. JULIUS NYAMAI KULWA. He was a citizen of Kenya with all the particulars in his national identity card. He was born on 1st June, 1974. He told the court that he was from Kilifi, Kaloleni Mariakani Division - Kwale Sub-Location. He knew Sammy Alex Musyimi and Masha Mramba Mwarogo . On 11th October, 2022 he signed his witness statement. He wished to have it adopted and be part of his evidence in this case. He knew the matter in Court was a land dispute. In the year 1982 there was a case No. 14 between his father Kulwa Chalo and Chemu Sanga where his father won the case. It was decided the family of Masha Mramba Mwarogo should not cross the road from Mkapuni to Kibao Kiche.
34. PW - 2 told the court that Mr. Masha Mramba Mwarogo was a member of the Land Adjudication Committee. It's while there that he went and crossed the said road i.e. he abrogated the Committee's order and took the land from the family of Sammy Alex Musyimi. There was a land dispute and later on a case lodged before the Committee. He was a witness in the case. He refused the papers and further his name did not appear. From the documents filed, Masha Rogo mentioned that he was a brother to Mr. Masha Mramba – hence he was not the same person. Sofa Mwarogo also known as Kanze Mwarogo



was the uncle of Masha Rogo. There was a different parcel from the one in the suit land. They never won the said case. They were chased away from that land and hence they moved from there to where they are now claiming. Masha Mwarogo had a title. Plot No. 3016 was derived from the mother title Plot No. 2147 through a sub – division.

B. Cross examination of PW - 2 by Mr. Mutubia Advocate.

35. He told the court that he was 50 years old having been born on 1st June, 1974. In the year 1982 he was 8 years old. He would attend Court then. However, as for the 1968 case, he was only told by his father. His family used to have a land dispute with the family of Masha Mramba Mwarogo – the 1st Respondent. They still have an issue with them. Plot No. 2147 was for Cholu. The land was for his neighbors. Between Plot 016 was approximately one kilometer to their home. His plot was 2145, Plot No. 2145 and 3016 were adjacent. They were from the same place being Mbala Mweni Land Adjudication Section. All these parcels were the same land adjudication. He was aware they filed appeal. As far as he was concerned, the appeal was never heard. They filed an objection before the arbitration committee but which was not heard and they proceeded to the Minister. While there, they were referred back to the committee.
36. PW - 2 told the court that he testified in the year 2018. He knew Plot No. 2145. Plot No. 2147 gave birth to Plot No. 3016. Hence they got their share and hence they were not trying to get into another people's land.

C. Cross examination of PW – 2 by Mr. Waga Advocate.

37. PW - 2 confirmed that he presented the papers for the case in 1968 to the Committee. But they refused receive them. They were papers to show that they were people from the Akamba Ethnic Group. Hence he was unhappy for not being given the right to be heard. He had a problem with the committee as they oppressed many people. They favoured Mr. Masha Mramba. Mr. Mramba was a chairman of the Land. He had no interest nor right to be allocated the land there as a decision had been decided – using the road. It was the Tribunal that had made that decision on 14th January, 1982.

D. Re – examination of PW - 2 by Mr. Odhiambo Advocate.

38. PW - 2 reiterated that he went to testify on behalf of the family of Sammy Tembo Mramba. They were all Giriama and family members – tribunal had already decided from case No. 14 of 1982.
39. The Petitioners closed their case through their legal counsel Mr. Odhiambo on 2nd November, 2023.

V. The Respondents' response

40. The 1st Respondent opposed the Petition through a 14 Paragraphed Replying Affidavit sworn by Masha Mramba Mwarogo , the 1st Respondent and dated on 9th February, 2022. He averred that:-
 - a. The suit land fell within what was initially declared as Mwanda/Mbalamweni Adjudication Section. Annexed in the affidavit was a true copy of a letter by the Ministry of Lands dated 24th February 2012 marked as “MMM-1”.
 - b. On 17th May 2012, the District Land Adjudication & Settlement Officer Kilifi declared the entire Mwanda/Mbalamweni Area as an Adjudication Section. Annexed in the affidavit was a true copy of the Notice dated marked as “MMM - 2”.
 - c. Subsequently, adjudication and registration of the parcels of land falling within the said adjudication section commenced and the suit land was registered under his name.



- d. The Petitioners' Petition herein was fatally defective and was filed in contravention of mandatory provisions of the law and procedure for the following reasons;
- i. That the Petitioners had filed this Petition allegedly as children of the Late Cholu Musyemi Mbumbu– the deceased yet they had not obtained the mandatory Grand Letters of Administration. Consequently the Petitioners lacked the mandatory capacity and “the locus standi” to institute or sustain any legal proceedings on behalf of the said deceased or his Estate.
 - ii. That as was clearly admitted by the Petitioners, the dispute over the contested parcels numbers 2147 and 3016 Mwanda/Mbalamweni. This section was adjudicated upon in accordance with the law and decisions made where after the said parcels were registered under the names of the respective registered owners and as such, no challenge against the said first registrations could be entertained or sustained except as provided by the law.
 - iii. That the registration of the disputed parcels of land under the respective owners ousted the jurisdiction of this Honourable court to entertain any suit in respect of the parcels by way of Constitutional Petition as sought by the Petitioners or otherwise.
 - iv. That the Petitioners were availed the chance and opportunity to challenge and/or appeal against the decisions by the Land Adjudication Committee strictly under the stipulated processes and time lines and the Petition herein was filed in an attempt to unlawfully circumvent the strict and mandatory timelines set by the law.
 - v. And the allegations made by the Petitioners can only be comprehensively addressed and resolved by the Court without reference to *the Constitution*.
 - vi. That the Petitioners were accorded the necessary opportunity to raise objection to the Adjudication process which opportunity was fully utilized and exhausted where after the land Adjudication Officer issued his final decision which was not challenged through Appeal.
 - vii. That the law did not countenance the re- canvassing of the same issues and disputes in numerous fora or courts and the relevant statutory framework applicable to the present dispute provides for a fair, comprehensive and final process for resolution of land Adjudication disputes and the filing of the Petition herein amounts to forum shopping and is a gross abuse of the Court process.
 - viii. That the dispute herein was a matter touching on adjudication process under the relevant statutory instruments and did not meet the threshold for a Constitution Petition could not be challenged in the matter set herein and attempts to reopen the Adjudication process may lead to perpetual litigation, confusion, chaos and general anarchy in the administration and management of land issues in this Country.
 - ix. That the fact that the Petitioners had invoked the specific Articles of *the Constitution* and sought constitutional reliefs in their otherwise defective Petition never made the dispute before Court a Constitutional Petition.
 - x. That his claim was limited to parcel No. 3016 and the inclusion of parcel No.125 in this Petition was aimed at obfuscating issues.



- e. The Petition herein was filed after undue delay and Petitioners were guilty of acquiescing in the decision made on 12th November, 2015.
 - f. This Honourable Court had no jurisdiction to entertain an Appeal arising from Land Adjudication disputes and has no powers to substitute the decision made by the 2nd Respondent in favour of the 1st Respondent.
 - g. The Petition herein was filed contrary to the principle of Res - Judicata and the basis requirement that there must be finality in disposition of disputes. Annexed in the affidavit were true copies of sets of pleadings filed in various courts and determined marked as “MMM – 3”.
 - h. He was one who was aggrieved by the decision of the committee which awarded the deceased three (3) of his land.
 - i. The Petition herein was filed by the Petitioners in collusion with and/or on the instruction of powerful land cartels that had viciously resisted the issuance of titles to the locals and bona fide land owners in Kaloleni and Mariakani Areas so as to allow the said cartels to continue illegally acquiring and hoarding huge chunks of land belonging to the locals while denying the locals their constitutional right to own and use their land.
 - j. The Petitioners had not attached to their Petition any copies of their appeal, proceedings or copy of the decision by the Land Adjudication Committee that they sought to have overturned and it was impossible for this Honourable Court to interfere with a decision that had not been placed before it.
41. The 1st Respondent also filed a 5 Paragraphed further Replying Affidavit sworn by Masha Mramba Mwarogo , the 1st Respondent and dated on 5th August, 2022. In summary he averred that:-
- a. Subsequent to the Replying Affidavit sworn on 9th February, 2022, the Kilifi District Land Registry had issued to him a Title Deed for the suit property confirming that he was the lawful owner thereof. Annexed in the affidavit was a true copy of the Title Deed dated 17th September, 2021 and marked as “MMM - 1”.
 - b. Following the successful completion of the adjudication process, the registration exercise and subsequent issuance of the Title Deed to him pursuant to the said first registration, the Petitioners had no right or claim over the suit property and the Petition herein did not satisfy or meet the test for cancellation or revocation of him valid Title.
42. The 1st Respondent also filed an 8th paragraphed supplementary affidavit sworn on 28th April, 2023 by Masha Mramba Mwarongo, whereby he averred that:-
- a. The Replying Affidavit in response of the Petition sworn on 9th February, 2022in which the annexures were inadvertently not attached to the Replying Affidavit at the time of filing.
 - b. The mistake was purely an oversight on the part of his Advocates on record and wished to state as follows:-
 - i. The suit land fell within what was initially declared as Mwanda/Mbalamwei Adjudication Section. (Annexed in the affidavit was a true copy of a Letter by the Ministry of Lands dated 24th February, 2012 and 17th May, 2013 marked as “MMM -1a & 1b”).



- ii. On 17th May, 2012, the District Land Adjudication & Settlement Officer Kilifi declared the entire Mwanda/ Mbalamwei Area as an Adjudication Section. Annexed in the affidavit was a true copy of Notice marked as “MMM - 2”.)
 - iii. The Petition herein was filed contrary to the principle of Res Judicata and the basic requirement that there must be finality in disposition of disputes. (Annexed in the affidavit was a true copy of sets of pleadings filed in various courts and determined marked as “MMM - 3”).
43. The 1st Respondent called his first witness on 20th February, 2024 at 12.50 pm who testified in the court thus:-

A. Examination in Chief of RW - 1 by Mr. Mutubia Advocate.

44. RW - 1 was sworn and testified in Swahili language. He identified himself as Masha Mramba Mwarogo .He was a citizen of Kenya holding the national identity card bearing all the particulars as shown to Court. He told the Court that he was born at Mwanda Mbalamweni Kawala at Kibao Kicho which area is situated between Kaloleni and Mariakani within the County of Kilifi. He was a farmer of Maize, beans and green beans. He was in Court because of the suit land. He remembered swearing a Replying Affidavit dated and sworn on 9th February, 2022. He also sworn a Further Affidavit dated 2nd August, 2022. Further, he swore a Supplementary Affidavit dated 28th April, 2023 and the list of documents. He did not remember the parcel numbers. He had a large parcel.
45. According to RW – 1, he was aware that the Petitioners had sued him. They took his parcels and divided it into two but it was later returned to him. He now had a title deed. The land belonged to his father. Although they came from Ukambani, but they were later on given 3 acres by the Demarcation Committee. It was considered they had lived on the land for a long period of time. The Petitioners claimed to be the sons of the deceased their father who was allocated the land but he raised an objection. The dispute was heard and they won the case. The deceased never raised any appeal. Its later on they filed the case and got the decision from the Land Adjudication. He was issued with a Title deed. They came from Kitui, their elders used to buy livestock from there. They came and were shown the place to settle. Later on they claimed the whole land – for Masha. They were allocated 3 acres. He was referred to the letter dated 22nd February, 2012 from Commissioner of Lands – the Land Mwanda/Mbalamweni Adjudication Kilifi to the Dlaso – he stated the same was marked for identification.
46. Further the witness told the Court that there had never been a dispute on the land. There were not neighbors with Kulwa Charo. He told the court while referring to Exhibit 2(a) and (c) he stated that it was a decision of the court. The Petitioners were claiming parcel numbers 2147 for the deceased which measured 3 acres. He needed it. The 1st Respondent’s land was Land Reference No. 3016. He was allocated the land and issued with a Certificate of Title on 17th September, 2021. It measured 0.62HA (approximately 1.5 acres). On the allegation that he was given the said land illegally was baseless as the proper procedure was followed. He prayed for the court to give him the relief sought and dismiss the case and costs to be awarded.

B. Cross Examination of 1st Respondent by Mr. Waga Advocate.

47. RW - 1 told the court that the Petitioner had lived on the land for over 50 to 60 years with their parents. Before the land adjudication process there were boundaries. They occupied 3 acres and after the Land Adjudication process were allocated said land. The deceased was not content and hence he sued them on a claim they were given a bigger share. He won the case. There were only occupying a small portion where they were living and occupying. During the land adjudication process he was physically there.



They misled the team to be shown a bigger portion he protested but he was overruled he offered to sue and which he did and won the case.

C. Cross Examination of 1st Respondent by Mr. Odhiambo Advocate.

48. RW - 1 stated that he was not educated. He was born in 1954, he was called Katana Sanga Mwarogo, Masha Mramba Mwarogo was his elder brother. He died in January, 2023. His identification card showed that he was Masha Muramba Mwarogo. He had signed all his affidavit but he was illiterate. Before the adjudication/demarcation of the land he had no dispute. There was no dispute with John Musyimi. On the land there was a road on the left side as one drove to Mrabai/ Kiabo Kiche. Plot No.2147 and 3061 were on the right-hand side of the road.
49. RW - 1 reiterated that he was not aware of any case revolving the two parcels. He refuted the fact that Kuluwa Charo won the case. He never signed any document on 20th September, 1995. By this time the adjudication had not commenced. He was aware of the case in the year 1986. RW - 1 was a member of the Land Adjudication Committee. He never informed the committee of this fact so as to show that there would be conflict of interest. He had not brought any such documents. In the committee, he had a family member – called Emmanuel Tembo (Deceased). But he knew for a fact they were asked to step out. He did not know any one by the name Sofia. Plot No. 2147 was not bigger than Plot No. 3016. The deceased failed to neither proof nor demonstrate that the procedure was never followed. There was no land dispute before the land adjudication. They used to live in harmony and peace. It was the adjudication process that brought the dispute.

D. Re – examination of the 1st Respondent by Mr. Mutubia Advocate.

50. RW - 1 reiterated that Masha Mramba Mwarogo who died was his step brother. Their father was Muramba Mwarogo. He was served with summons by the Land Adjudication Committee. His father had 12 wives. He was also known as Masha Mramba Mwarogo as well. Plot No. 3016 was derived and excised from the Plot No. 2147. Hence it was sub - divided. The committee members were from different places. He was appointed as a member of the village. The name Mr. Emmanuel Tembo was not present when the decision was made. He was asked to step out.
51. The 1st Respondent through his Learned Counsel Mr. Mutubia closed his case on 20th February, 2024.

VI. The cases by the 2nd, 3rd and 4th Respondents

52. The Respondents opposed the Petition through Grounds of Opposition dated 10th July, 2021 on the following grounds:
- a. The Petition was misconceived, frivolous, vexatious and an abuse of the Court process.
 - b. The Petitioner has not sought for any stay before the Adjudication Committee on the decision and orders made on the 12th of November 2015 nor has he lodged an Appeal before the Arbitration Board in regard to plots no. 2147 and 3016 Mwanda/Mbalamweni Adjudication Section.
 - c. The 2nd Respondent was carrying out their mandate under Section 15 of the [Land Registration Act](#) to draw up Cadastral Maps during carrying out land surveys upon the 2nd to 4th Respondents and issue them titles under Section 26 of the [Land Registration Act](#) and thus should not be condemned from carrying out their mandate.
 - d. The Petitioner had failed to demonstrate in his Petition how the Adjudication Committee erred in both law and fact in regard to the determination of the issue of ownership of the parcel



land No.2147 and 3016 Mwanda/Mbalamweni Adjudication Section since the matter has not yet been heard and determined upon appeal after various objections were made.

- e. The Petitioner had failed demonstrate how his constitutional rights have been infringed.
 - f. The Petitioner had not demonstrated any color of right to make claims on the suit property.
 - g. It would set a dangerous precedent should the court be inclined to grant the Petitioner the orders sought in his Petition.
53. The 2nd, 3rd and 4th Respondents prayed for the Petitioner’s Petition to be dismissed with costs as it had no merit. The 2nd, 3rd and 4th Respondents through their Learned Counsel Mr. Waga closed their case without calling any witnesses on 20th February, 2024.

VII. Submissions

54. The parties while all in court on the 26th September, 2024 consented to canvassing the Petition dated 25th May, 2021 by way of written submissions. Pursuant to that on 20th February, 2024 parties felt there was strong need to have the court conduct a site visit. The same was scheduled for 7th June, 2024. Thereafter, the Honourable Court reserved the delivery of Judgment date on 21st February, 2025.

A. The Written Submissions by the Petitioners.

55. The Petitioners through the Law firm of Messrs. Odhiambo S. E. & Company Advocates filed written submissions on 10th March, 2022 dated 9th March, 2022. Mr. Odhiambo Advocate submitted that the Petition dated 25th May, 2021 sought several orders which were stated on the Petition. The Petition was supported by affidavit sworn by Sammy Alex Musyemi on 25th May, 2021. The gist of the Petition was that the 2nd Respondent did not record and consider the evidence of the Petitioners in respect of plot No. 3016 during adjudication and also did not hear their objection.
56. Further, the Petitioners averred that the 1st Respondent and his family members were members of the Land Adjudication Committee and they participated and determined the dispute between the Petitioners’ late father and the 1st Respondent. The Learned Counsel submitted that the 2nd Respondent ought to have considered the evidence that the dispute over the parcel of land had been determined by competent Courts in the cases which decisions are attached to the Supporting affidavit and marked as “SAM - 2(a), 2(b), 2(c) and 2(d)” which were at pages 69 and 95 of the pleadings.
57. The Learned Counsel averred that the 2nd Respondent was obliged to abide by the said decisions of the Court when determining the dispute between the Petitioners and/or their late father and the 1st Respondent. It was the just expectations of the Petitioners that the 2nd Respondent would consider their evidence in determining the dispute in respect of Plot No. 3016. The 1st Respondent had lost all the legal rights and interest to the suit plots which evidence the 2nd Respondent did not consider though the Petitioners and/or their late father disclosed that the Courts had determined the issue of ownership of the plots before adjudication. The Petition was not opposed by the 1st Respondent.
58. The 2nd to 4th Respondents have filed grounds of opposition and the 1st ground was that the Petitioners did not seek for any stay before the Adjudication Committee on the decision of 12th November, 2015. The Learned Counsel asserted that on that ground that Petitioners had stated in the pleadings and the supporting affidavit that they filed objection of the Land Committee decision and had annexed a letter marked as “SAM – 3” and the response from the 2nd Respondent marked as “SAM – 4” in affidavit in support of Notice of Motion application.



59. It was the Learned Counsel's submission that it was wrong for the 2nd Respondent to hive off Plot No. 3016 from the Petitioners' Plot No. 2147 since the whole Plot No. 2147 had been adjudged as belonging to the Petitioners' late father by the Courts as exhibited in annexure "SAM - 2(a) to (d)". The Petitioner had filed this Petition pursuant to the 2nd Respondent's advice as per annexure as "SAM - 6" of the affidavit in support of the application.
60. They also urged the Court to consider the averment in Paragraph 17 of the Supporting affidavit that the 1st Respondent's Plot was indicated as No. 3017 in the map sheet Plot No. 13 yet in the 1st Respondent's office it was indicated as Plot No. 3016. The Respondents had not rebutted that evidence.
61. Further, the sub - division done on 17th November, 2020 was contrary to the Land Committee decision which evidence and/or fact the Respondents had not rebutted. With respect to grounds 4 of the 2nd to 4th Respondents' grounds of opposition, they submitted that this Honourable Court had powers to supervise the 1st Respondent and vary or set aside the decision made by the 2nd and 3rd Respondents. In respect of ground 5, they submitted that the Petitioners had demonstrated in the Petition and supporting affidavit how the 1st Respondent erred in both law and fact with regard to the determination of the dispute/issue of ownership of parcel Nos. 2147 and 3016 Mwanda/Mbalamweni Adjudication Section.
62. The Committee members who had interest in the plot in question and that was the 1st Respondent and his relatives named in Paragraph 9 of the Affidavit in Support of the Petition ought to have declared their interest and recused themselves from hearing and determining the dispute. The Petitioners had also demonstrated in the Petition and supporting affidavit how their Constitutional rights had been infringed and they had a right pursuant to the provisions of *the Constitution* to seek remedy in this Court. The provisions of *the Constitution* have been stated in the Petition.
63. It was the Learned Counsel argued that the grounds by the 2nd to 4th Respondents were not points of law and the 2nd to 4th Respondents had failed to rebut the evidence and facts in the Petition and supporting affidavit. It was incumbent upon the 2nd Respondent to file a supporting affidavit and annex in the proceedings from the time of adjudication and at every state of determining the dispute between the 1st Respondent and the Petitioners and/or their late father.
64. In conclusion, the Learned Counsel urged the Court to consider the pleadings in the Petition, the evidence in the supporting affidavit and the submissions herein and grant the Petitioners' prayers as sought from the filed Petition herein.

B. The Written Submissions by the 1st Respondent

65. The 1st Respondent through the Law firm of Messrs. Sherman Nyongesa & Mutubia Advocates filed their written submissions dated 28th March, 2024. Mr. Mutubia Advocate commenced his submission by stating that the 1st Respondent (hereinafter referred to as 'the Respondent') opposed the Petitioners' Petition herein on the ground that the Petition was filed contrary to the provisions of the *Land Adjudication Act*, Cap. 284 and Constitution. He held that the said Petition never met the test for a proper Constitutional Petition
66. To commence with, the Learned Counsel provided the Court with a brief background. He held that it was not in dispute that the Petition herein arose from proceedings conducted by the Mwanda/Mbalamweni/Adjudication Section Officer within the defunct Kilifi District. It was also not in dispute that after the decision arrived at by the Mwanda/Mbalamweni/Adjudication Committee dated 12th November, 2015 the Petitioners never preferred an Appeal against it. According to the Learned



- Counsel, a clear communication was relayed to them as per the letter dated 14th August, 2019 by the Land Adjudication & Settlement Officer Kilifi, Kaloleni, Rabai & Ganze Sub-Counties, which was attached to the Petitioners Affidavit as annexure marked as “SAM – 5” at page 20.
67. The import of the letter marked as annexure 5 aforesaid was that the Petitioners had failed to lodge an appeal to the Minister within Sixty (60) Days from 12th November, 2015 as was required of them under the provision Section 29 of the Land Adjudication Act Cap. 284 of the Laws of Kenya. The Petitioners’ letter dated 30th July, 2019 and the letter dated 14th November, 2020 attached to the Petitioners’ Affidavit as annexure marked as “SAM - 4 and 5” at pages 19 and 21 of the Petitioner's Affidavit were of no effect and/or consequence since they were written long after the expiry of Sixty (60) Days period allowed for Appeal.
68. The Petitioner’s attempts to introduce the previous decisions or Court Cases had no bearing on the Proceedings by the Adjudication Committee and this Court for the reason that the Adjudication Committee was not bound by the said Court Cases and was allowed to undertake independent and objective investigations and hearings and write at its own independent decision which was not subject to Appeal to this Honourable Court or Supervision by way of Constitutional Petition as sought by the Petitioners herein.
69. On the Petitioners’ Petition, the Learned Counsel contended that the Petition was allegedly brought under the provisions of Articles 13, 19, 20, 21,26, 28, 29, 40, 47 and 50 of the Constitution of Kenya 2010 and sought declaration that:-
- a. Denial to fair hearing and reasonable and procedurally fair administrative action
 - b. Order of Certiorari to quash decision made on 12th November, 2015
 - c. Cancellation of title issued to the 1st Respondent in respect of the TitleNo.3016/Mwanda/Mbalamweni/Adjudication Section.
70. The Petitioners’ Petition was allegedly based on the following grounds:-
- a. That the Petitioners filed an Appeal to the Arbitration Board which had not been heard
 - b. That the Adjudication Committee never recorded the evidence tendered by the Petitioners father – the deceased.
 - c. That the Adjudication Committee ignored the previous Court Cases in its decision
 - d. That the Adjudication Committee considered extraneous evidence
71. While opposing the Petition, the 1st Respondent filed a Replying Affidavit Sworn by Masha Mramba Mworogo on 9th February, 2022 and a Supplementary Affidavit Sworn on 9th May,2023. From these pleadings the Respondent averred that:-
- a. The Petitioners had no locus standi to file the present Petition for lack of the requisite letters of Administration in respect of the Estate of the deceased.
 - b. Petitioners failed to file Appeal against decision by the Adjudication Committee and the Court has no Jurisdiction to entertain further proceedings in respect of the decision by the Adjudication Committee.
 - c. The Petition never met the test for a Constitutional Petition and no constitutional issues were disclosed to warrant this Honourable Court’s intervention as sought.
 - d. The Petition was Re - Judicata.



- e. The 1st Respondent was the registered owner of the Title No. Kilifi/Mwanda/Mbalamweni/3016 and his Title could not be challenged as sought.
72. The 1st Respondent also filed a Preliminary Objection dated 6th July, 2021 and should seek to rely on the same. He argued that the Petition herein was non - starter and amounted to a gross abuse of the Court process.
73. On the analysis of issues and on the Constitutional Petition. The Learned Counsel contended that the Petition never met the test for a Constitutional Petition. That the issues raised by the Petitioners never amounted to constitutional issues to be considered by the Honourable Court. The Petitioners and their late father were accorded numerous chances to be heard right from the cases before the Kaloleni Court and the Adjudication Committee and which arrived at the same decision against the Petitioners and in favour of the 1st Respondent. The fact that the Courts and the Adjudication Committee arrived at decisions that were not favourable to the Petitioners did not give rise to a constitutional issue.
74. The Petitioners had their right to Appeal against the decision by the Adjudication Committee which they failed to exercise. There was no explanation given as to way they failed to file an Appeal as was required of them. Having failed to comply with mandatory provisions of the law, the Petitioners could not be allowed to turn around and blame the Adjudication Committee when they were the ones (Petitioners) who failed to Appeal the decision they complain about.
75. The Learned Counsel submitted that that the Petitioners' Petition was an Appeal against the decision by the Adjudication Committee's decision through the back door couched a 'Petition' and this Honourable Court has no Jurisdiction to grant the prayers sought for substitution of the decision by the Adjudication Committee and the Land Adjudication & Settlement Officer, Kilifi. The Petitioners admitted and conceded that they failed to file Appeal within the required time but alleged as part of their Petition that their Appeal was still pending and has not been heard. Under the provision of Section 30 of the *Land Adjudication Act* Cap. 284 of the Laws of Kenya, the Court and the Petitioners were barred from instituting or entertaining any civil proceedings concerning an interest in Land situated within an Adjudication Section until the Adjudication Register had become final and therefore this Honourable Court has no Powers to intervene at all.
76. The Learned Counsel submitted that the Petitioners insisted that they filed an Appeal before the Arbitration Board which had not been heard. Further, the Petitioners claimed that they were denied their Constitutional right to Appeal. These submissions were contrary to the evidence attached to the Petitioners Affidavit which showed that the Petitioners failed to file any Appeal within the required time. The Petitioners alleged that the Adjudication Committee was biased on grounds that it had four (4) Members of the same family. This allegation was not proved and the names of the alleged Committee Members and the Committee Meetings, proceedings or decisions where they took part was not supplied or provided.
77. The Petitioners further alleged that the survey of the boundary had not been done without substantiating the allegation. No letter or document to or from the Director of Surveys was placed before the Court to prove or disprove the allegations. The allegation that the 1st Respondent was an imposter or a fraudster was not supported by any evidence. Under the contents of Paragraph 3 of the Petition the Petitioners describe the 1st Respondent as an adult of sound mind residing in Kaloleni. Under the averments made out under Paragraphs 13 and 15 of the Supporting Affidavit the Petitioners describe the 1st Respondent as a person who was alive and that was why they sued him and served him with this Petition.



78. According to the Learned Counsel, during the hearing, the 1st Respondent produced his national identity Card and explained the coincidence in similarity of names between him and his Deceased Step-Brother. If the Petitioners insisted that the 1st Respondent was deceased and not the person they served and who appeared before Court, then the Petition herein ought to be dismissed and/or struck out for reasons that the Petitioners either sued either a dead person or maintained a Petition against a person they knew was dead. Dead people cannot be sued.
79. It was incumbent upon the Petitioners to prove that the 1st Respondent was deceased and the person they served or who came to Court was an impostor. It was not upon the 1st Respondent to prove that he was not the deceased or that he was alive. Notwithstanding the Petitioners' self-inflicted confusion, the 1st Respondent through his Advocates supplied the Court and the Petitioners' Advocates with copies of the Certificate of Death and the national identity Card for Masha M. Mwarogo; the copy of the identity card for the 1st Respondent. The Petitioners would have easily used to prove the allegation of fraud. Instead, they failed to do so by electing to make unsubstantiated allegations by way of written Submissions. They did this instead of providing tangible evidence that the 1st Respondent was an imposter as alleged.
80. To buttress on this point, the Learned Counsel relied on the case of:- "Mombasa ELC Petition No.46 of 2021 Pascal Kazungu Wanje & 6 Others - Versus - Masha Mramba Mwarogo & 3 Others", the Court considered a similar Petition emanating from the same adjudication exercise forming the subject matter of this Petition and held as follows:-

"I concur with the above referenced cases that this Petition does not meet the threshold of the Court's Constitutional interpretative mandate under the Bill of rights provisions of *the Constitution*. There should be a clear delineation of constitutional matters and ordinary Civil Suits. I find that there is sufficient statutory legal provision that govern enforcement of Civil Land matters and the Petitioner ought to have invoked the jurisdiction of the ordinary Civil Court if at all. In conclusion, this Petition is not sustainable and constitutes an abuse of the process of the Court and the Application and Petition is accordingly ordered struck out with costs to the Respondents."

81. Additionally, in the case of:- "Mumo Matemo – Versus - Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR" the Court of Appeal restated the principle established in "Anarita Karimi Njeru -Versus -The Republic (1979) eKLR" that a constitutional Petition must set out with a degree of precision complaint, the provisions infringed and the manner in which they are alleged to have been infringed. The Petitioners herein failed to set out the particular Articles of *the constitution* allegedly infringed, the manner in which they were infringed and the reliefs sought. Certainly, a prayer for cancellation of title is not a constitutional remedy or relief.

82. Further, in the case of:- "Bernard Murage – Versus - Fine Serve Africa Limited & Others (2015) eKLR" the Court held as follows:-

"Not each and every violation of law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first."

83. The Petitioners had their right of Appeal under the provision of Section 29 of the *Land Adjudication Act* which they failed to pursue as per the law and they are therefore not entitled to pursue the lost right by way of a constitutional Petition as sought. He cited the case of:- "Troustick Union International – Versus - Mbeyu & Another (1993) eKLR" which was quoted with approval in "Sisilia Nyako &



Another – Versus - Attorney General & 4 Others (2021) eKLR” the Court held that a suit commenced by a party who has not obtained letters of Administration was incompetent as the party filing it lacks the locus standi to present or prosecute the suit.

84. The Petitioners were clear in their evidence that they had filed this Petition on behalf of their Late Father and that they had not sought or obtained the requisite Letters of Administration before filing of the Petition. To support his case, the Learned Counsel referred to the case of:- “Joseph Tootio & 12 Others – Versus - The District Land Adjudication & Settlement Officer Narok South & 24 Others (2021) eKLR” the Court dismissed the Petition on the ground that the Petition had violated the provisions of Section 30 of the [Land Adjudication Act](#). The Petitioners herein had violated the provisions of the Law by purporting to file an Appeal by way of a Petition Six (6) Years after the decision contrary to the law.
85. In conclusion, the Learned Counsel submitted that whereas the Court may have supervisory jurisdiction over certain Judicial or Quasi-Judicial bodies in their Junctions, such supervision must be exercised within the realm of established Law and legislation and cannot be at the whims of parties who fail to succeed in their claim before the lower judicial bodies.
86. The decision complained against by the Petitioners was rendered on 12th November, 2015. No or no valid Appeal was filed against the said decision in terms of Section 29 of the [Land Adjudication Act](#) Cap. 284 of the Laws of Kenya. The Petition herein was filed on 13th May, 2021 almost six (6) Years after the decision contrary to the provisions of [Limitation of Actions Act](#), Cap. 22 and the [Law Reform Act](#). The [Land Adjudication Act](#) provides for the procedure for aggrieved parties and prohibits the filing of Appeal before any other Court. This Honourable Court has no jurisdiction to substitute the decision by the Adjudication Officer as sought and the 1st Respondent has been issued with a title which is indefeasible for being a first registration.
87. The only remedy available to the Petitioners to challenge a Title issued under Section 24 of the [Land Registration Act](#) 2012 is to invoke the provisions of Sections 25 and 26 thereof by way of filing a suit seeking cancellation or revocation of the Title and not as sought in the present Petition. Consequently the 1st Respondent prayed that the Petition herein be dismissed with costs to the 1st Respondent.

VIII. Analysis and Determination

88. I have carefully considered all the filed pleadings pertaining to the Petition dated 25th May, 2021, the Affidavits by the Petitioner, the articulate written submissions by both the Petitioner and the Respondents, the myriad of cited authorities, the appropriate provisions of [the Constitution](#) of Kenya, 2010 and the statutes.
89. For the Honorable Court to reach an informed, just, fair and reasonable decision, it has condensed the Subject matter into the following three (3) salient issues for its determination. These are:-
- a. Whether the Petition by the Petitioners meets the threshold for Constitution Petitions.
 - b. Whether [the Constitution](#) Petition has any merit and, if affirmative, if the Petitioners are entitled to the reliefs sought?
 - c. Who will bear the Cost of the Petition?

Issue No. a). Whether the Petition by the Petitioners meets the threshold for Constitution Petitions.

90. Under this Sub heading, for the Court to respond to this query, assessing certain aspects of the concept of Constitutional provision are inevitable. To begin with, under the provision of Article 2 (1) & (4) of



Constitution of Kenya defines the Constitution as being the Supreme law of the Republic and it bids all persons and all States at all levels. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in in contravention of this Constitution is invalid.

91. Additionally, I dare say that a Constitution is a living tissue. Just like all other tissues, it has to be fed and watered. It breathes without oxygen and freshness it will die. I have learnt that these things are not just metaphorical. They are real. As a matter of course, the Constitution of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

- “ a. Promotes its purposes, values and principles;
- b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c. Permits the development of the law; and
- d. Contributes to good governance.....”

92. This Court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

93. Based on the principles set out in the edit of the Court of appeal case of the “Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another (Supra)” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru (Supra)” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

“ Constitutional violations must be pleaded with a reasonable degree of precision.....”

Further, in the “Thorp – Versus – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:

“ The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing.”

94. The provision of Article 23(3) of the Constitution empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.

95. In this Petition, the Petitioners seeks declarations cushioned around Articles 40, 47 &, 50 of the Constitution of Kenya. Further the Petitioners are contending administrative action by the 2nd Respondent in the issuance of a title deed to the 1st Respondent. Thus in application of these set out principles for filing a constitutional Petition. Thus, despite the vehement submissions by the Learned Counsel for the 1st Respondent in castigating this legal position taken by the Petitioner, the



Honourable Court is fully satisfied that the Petitioners herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and pleading for the prayers sought.

Issue No. b). Whether the Constitutional Petition has any merit and, if affirmative, if the Petitioner is entitled to the reliefs sought?

96. Under this sub title the court is called upon to examine whether the Petitioners have made out their case in their Petition and whether they are entitled to the prayers sought at the foot of the Petition. Before proceeding any further, the Honourable Court did indicate that it conducted a site visit of the suit land and prepared a comprehensive report. Below is the said report reproduced here verbatim.

“IX. Site Visit Report

Republic Of Kenya

In The Environmental And Land Court

At Mombasa

Petition Elc No. 22 Of 2021

Sammy Alex Musyemi

Daniel Musyemi Alex

Wambua Mumo Muyemi

Robert Musyoka Mwambua.....petitioners

- VERSUS -

Masha Mramba Mwarogo

Land Adjudication Officer, Kilifi County

The Land Registration Office, Kilifi County

Attorney General.....respondents

Site Visit Report Held On 7th June, 2024 At The Kaloleni - Mombasa At 12.00 Am

I. Quorum

A. Court

1. Hon. J. M. Nyariki - Deputy Registrar (ELC)
2. Zainab Khalid - Court Assistant
3. Midega Jaika - Advocate Trainee

B. The Representation And Parties Present

1. Mr. Odhiambo – Advocate for the Petitioners,

C. The Other Parties At The Site Visit

1. The Parties to the suit
 - a. Sammy Alex Musyemi
 - b. Daniel Musyemi Alex



- c. Wambua Mumo Muyemi
 - d. Robert Musyoka Mwambua - the Petitioners
 - e. Masha Mramba Mwarogo – the 1st Respondent
2. The Police Officer
- a. Mr. Ouma Kungu

II. Preliminaries

At 12.00 noon, while at the site with the parties agreed that the purpose of the site visit was to ascertain who was in occupation of the suit property. They also agreed that the Court was to see the suit property, its position and on which side of the road the property was on.

III. Comments From Parties

1. Sammy Alex (The 1st Petitioner) – told the court that he resided on the suit property a fact that was confirmed by the 1st Respondent. He showed the Court the boundaries of the suit property. According to him when his parents settled on the land they had not been born yet. The land was 22 acres and the plot no. was 2147. There was a history with Plot No. 2145 (where the station vehicle had been parked which was a distance away from the suit property) was what was motivating the 1st Respondent to contest the suit property because he had also lost the said Plot No. 2145. The 1st Petitioner intimated that the 22 acres included Plot No. 3016 which was 0.62 ha that had previously been subject to Land Adjudication proceedings. According to him Plot No. 3016 was a subdivision of Plot No. 2147.
2. Masha Mramba (The 1st Respondent) – He told the court that the Plot was his and the dispute between him and the Petitioners was the subdivision the suit property. According to the 1st Respondent the property was his and the Petitioners had only been invited on the land by his father just to cultivate.

He further told the court that when the Petitioners' parents settled on the land he was young or so his parents told him. He indicated that he had a title deed for the 22 acres of land which was Plot No. 3016. When asked to point out his house by the Deputy Registrar, the 1st Respondent pointed at a house which was very far away from the suit property and alleged that he lived his brother's house since he had been displaced from the suit property. He further stated that his brother had bought the property on where the house stood and where he lived.

IV. Comments And Observations

Court: -

From the observation of the court it was evidence that the parties were not able to identify the boundaries of suit property; there was no surveyor on the ground to confirm the size of the suit property and the correct plot number but from the Court's observation is that the Petitioners resided on the suit property and they had cultivated on it. The Homestead comprised of



permanent houses which also included a cow shade and other amenities like a water tank. The Petitioners were cultivating maize on the suit property for domestic consumption.

The Court directed that the matter was to be mentioned on 17th June, 2024 to confirm whether the Deputy Registrar has placed the site visit report on record. The parties were urged to try to resolve the matter amicably.

V. Pictures Captured At The Site

The Suit property

The site visit was concluded at 2:45 P.M.

.....
Hon. J. M. Nyariki

(deputy Registrar)

Environment And Land Court

Mombasa

97. To begin with, below are some of the fundamental and legal issues raised by the 1st Respondent that this Court must determine. These are:-
- a. Whether the Petitioners have “the Locus Standi” to file the present suit?
 - b. Whether this Honourable Court has the jurisdiction to entertain further proceedings in respect of the decision by the Adjudication Committee?
 - c. Whether the Petition is barred by the doctrine of Res judicata?
 - d. Who is the legal owner of the suit property and whether the title can be challenged?
98. On whether the Petitioners have “the locus standi” to file the present suit; whereas many issues could have been considered, I am convinced that since the 1st Respondent challenged the Petitioners’ locus standi to bring this Petition, I would do well to consider the issue after whether or not this Petition has attained the laid down threshold of a Constitutional Petition or otherwise of its determination of the instant suit.
99. Legally speaking, the issue of locus standi is a point of law which this Court is under the duty to determine first before any other. Locus standi is defined in Black’s Law Dictionary, 9th Edition (page 1026) as “the right to bring an action or to be heard in a given forum”.
100. In the case of “Law Society of Kenya – Versus – Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000”, as follows:-

“Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of “Alfred Njau and Others – Versus - City Council of Nairobi [1982] KAR 229”, the Court also held that:-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.



101. Further in the case of “Julian Adoyo Ongunga & Another — Versus - Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi (Deceased) eKLR” Mrima J described a party filing a suit without an Ad Litem as follows:-

“.....Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain the suit even where a valid cause of action exists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties...”

102. Therefore, locus standi means the right to appear before and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard because of that. Locus standi is so important that in its absence, party has no basis to claim anything before the Court. It is not in dispute and it is clear on the record that the Petitioners had filed the Petitioners on behalf of their Late Father and that they had not sought or obtained the requisite Letters of Administration before filing of the Petition.

103. It is trite that any beneficiary is entitled to protect their interest in the estate of a deceased person by moving to court and seeking orders to preserve the estate. In this respect the applicants relied on the case of “Re Estate of Benson Mainigi Mulwa (deceased) (2021) eKLR” where Odunga J held that:-

“In my view since intermeddling can be committed even by administrators, any person interested in the state of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate. It is therefore not mandatory that such an application be made by the administrators or with consent or authority of the other beneficiaries since a beneficiary is properly entitled to protect his or her interest in the estate.”

104. An explanation was rendered by Musyoka J in the case of: - “Veronica Njoki Wakagoto (Deceased) 2013 eKLR” to buttress the effect of Section 45 of the [Law of Succession Act](#) by stating that:-

“The effect of [section 45].....is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

105. Under the provision of Section 45 of the [Law of Succession Act](#), Cap. 160, the act of person dealing with the property of a deceased without following the proper procedure amounts to intermeddling and the Act provides as follows:-

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall –



- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or both fine and imprisonment ...”

106. While still at the same point, I am well guided by the case of:- “In Re Estate of M’Ngarithi M’Miriti (2017) eKLR”, where the term “intermeddling” was elucidated to mean as follows:-

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

107. During the cross examination, the 1st Petition testifying as PW - 1 told the court that up to the time of his testimony on 5th December, 2022 admitted never having obtained the Grant Letters of Administration to the Estate of the Deceased nor the Ad Litem for purposes of instituting the instant suit. At this juncture, I dare say, This was a serious assertion with dire legal implication to the whole suit and the management of the estate of the deceased. In the case of “Hawo Shanko – Versus - Mohamed Uta Shanko [2018] eKLR” Justice Chitembwe while addressing the failure to obtain a Grant of Letters of Administration prior to filing a suit observed that:-

“.....The general consensus is that a party lacks the Locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or Applicant has not been formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate. If each beneficiary is allowed to file a suit touching on a deceased’s estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit.....

108. The court further stated that;

‘.....if any relationship with the deceased does exist whether son, daughter, wife, widow is not sufficient. That relationship does not give the locus standi to any relative to obtain suit before obtaining limited grants. One’s relationship to the deceased does not clothe such a party with the locus standi. It is the Limited Grant which does.’



109. A claim that one has no locus standi therefore challenges a party's right to be heard before a court and if a determination is made in the affirmative then this issue has the capability of disposing of the suit. A claim that a party lacks locus standi therefore is a pure point of law and one that needs to be raised and determined at the earliest.
110. The provision of Section 82 of the Law of Succession Act gives the personal representatives of a deceased person's estate the power to "enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death of his personal representative". It appears that one can only institute or enforce a suit on behalf of the estate of a deceased person once they have been appointed personal representatives to such estate. Such appointment under the Succession Act can only be by way of obtaining a full grant or a grant limited for purposes of instituting a suit and prosecuting it which would in this case be an Ad-litem.
111. The court is bound by the civil procedure rules which mandate that any suit brought/instituted on behalf or against a deceased person should be through the legal representative. The law of succession act on the other hand only recognizes a person as a legal representative by virtue of having a grant which gives them the mandate to act on behalf of the estate.
112. I have also noted that 1st Respondent stated as RW - 1 that his names were Katana Sanga Mwarogo, Masha Mramba Mwarogo was his elder brother who had died in January 2023 but RW 1 identification card showed that his name was Masha Muramba Mwarogo. Further when reexamined RW 1 reiterated that Masha Mramba Mwarogo who died was his step brother; their father was Muramba Mwarogo.
113. From the above cases and authorities, it is apparent that for a party to have locus stand in a suit involving a deceased person then they must first obtain a grant limited for that purpose. I find that the Petitioners ought to have obtained a grant prior to filling a suit and further should have ascertained the capacity of the Respondents to defend the suit especially the 1st Respondent. In view of the foregoing, Petitioners have no locus standi to institute a claim before this Court.
114. Further on the issue of Jurisdiction of this Court in determining this Petition, the Respondents have challenged the filing of this Petition in this Court and the procedure after the decision of the Land Adjudication Committee and limitation of the time. The land adjudication act stipulates the procedure for handling land adjudication matters. From the provisions of Sections 3 to 30 of the Act makes clear from provision of the adjudication process from the time when an area is declared an adjudication section by the Minister of Land & Settlement; establishment of the Adjudication Committee and the demarcation of the area against the registered members who are composed in the Area list. The Act provides very clear mechanisms of raising objections or disputes by members and effective mechanisms on how to resolve them through the Adjudication Committee and Arbitration Tribunals – "Quasi – Judicial" organs manned by the Adjudication Officer. The culmination of all this is founded under the provision of Section 29 of the Land Adjudication Act, Cap. 284 provides as follows:
- (1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—
 - (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.



115. In all this, the Honourable Court plays no single role apart from where a person is aggrieved on how the process has been managed for instance having been done through bias, capriciously, unreasonably or on an abuse of the due process that one may move High Court to seek prerogative writs under Judicial review in form of Certiorari, or Mandamus or Prohibition against such an action by a public officer. I wish to associate myself with the decision in the case of “Vincent Narisa Krop & 3 others – Versus - Martin Semero Limakou & 12 others [2020] eKLR”, where the Court opined itself that:-

“The mandate of determining ownership of land in accordance with customary law at the land adjudication stage is therefore granted not to the courts but to the authorities vested with the power to determine customary ownership of land under the mechanisms set out in the Act. It is only through the mechanisms set out in the Act that the proper evidence of ownership can be adduced and the land awarded to the deserving persons. The appeal to the Minister is the final stage in the process. Decisions made at this stage should not be set aside easily; Save for judicial review orders to correct procedural defects in the proceedings leading to the Minister’s determination, the Minister’s decision is not appealable.....”.

116. I further associate myself with the reasoning in the in the above case and the provisions of Section 29 of the *Land Adjudication Act* that any decision by the Land Adjudication Committee should follow the procedure laid down in the provisions of the *Land Adjudication Act* which appeal should have been lodged within sixty days of the decision and orders which should have been any day before the 13th January, 2016. According to the Respondents it was clear that the Petitioners were clear in their evidence that they had filed this Petition on behalf of their Late Father and that they had not sought or obtained the requisite Letters of Administration before filing of the Petition. In the case of:- “Joseph Tootio & 12 Others – Versus - The District Land Adjudication & Settlement Officer Narok South & 24 Others (2021) eKLR” the Court dismissed the Petition on the ground that the Petition had violated the provisions of Section 30 of the *Land Adjudication Act*. The Petitioners herein had violated the provisions of the Law by purporting to file an Appeal by way of a Petition Six (6) Years after the decision contrary to the law

117. Further the Land Adjudication process is quasi-judicial and any challenge of the decision should be by way of judicial review being that the *Fair Administrative Action Act* has laid out the procedure, which is judicial review, that ought to be followed in challenging a decision by a quasi- judicial body. I find that the correct approach that should have been followed by the Petitioners would be to challenge the decision of the Land Adjudication Committee according to Section 29 of the *Land Adjudication Act* then filing a judicial review claim.

118. Having already made a finding that the Petitioners lack “ the Locus Standi” and the approach of instituting this Petition is not proper, I am inclined in penning out as the Court is unable to determine a claim where parties have no legal standing before it and no jurisdiction to determine the matter. Notwithstanding the provision of Article 159 (2) (d) of *the Constitution* of Kenya, where dissuade the fact that this is not a procedural technicality, I cannot avoid citing the now famous “classicus locus” case of In the case of “Owners of the Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya) Limited [1989] KLR 1” Nyarangi, JA expressed himself as follows:-

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and



nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

119. I dare say no more. Therefore, having stated all this, the only thing left for this Court to determine are the costs.

ISSUE No. c). Who bears the costs of the Petition.

120. It is now well established that the issue of Costs is the discretion of Courts. According to the Black Law Dictionary, “Cost” is defined to mean:- “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”. The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides :-

- “(1) The award of costs is at the discretion of the Court.
- (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

121. In the case of “Reids Hewett & Company – Versus - Joseph AIR 1918 cal. 717” and “Myres – Versus - Defries (1880) 5 Ex. D. 180”, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”



122. Further, these legal principles were upheld in the Supreme Court case of “Jasbir Rai Singh – Versus – Tarchalans Singh, (2014) eKLR” and the Court of Appeal cases of “Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya & Ano. (2016) eKLR” the Courts held:-

“.....the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

123. Having already made a finding that the Petitioners have no locus standi to institute this Petition and the approach of instituting the suit was not proper; I am inclined to dismiss the suit herein with costs to the Respondents.

X. Conclusion and Disolution

124. Consequently, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioners have no standing before this Court, for avoidance of doubt, I make the following orders:-

- a. That the Petitioners’ Petition dated 25th May, 2021 by Sammy Alex Musyemi, Daniel Musyemi Alex, Wambua Mumu Musyemi and Robert Musyoka Mwambua be and is hereby found to lack merit and thus it is dismissed with costs for the reasons that the Petitioners lack the legal capacity (“locus standi”) to institute the Petition.
- b. That based on the Doctrine of Constitutional Avoidance, the remedy available to the Petitioners in the given circumstances is to institute an ordinary suit for claim of ownership of the suit land under the appropriate provisions of Articles 40 (1) & (2) of *the Constitution* of Kenya, 2010; Sections 24, 25 and 26 (1) of the *Land Registration Act*, No. 3 of 2012.
- c. That the Respondents shall have the costs of this Petition dated 25th May, 2021 to be borne by the Petitioners jointly.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH THE MICROFT TEAMS VIRTUALLY, SIGNED AND DATED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2025.

.....

HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Odhiambo Advocate for the Petitioners.
- c. Mr. Mutubia Advocate for the 1st, 2nd & 3rd Respondents.

