



**Tsuma & 33 others v Nyamweya & 5 others (Environment & Land Petition  
E025 of 2022) [2024] KEELC 4406 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4406 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION E025 OF 2022**

**LL NAIKUNI, J**

**MAY 15, 2024**

**BETWEEN**

**PANABIS TSUMA ..... 1<sup>ST</sup> PETITIONER**

**OMAR MWALIMU ..... 2<sup>ND</sup> PETITIONER**

**MARY OMULAMA SHILWA & 31 OTHERS & 31 OTHERS .... 3<sup>RD</sup> PETITIONER**

**AND**

**WENDY BRYANT NYAMWEYA ..... 1<sup>ST</sup> RESPONDENT**

**LEAH NTHAMBI BRYANT ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE POLICE ..... 3<sup>RD</sup> RESPONDENT**

**OCS BAMBURI POLICE STATION ..... 4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**EZEKIEL ROTICH ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. Before this Honorable Court for hearing and determination are two (2) applications. These are the Notice of Motion application by the Petitioners/ Applicants dated 24<sup>th</sup> October, 2023. It was brought under a certificate of urgency by the Applicant under the provisions of Sections 1A & 1B of the Civil Procedure Act, Cap. 21, Order 40 Rule 1, 51 of the Civil Procedure Rules, 2010, Sections 3, 13 (7), 19 of the Environment and Land Court Act, No. 19 of 2011. Additionally, the other is the Notice of Motion application by the 2<sup>nd</sup> Respondent dated 27<sup>th</sup> January, 2024. It was also brought under a Certificate of Urgency by the Applicant under the provisions of Sections 1A and 1B of the Civil



Procedures Act, Cap. 21, Article 159 (2) of the Constitution of Kenya, 2010, Order 37 Rule 19 and Order 2 Rule 15 1(d) of the Civil Procedure Rules 2010.

2. Upon service of the application, all the Respondents filed either replies and/or grounds of opposition. The Honorable Court shall be dealing with each of them separately and hence deliver an omnibus Ruling accordingly.

## **II. The Notice of Motion application dated 24<sup>th</sup> October, 2023**

3. The Petitioners/Applicants sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. This Honourable Court do issue a Temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and any third parties including BARNSBURY INVESTMENT LIMITED and its directors Rishma Kurji and Aman Kurji either by themselves or through their servants, agents, or any other person evicting, demolishing, harassing, selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, leasing, letting, charging or otherwise interfering with all that parcels land known as land reference numbers CR. 40989 situate in Mombasa Municipality in the Mombasa County containing by measurement Two decimal Seven Eighty Nine 2.789 Ha (Hectares) respectively or thereabout being subdivision Number 11352 Origin No. 317/2 Section I Mainland North as delineated on Land Survey Plan Numbers 228820 and CR. No. 40990 situate in Mombasa County measuring two decimal point nought two three hectares (2.023 HA) or thereabout and being sub- division No. 11353 (Original Number 317/3) Section I Mainland North as delineated on Land Survey Plan Number 228821 pending the hearing and determination of the Petition dated 24<sup>th</sup> June, 2022.
  - d. Spent.
  - e. An order be issued directing the Land Registrar Mombasa county to prohibit and/or restrict any dealings relating to all that land Land Reference Numbers CR. 40989 situate in Mombasa Municipality in the Mombasa County containing by measurement Two Decimal Seven Eight Nine 2.789 Hectares respectively or thereabout being subdivision Number 11352 Origin. No. 317/2 Section I Mainland North as delineated on Land Survey Plan Numbers 228820 and CR NO.40990 situate in Mombasa county measuring two decimal point nought two three hectares (2,023 HA) or thereabout and being sub-division No.11353 (Original Number 317/3) Section 1 Mainland North as delineated on Land Survey Plan Number 228821 pending the hearing and determination of this Petition.
  - f. That the Honourable Court be pleased to lift the Corporate veil of incorporation of BARNSBURY INVESTMENTS LIMITED and join to this suit TIMOTHY BRYANT, AMAN KURJI, RISHMA KURJI AND BARNSBURY INVESTMENTS LIMITED as the Respondents respectively.





Court at Mombasa. (Annexed and Marked as “PT - 3” was a copy of the sale agreement 2<sup>nd</sup> December 2022, a copy of the transfer dated 26<sup>th</sup> July 2023, copy of the Certificate of title number CR.40989).

- k. A Certificate of Postal Search contained as amongst the documents therein showed that the said parcel of land was fraudulently transferred to Barnsbury Investment Limited while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were aware that the suit property was being litigated upon. (Annexed and Marked as “PT - 4” was a copy of the Certificate of Postal Search dated 23<sup>rd</sup> August 2023.)
- l. It was on this basis that they sought injunctive orders from this Honourable Court as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had sought to dispose the Petitioners/Applicants of the suit property through the said transfer to Barnsbury Investment Limited.
- m. It was in the interest of justice that the injunctive orders sought was granted to protect the Petitioners/Applicants proprietary rights as granted under the provision of Article 40 of the Constitution of Kenya, 2010 as the Petitioners/Applicants had met the threshold one was required to satisfy for the grant of injunctive orders.
- n. Based on the documentary evidence tendered in the application herein the Petitioners/Applicants averred that they had established ‘a prima facie case’ as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein who had illegally sold land to third parties despite the fact that their existed contempt proceedings against them for violation of a court order issued by the court in the civil case of “ELC (Petition) No. 9 of 2022 Anderson Kiraga – Versus - Wendy Bryant and another”.
- o. In furtherance to the above, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents further proceeded to dispose of the suit property to third parties knowing very well there were court cases in relation to the suit properties.
- p. They had also established that they were likely to suffer irreparable loss and damage that cannot in anyway be compensated by way of damages as one of the prayers sought in their Petition dated 24<sup>th</sup> June 2022 was an order that they be reinstated to the suit property as they were the rightful owners.
- q. The balance of convenience was in their favour as they had annexed overwhelming evidence as against the Respondents to warrant the grant of the injunctive orders pending the determination of this matter.
- r. It was on this basis that the Petitioners/Applicants beseech this Honourable court to issue the injunctive orders sought herein to ensure that justice was upheld.

### III. The Responses to the Notice of Motion application dated 24<sup>th</sup> October, 2023

- 5. The 1<sup>st</sup> Respondent opposed the application through a 14 Paragraphed Replying Affidavit sworn by herself, WENDY BRYANT NYAMWEYA where she averred that:
  - a. As a general response to the said application, the Respondents had approached this Honourable Court with unclean hands.
  - b. There was a scheduled site visit on 31<sup>st</sup> October 2023. However, the Respondents hereinfiled an application to divert the courts attention from an already scheduled site visit.
  - c. The Applicants were on a mission to ensure that the Court did not conduct a site visit for fear of the Court discovering material facts which would be part of important proceedings in this suit.



- d. The Petitioners/Applicants had never been residents of the suit properties and therefore the temporary injunctions orders been sought were a wild goose chase and a mode taken by the Applicants to ensure that the matter does not proceed to full hearing by filing numerous applications.
- e. There was need to have this Honourable Court conduct an immediate Site Visit as per the provisions of Order 40 Rule 10 of the Civil Procedure Rules, 2010 so that the Court could be able to clarify the evidence which parties have placed before it and form impressions and findings which would be part of the proceedings.
- f. The Intended Respondents and Intended Interested Parties were not properly on record in the matter for the Applicant to warrant for substantive orders since the applicant has not sought for leave as it is required to have the parties joined into the suit as stipulated under the provision of Order 1 rule 10 of the Civil Procedure Rules, 2010.
- g. The Applicant's approach to have substantive orders on the intended respondents was a mere backdoor approach which the Court should not entertain as highlighted in the case of "James Ndung'u Kero – Versus - Chief Land Registrar, Director Of Survey & Attorney General (Environment & Land Case E046 of 2021)[2022] KEELC 1446(KLR) (16 February 2022) (Ruling)" where the Court held that:-

“In relation to the grounds, this court observes that the learned state counsel introduced three (3) interested parties to the suit. These were one Peter Njogu Karanu, Peter Gaitho Karanja and Mathew Mitheu Rimui. The Attorney General did not seek leave of the court to introduce them as parties to the suit. It was un-procedural to do so. order 1 rule 10 of the Civil Procedure Rules and rules 2 and 7 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,2013 (Legal Notice No 117 of 2013) provide for the manner of joinder of persons wishing to be introduced as interested parties to suits. What the Attorney-General did in this process was nothing but backdoor ushering of parties into a suit. Therefore, they are improperly enjoined as parties to the suit. Enjoinment of parties is not as of right.”

- h. It was only proper, prudent, just and in the interest of justice, fairness, equity, constitutionalism, principles of the rules of law and Natural justice and protection of fundamental rights and the instant freedoms enshrined in the Constitution of Kenya, 2010 that this application ought to be disallowed in its entirety.
  - i. The application dated 24<sup>th</sup> October, 2023 was misconceived and an abuse of court and the same should be struck out with costs.
- j. The affidavit was in opposition to the instant application and urge the Honourable Court to dismiss the same with costs.
  - 1. The 2<sup>nd</sup> Respondent opposed the Notice of Motion application dated 24<sup>th</sup> October, 2023 through a 16<sup>th</sup> Paragraphed Replying Affidavit sworn by Leah Nthambi Bryant, the 2<sup>nd</sup> Respondent herself where she averred that:-
    - i. They owned Plot MN/I/11352 and MN/I/11353 (“the suit property”). This was confirmed by the Petitioner in his own pleadings and a fact he wishes to overturn through these proceedings.



- ii. It was true that part of the suit property had been sold and transferred to the 4<sup>th</sup> Intended Respondent. This fact was known to the Petitioners.
- iii. She had been shown a copy of the Petition and noted the precise prayers sought by the Petitioners. These are:-
  - a. A declaration that the demolition by the Respondent's is illegal, irregular, unprocedural and contrary to Articles 26, 27 (2) (4) & (6) 28, 29, 39, 43, 47, 56, 57 and 245 of the Constitution of the Republic of Kenya and is therefore null and void.
  - b. An order restraining any purported demolition and/or forceful eviction by the Respondent against the Petitioners.
  - c. A declaration that the Petitioners herein are entitled to the full protection from discrimination and the same right has been violated and they are entitled to full compensation as a result of loss suffered during and after the illegal demolition of their structures.
  - d. A declaration that the Petitioners herein and other members of the public are entitled to the full enjoyment of the right to economic and social rights that are about to be violated and are already violated.
  - e. An order that the costs of the reinstatement of the petitioners' structures and/or houses and/or value of the petitioners' structures and/or houses be borne by the Respondents.
  - f. General damages for unlawful eviction, injury, loss and damage caused and the violation of human rights.
  - g. Special damages amounting to Kshs. 200,000/-.
  - h. Exemplary damages.
    - i. Costs of this Petition.
- iv. From the face value of those prayers, she noted that there was no prayer for declaration that the Petitioners/Applicants were the registered owners of the suit property.
- v. The inception of this Petition, the Petitioners had never sought orders to restrain us from selling the suit property or dealing with our property as the registered owners.
- vi. As a registered owner, her rights were protected under the provision of Article 40 of the Constitution. In this regard, they exercised their rights and sold the suit property to the 4<sup>th</sup> Intended Respondent.
- vii. He had not breached any Court order when he exercised his right to sale what he constitutionally owned.



- viii. The prayers (v), (vi), (vii), (viii) and (ix) were seeking monetary compensations should they succeed. In that regard, there was no basis for the court to be called upon to issue injunctive orders.
- ix. Prayers (i), (iii) and (iv) were seeking orders for mere declarations without any consequential remedies attached to the land.
- x. Prayer (ii) was overtaken by events. None of the Petitioners was on the suit property as at the time the Petition was filed.
- xi. She had seen the contents of the Notice of Motion application dated 24<sup>th</sup> October, 2023 and noted the following:-
  - a. Prayers (b), (c) and (f) seek orders of injunction against a non- parties. To the best of her knowledge, the parties named therein and classified as intended Respondents are not parties in this Petition.
  - b. There was no prayer for joinder of parties. In that regard the court is invited to issue injunctive orders as well as other orders against people who are not parties to this Petition. As long as prayers (b), (c) and (f) are against none parties, the same offend the rules of natural justice and the provisions of Article 50 of the Constitution.
- xii. The court does not have jurisdiction to issue orders against non-parties.
- xiii. She had been shown prayer (d) and (e) which seek to stop all dealing in relation to the suit property. In this regard, for those orders to be granted the petitioners must meet the threshold set in the case of “Giella – Versus -Cassman Brown & Anor” and that is say:-
  - a. That the Petitioners have a prima facie case with a probability of success. She had gone through the Supporting Affidavit and noted that the petitioners concede that a suit property has long been transferred to a third party. In deed in paragraphs 11 and 12 they have proceeded to exhibit the Sale Agreement and the document of transfer. What is curious here is what is stated in paragraph 13 of the affidavit where the petitioners state that they have been disposed of the suit property through the said transfer. She challenge the Petitioners to tell the court when the suit property became their property and through which process. She further challenge the Petitioners to produce a court order vesting the suit property into their hands. Finally, She challenged the Petitioners to produce a copy of Title showing that they are the registered proprietors of land.

In paragraph 14, the petitioners are seeking injunctive orders to protect their proprietary rights under Article 40 of the Constitution. In this regard, in Kenya one can acquire land through one of the following means as set out in Section 7 of the Land Act no. 4 of 2012.

  - i. allocation;



- ii. land adjudication process;
  - iii. compulsory acquisition;
  - iv. prescription;
  - v. settlement programs;
  - vi. transmissions;
  - vii. transfers;
  - viii. long term leases exceeding twenty-one years created out of private land; or any other manner prescribed in an Act of Parliament.
- xiv. Even at this interlocutory stage, she challenged the Petitioners to set out how they acquired the suit property. Towards this, it is within her knowledge that as at 3<sup>rd</sup> April, 2023, the Petitioners had filed their final submissions to the Petition. In those submissions, there was no submission confirming a believe that the Petitioners were the proprietors. The only tangible claim they laid before the court are monetary awards which have no foundation. Based on the above, there can never be a prima facie case with a possibility of success.
- xv. The second issue for them to prove was that damages were not adequate remedies. They had demonstrated the kind of final orders the petitioners are seeking. Those prayers could be compensated by way of damages. In fact all of them besides the one of restitution are in monetary terms. The burden of proving that damages are not adequate compensation lied with the Petitioner.
- xvi. The last time to prove relates to the balance of convenience. The Petitioners alleged that they were evicted from the suit property on 18<sup>th</sup> June, 2022. This was in Paragraph 20 of the Petition. The second respondent in her affidavit filed in court on 23<sup>rd</sup> August, 2022, explained that a group of land grabbers had attempted to enter the suit property using a court order issued by a court without jurisdiction. The second respondent received assistance from the National Police Service and all invaders were thrown out. This happened within a span of one week and no structures had been erected to completion. The 2<sup>nd</sup> Respondent had further explained that the suit property had been part of their home from where they grew up. She further demonstrated that her mother was buried within the suit property. In a report done on 6<sup>th</sup> June, 2022 by Valueconsult Limited, it showed the structures which were existing and there was no evidence of a squatter on site. This report could be found at Pages 67 to 81 of the Replying Affidavit filed in court on 23<sup>rd</sup> August, 2022. Further, the 2<sup>nd</sup> Respondent had demonstrated that the suit property had been sold on the transfer to a third party. In view of this, the balance of convenience tilted in favour of the 2<sup>nd</sup> Respondent.
- xvii. She had instructed her advocate to raise an objection that:-
- a. the application was wrongly drawn against the Intended Respondents. The first step the Petitioner should have taken was to file an application



to join the Intended Respondents as parties. The application dated 24<sup>th</sup> October, 2023 was premature and should be struck out.

- b. The application was unconstitutional and offended the rules of natural justice. It offends the provision of Article 50 of the Constitution.
- c. The application was at variance with the main Petition unless the Petition was amended, the application dated 24<sup>th</sup> October, 2023 had no foundation and ought to be struck out.
- d. The parties having filed their submissions. What remained in the main Petition was a date to highlight the said submissions and take a date for Judgment. The Applicant should have sought leave to reopen the proceedings before filing the application dated 24<sup>th</sup> October, 2023.

#### **IV. The Notice of Motion application dated 27<sup>th</sup> January, 2024**

7. From the application dated 27<sup>th</sup> January, 2024, the 2<sup>nd</sup> Respondent/Applicant sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. THAT this Petition be struck out for being otherwise an abuse of the process of the court and or alternatively, the same be converted to a Plaint and Amended accordingly.
  - d. THAT the costs of the application be provided for.
8. The application was premised on the grounds, testimonial facts and the averments on the face of the application and the 17 Paragraphed Supporting Affidavit of JOSEPH MANZI MUNYITHYA the Interested Party herein and one (1) annexure marked as “JMM - 1” annexed thereto. The Applicant averred that:
  - a. It was admitted by all sides that at the time of filing this Petition that his client was one of the registered owners of Plot MN/I/11352 and MN/I/11353 (“the suit property”). This was confirmed by the Petitioners in their own pleadings and a fact he wished to overturn it through these proceedings.
  - b. It was true that part of the suit property had been sold and transferred to the 4<sup>th</sup> Intended Respondent. This fact was known to the Petitioners and formed part of the Petitioners documents. It was not contested that the Purchaser was the 4<sup>th</sup> Intended Respondent.
  - c. He knew that in the Petition the Petitioner had sought the following orders:-
    - i. A declaration that the demolition by the Respondent's is illegal, irregular, unprocedural and contrary to Articles 26, 27 (2), (4) & (6) 28, 29, 39, 43, 47, 56, 57 and 245 of the Constitution of the Republic of Kenya and was therefore null and void.
    - ii. An order restraining any purported demolition and/or forceful eviction by the Respondent against the Petitioners.



- iii. A declaration that the Petitioners herein are entitled to the full protection from discrimination and the same right has been violated and they are entitled to full compensation as a result of loss suffered during and after the illegal demolition of their structures.
  - iv. A declaration that the Petitioners herein and other members of the public are entitled to the full enjoyment of the right to economic and social rights that are about to be violated and are already violated.
  - v. An order that the costs of the reinstatement of the petitioners structures and/or houses and/or value of the petitioners' structures and/or houses be borne by the Respondents.
  - vi. General damages for unlawful eviction, injury, loss and damage caused and the violation of human rights.
  - vii. Special damages amounting to Kshs. 200,000/-.
  - viii. Exemplary damages.
  - ix. Costs of this Petition.
- d. From the face of these prayers, he noted that there was no prayer for declaration that the Petitioners are the registered or beneficial owners of the property.
  - e. It was within his knowledge that his client swore an affidavit on 24<sup>th</sup> November, 2023. For ease of reference he annexed hereto a copy of the same and mark it annexure as a "JMM - 1".
  - f. He had received instructions from his client that she wished to cross examine the Petitioners at a full hearing. It was within his knowledge that in this Petition directions were given that the same be determined by way of written submissions. Indeed, it was within his knowledge that the Petitioners had filed and served their written submissions. Equally, it was within his knowledge that they had filed and served their clients written submissions. As at that moment, he knew as a lawyer that there was no room for them to cross examined the Petitioners.
  - g. He had equally received instructions from his client to request the Court to allow her to file a bundle of documents and summon several witnesses in support of her case. In this case and as he had explained, there was no room to file witness statements and bundle of documents given that the Petition was to be determined by way of written submissions.
  - h. He had now seen the application by the Petitioners dated 24<sup>th</sup> October, 2023 in which the Petitioner had introduced four other parties who were not there at the beginning of this matter. The Court had now to give new directions to determine how the new parties are to join the suit and what documents the said parties can file. In this, he remembered that on 18<sup>th</sup> January, 2024 the court directed how that application was to be dealt with. That process never granted his client an opportunity to file documents and cross-examine the Petitioners.
  - i. He had equally discussed the Petition as drawn with their client, the same never met the threshold of a Constitutional Petition as laid out in the case of "Amarita Karim Njeru – Versus - republic [1976-80]1KLR 1283" and "Trusted Alliance Society of Human Rights – Versus - Attorney General and others [2015] eKLR" and subsequent decisions by the Courts in Kenya.



- j. He had seen one of the substantive prayers in the Petition was for reinstatement. In this case, the Petitioners had not disclosed any document to show how they acquired the property. From a perusal of the Petition, he had noted that the claim of the Respondent was based on the doctrine of adverse possession. In this case, he could denote as a lawyer that the claims for Title under adverse possession was filed by way of Originating Summons under the provision of Order 37 of the Civil Procedure Rules 2010. He had done his research and seen the judicial trends in dealing with claims of this nature where squatters filed a Constitutional Petition to claim land instead of Originating Summons. He took the position that the right approach of the Petitioners was to file the claim by way of Originating Summons and or by way of an ordinary suit initiated by a Plaintiff. For this reason, the court had two (2) options namely:-
  - a. Strike out the Petition and direct the Petitioners to file an ordinary suit either by way of a Plaintiff or Originating Summons; or.
  - b. Direct that the Petition be amended to a Plaintiff and directions be given thereafter.

Their client's instruction were to urge the Court to strike out the petition for failure to meet the legal threshold of a Constitutional Petition.
- k. He was present in court on 18<sup>th</sup> January, 2024 when this matter came up for mention. Certainly, those directions had opened a new frontier of litigation by introducing new parties informally. Along the way there were orders being sought outside the framework of the Petition. This would certainly expose their clients.
- l. Having sold the suit property to a none party, and considering that the Petitioners were challenging the legality of that sale, their client wishes to file a Counter-claim and claim among other things, damages for trespass, damages associated with possible frustration of the sale of the suit property to a third party and indemnity should the third party purchaser file a claim against their client. This demanded a Plaintiff being filed but not the current Constitutional Petition.
- m. He urged the Court to grant the prayers sought in his application.

## **V. Submissions**

- 9. On 18<sup>th</sup> and 30<sup>th</sup> January, 2024 respectively, while all the parties were present in Court, they were directed to have the two (2) Notices of Motion application dated 24<sup>th</sup> October, 2023 and 27<sup>th</sup> January, 2024 be disposed of by way of written submissions. Pursuant to that all the parties obliged and a ruling date was reserved for 25<sup>th</sup> March, 2023 by Court accordingly.
  - A. The written submissions for the 1<sup>st</sup> Respondent in support of the 2<sup>nd</sup> Respondent/Applicant's application 27<sup>th</sup> January, 2024
- 10. The 1<sup>st</sup> Respondent through the law firm of Messrs. Waziri Omollo & Company Advocates filed their submissions which were undated. Waziri Advocate stated that the submissions before this Honourable court emanates from this court's direction on 20<sup>th</sup> February 2024 that the Notice of motion dated 27<sup>th</sup> January 2024 be canvassed by way of written submissions.
- 11. The 2<sup>nd</sup> Respondent's filed the Notice of Motion dated 27<sup>th</sup> January 2024 seeking the orders as set out herein above. The application was supported by a Supporting Affidavit dated 27<sup>th</sup> January, 2024. The



1<sup>st</sup> Respondent informed court on 20<sup>th</sup> February 2024 that they had no intentions of filing a Replying affidavit on the 2<sup>nd</sup> Respondents application as they wholly joined and are fully associated with the 2<sup>nd</sup> Respondents on the issues raised in the application.

12. On the issues for determination, the Learned Counsel relied on the following three (3) issues. Firstly, whether the Petition met the threshold of a Constitutional Petition. The Learned Counsel submitted that the court in the celebrated case of “Anarita Karimi Njeru – Versus - Republic 1976-1980 KLR 1272” held that when a Petitioner approaches the court for redress of a violation of a constitutional right he must with precision state the right, the provision of constitution under which that right is provided and the manner in which he alleges that the right has been violated. The observations of courts regarding this issue over time were qualified by the decision of the Court of Appeal in the case “Mumo Matemu - Versus - Trusted Society for Human Rights Alliance & 5 Others [2013] eKLR” where the court observed that what is needed is not a formulaic approach to the drafting of the pleadings but that the claim of violation must be discernible from whatever pleadings have been placed before the court. The court observed as follows:

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

13. The Court of Appeal in the “Mumo Matemu case” observed that:

“Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in “Anarita Karimi Njeru (supra)” that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today: “The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...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.”

14. In the case of “Humprey Mutegi Burini & 9 Others – Versus - Chief of the Kenya Defence Forces & another [2017]eKLR” (Mativo J) observed as follows:

“In my view, the above are generalized allegations. There are ten Petitioners in this Petition. It would have been prudent for the Petition to contain particulars of the alleged violations subjected upon each Petitioner, the loss or damage if any suffered and specify the injuries suffered whether physical or physiological. The Petition ought to contain details of the alleged place of arrest for each Petitioner, detention, conditions at the place of detention and a chronology of the torture inflicted and if possible the culprits. That way, the Respondents



would have been confronted with a specific claim to respond to. To, me, this petition lacks clarity and with tremendous respect discloses extremely poor pleadings and does not conform to the rule 10 (2) edited above. It is difficult for the court to determine the nature and extent of torture meted on each petitioner and arrive at a fair and reasonable compensation in absence of such clarity and specify.”

15. The Learned Counsel contended that the Petitioner in this case had presented their Petition and some of the allegations in the Petition point out to a claim of Land Adverse possession. Drawing from the decisions cited above, it was indeed evident that the kind of specificity required of a Petitioner by the holding in “Anarita Karimi Njeru (supra)” has not been met by the Petitioners in the instant petition and that therefore this petition is defective.
16. The Learned Counsel referred Court to the case by the Supreme Court of Kenya in “Communications Commission for Kenya & 5 others – Versus - Royal Media Services Limited & 5 others [2014] eKLR” on the same element of specificity and precision stated thus:

“Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision In Anarita Karimi Njeru – Versus - Republic [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”
17. The Learned Counsel averred that the Petitioner in this case although alleged violation of the provision of Articles 29 (c), 27(1), 29(A), 40 and 47 of the Constitution of Kenya 2010 but he had failed to clearly demonstrate to this court how the stated provisions of the law had been denied, violated or infringed or threatened, a party invoking this article had to show the rights said to be infringed, as well as the basis of his or her grievance. This was clearly not demonstrated.
18. Secondly, on whether the Petitioners could pursue a claim of title for Land Adverse possession with a view of claiming legal rights over parcels of land owned by 1<sup>st</sup> and 2<sup>nd</sup> Respondents in a Constitutional Petition. The Learned Counsel submitted the Petitioner in his claim alleged that sometimes in the year 1995 or thereabout their forefathers resumed occupation of Land Reference No.11353/1/MN and 11352/1/MN which arose from the original suit parcel of land known as MN/1/317 which originally belonged to a white settler who deserted the property and his whereabouts was unknown till to date. The Petitioner further averred that up until they were evicted by the respondents, they enjoyed quiet and peaceful occupation of the suit property wherein they constructed semi-permanent structures where they peacefully resided with their families.
19. From the above description which was clearly indicated on their Petition it went without saying that as a result of the long uninterrupted and continuous occupation of the portion of Land they allege to have acquired title under the doctrine of adverse possession and have acquired rights to own and occupy land which according to them it is protected under the provision of Article 40 of the Constitution of Kenya, 2010. The doctrine of Adverse Possession was one of the ways of acquiring land in Kenya. The statutory provisions that underpin the doctrine of adverse possession is set out under the provisions of Sections 7,13 and 38 of Limitations of Actions Act Cap 22 and Order 37(1) of the Civil Procedure Rules, 2010.



Section 7 of the Limitation Act provides that:-

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 13 of the Limitation Act on the other hand provides:

A right of action to recover land does not accrue unless the land is in possession of some person in whose favor the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9,10,11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act the land in reversion is taken to be adverse possession of the land.

20. Finally, the provision of Section 38 of the Limitation Act states:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

(2)An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

21. The Learned Counsel argued that the procedure for filing a claim for adverse possession in Kenya is provided for under the Order 37 of the Civil Procedure Rules, 2010 wherein a person was required to file an Application under the provision of Section 38 of the Limitation of Actions Act, cap. 22 by way of an Originating Summons supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.

22. To buttress on this point, the Learned Counsel cited the case of “ELC (Mombasa) Petition No. 15 of 2017 - Bandari Investment Company Limited- Versus- National Police Service Others eKLR (2021)”, where Justice Sila Munyao had this to say:

“My position is that the Petitioners ought to have filed an ordinary Civil Suit rather than a Constitutional Petition. There are indeed issues raised by the 6<sup>th</sup> to 23<sup>rd</sup> Respondents which cannot be heard and determined through this Petition. For instance, the 6<sup>th</sup> to the 23<sup>rd</sup> Respondents have raised the issue of Land Adverse Possession and have provided to me several case that they have filed where they seek orders of adverse possession in their favour. I cannot determine an issue of adverse possession through a Petition and I cannot wish away their responses.tf indeed there is a question whether the 6<sup>th</sup> to 23<sup>rd</sup> Respondents are in adverse possession, that is a question that can only be determined through a hearing in an ordinary Civil suit”.



23. It was therefore evident that the Petitioners in this case have a claim for Adverse possession and they have filed a Petition instead of an Originating summons. This was therefore not the proper mode to institute this suit and therefore the parties herein were not entitled to the reliefs sought from the filed pleadings. The Learned Counsel referred Court to its own decision on the same matter in the case of:- “Kyule & 640 others – Versus - County Government of Kajiado & 5 others (Constitutional Petition 25 of 2020) [2023] KEELC 16997 (KLR)(21 March 2023) (Judgment)” where Justice L. Naikuni had this to say on this issue:-

“In direct application of the above cited provisions, certainly I conversely state that a Constitutional Petition is not an appropriate mechanism to ventilate claims based on title for Land adverse possession. For avoidance of doubt this issue is better dealt with through laid down procedure”

24. Additionally, the Learned Counsel held that Justice Sila Munyao in the case:- “Parkire Stephen Munkasio & 14 others – Versus - Kedong Ranch Limited & 8 others [2015] eKLR” rendered himself thus:-

I think this is a good point to also address the argument that this Petition is incompetent for seeking to pursue a claim for adverse possession as a Constitutional Petition. I agree with this argument. Claims for adverse possession are adequately addressed by the Limitation of Actions Act, CAP 22, Laws of Kenya, and the Civil Procedure Rules, specifically Order 37 thereof. Claims of adverse possession are private law claims which need to be addressed through the private law legal channels provided. I do not see how the Petitioners can assert a claim for adverse possession, a purely private law claim, through a constitutional petition. Indeed I doubt if there is a constitutional violation which one will point at, when pursuing a suit for adverse possession. It follows that even if I am wrong on the point that the issue of adverse possession on behalf of the same parties herein has previously been litigated, the aspect of this Petition, that relates to pursuance of a right over land by dint of adverse possession is incompetent, for there are laid down procedures on how to pursue an adverse possession suit, which ought to be followed.”

25. Thirdly, on whether this Honourable Court should dismiss and/or strike out the Petition against the Respondents. The Learned Counsel submitted under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010 empowers the court:-

“At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that-

- a. It discloses no reasonable cause of action or defence in law; or
- b. It is scandalous, frivolous or vexatious; or
- c. It may prejudice, embarrass or delay the fair trial of the action; or
- d. It is otherwise an abuse of the process of the Court and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.



26. In the Kisii High Court Petition No. 3 of 2020 “Peter Ochara Anam 3 Others – Versus - Constituency Development Fund Board & 3 Others (2011) eKLR” Asike-Makhandia J.(as he then was) stated:
- “.....of what use will be constitutional petitions or references if they are turned into a panaceas for all legal problems that the citizens of this Country may have or imagine? I don't think the Constitution was meant to replace statutes that provide remedies to those concerned.”
27. Further in “Ben Kipngeno & 6 Others – Versus - Attorney General & Another (2007) eKLR”, the Court, when faced with similar circumstances, held that recourse to Court by way of a constitutional petition:
- “...is not meant for every contravention falling under other under other statute would be rendered useless if parties were to transfer every contravention into a constitutional issue...”
28. In light of the foregoing, the Learned Counsel submitted that the Petitioners Petition dated 24<sup>th</sup> June 2022 was scandalous, frivolous and vexatious. That the same was an abuse of the court process and the same should be struck out with costs to the Respondents. The Petitioners against Respondents should be dismissed and/or struck out for reasons that have been submitted above and further for reasons that the suit was Res Judicata as there was an existing matter pending trial before court.
29. In conclusion, the Learned Counsel submitted that the 2<sup>nd</sup> Respondents application dated 27<sup>th</sup> January 2024 be allowed for reasons that the Petition failed to meet the threshold of a Constitutional Petition and the same should be struck out with costs to the Respondents.
- B. The written submissions by 2<sup>nd</sup> Respondent in support of application dated 27<sup>th</sup> January, 2024
30. The 2<sup>nd</sup> Respondent through the Law firm of Messrs. Munyithya, Mutugi, Umara & Muzna Co. Advocates filed their submissions dated 4<sup>th</sup> March, 2024. Mr. Munyithya Advocate commenced his submissions by stating that these were the submissions in support of the Application dated 27<sup>th</sup> January, 2024. The said application sought for the above stated orders. According to him, the brief background were that all the averments made in the Supporting Affidavit deponed by JOSEPH MANZI MUNYITHYA to wit:
- a. The 2<sup>nd</sup> Respondent/ Applicant was one of the registered owner of Plot MN/I/11352 and MN/I/11353 (“the suit property”).
  - b. The suit property was sold and transferred to the 4<sup>th</sup> Intended Respondent.
  - c. The Petitioners are trespassers in the suit property .
  - d. The Petition is crafted in a manner seeking adverse possession in favour of the Petitioners/ Respondents. A claim under adverse possession is made by way of Originating Summons under Order 37 of the Civil Procedure Rules 2010.
31. The Learned Counsel submitted that the Petitioners/Respondents were yet to respond to the Application thus rendering the same unopposed. Further, the Petitioners/ Respondents were yet to respond to the 2<sup>nd</sup> Replying Affidavit in response to the Petition traversing the issues raised therein despite taking direction to do so. These facts thus stand untraversed.



32. On whether the Petition met the threshold of a Constitutional Petition, the Learned Counsel was guided by the case of in “Mumo Matemu (Supra)” where the Court of Appeal endorsed the decision in “Miscellaneous Criminal Application 4 of 1979, Anarita Karimi Njeru (Supra)” and stated as follows:-

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

33. The Court of Appeal further proceeded to state that:

“Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap. 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.”

34. The Learned Counsel submitted the Petition before this Honourable Court was an omnibus pleading crafted with an intention to mislead and potentially embarrass the Court. A keen look at the Petition at Paragraphs 9, 10, 11, 12 and 13 clearly allude to a claim of adverse possession against the suit property on the one hand. However, Paragraphs 13, 14, 20, 21, 22, 23, 24, 30 to 46 clearly dictated an alleged breach of proprietary rights accruing to the Petitioners on the other. It was a principle of law that parties could not probate and approbate in their pleadings especially where such averments were inimical to each other. They relied on the findings in “Republic – Versus – Institute of Certified Public Secretaries of Kenya, Ex - Parte Mundia Njeru Geteria” where the Court held:-

“.....I do agree with KPSK that the Applicant is approbating and reprobating and should not be entitled to Judicial Review orders. In R - Versus - KENYA REVENUE AUTHORITY ex parte ABERDARE FREIGHT SERVICES LTD HDWC App. 9410/04, the court found the Applicant to be guilty of both legal and factual misrepresentations and the court held that the Applicant’s conduct disentitled it to the orders of Judicial Review which are discretionary in nature. It is obvious that Mundia is approbating and reprobating which is an unacceptable conduct. Such conduct was considered in EVANS -Versus - BARTLAM (1937) 2 ALL ER 649 at page 652 where Lord Russel of Killowen said;

“The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a Judgment cannot allege the invalidity of the judgment which conferred the benefit.”





The Petitioners would face no prejudice while seeking the alternative mode of disposing this matter as all issues would be adequately addressed.

41. The Learned Counsel argued that the same was no mere technicality as the provisions of the law enable a claim be properly placed before the Court and that the ingredients for the claim follow from the pleadings as set out under the provision of Order 37 and the prejudice of using this Petition as a stalking horse for a claim under adverse possession to be heard via Affidavit Evidence in the Petition herein would be oppressive to the Respondents.
42. On abuse of court process, the Learned Counsel submitted that the 2<sup>nd</sup> Respondent based his application upon the provision of Order 2 Rule 15 1(d) of the Civil Procedure Rules 2010. To support his point herein, the Learned Counsel cited the case of: -“John Harun Mwangi – Versus - Peter Gastrow & 3 Others [2014] eKLR” . The Court held that the Constitution only ought to be invoked when there was no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

“ Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all...”

43. Further, in addressing the issue in striking out of pleadings the Court of Appeal in the case of: -“Kivanga Estates Limited – Versus – National Bank of Kenya Limited [2017] eKLR” held:-

“ Striking out a pleading, though draconian, the Court will, in its discretion resort to it, where, for instance, the Court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious.

44. Therefore, Learned Counsel submitted that this Honourable Court exercises its judicial discretion in granting orders to strike out the Petition.
45. In conclusion the Learned Counsel urged the Honourable Court to grant the prayers sought in the Application dated 27<sup>th</sup> January, 2024 as they were merited. The Applicant had demonstrated that the Petitioners/Respondents’ Petition failed to satisfy the threshold of a Constitution Petition and is for striking out.

## **VI. Analysis and Determination**

46. I have carefully read and considered the pleadings herein, the elaborate written submissions and the cited authorities by the parties herein, the relevant provisions of the Constitution of Kenya, 2010 and the statutes. In order to arrive at an informed, fair and reasonable decision, the Honorable Court has crafted three (3) salient issues for its determination. These are:-
  - a. Whether the Notice of Motion dated 27<sup>th</sup> January, 2024 is merited?
  - b. If (a) is in the negative, whether the Notice of Motion dated 24<sup>th</sup> October, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.



- c. Who will bear the Costs of Notice of Motion application 24<sup>th</sup> October, 2023 and 27<sup>th</sup> January, 2024.

ISSUE No. a). Whether the Notice of Motion dated 27<sup>th</sup> January, 2024 is merited

47. From this omnibus application, it is instructive to note that there are two – fold prayers sought by parties. First, the Petitioners have sought to be granted Interim injunctive orders in order to preserve the suit property pending the hearing and final determination of the main Petition. Secondly, the Respondents wishes to have the suit struck out for being an abuse of the due process of the Law. The Honourable Court shall endeavor to deal with the double issues in this Ruling accordingly.

48. Under this sub - title, the Court shall examine whether or not to strike out the Petition, for failure to raise any constitutional issues. Under the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010 which provides for striking out of pleadings states as follows: Rule 15

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or
  - (b) it is scandalous, frivolous or vexatious; or
  - (c) it may prejudice, embarrass or delay the fair trial of the action; or
  - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.”

49. The Main grounds raised by the 2<sup>nd</sup> Respondent/ Applicant in this application are:

- i. The Petition is wrongly drawn to grant the Petitioners Title to land without initiating proceedings by way of originating summons for adverse possession.
- ii. The Petition does not raise issues which cannot be addressed by way of an ordinary suit or initiated by way of a plaint or by originating summons.
- iii. The Petition as drawn is an omnibus pleading and it possess the potential of embarrassing parties and the court as there is no opportunity for filing witness statements, bundle of document, and or cross-examination of witnesses.
- iv. The Petition as drawn does not meet the threshold of a constitutional petition as laid out in the case of “Anarita Karim Njeru (Supra)” and emphasized in “Trusted Alliance Society of Human Rights – Versus - Attorney General and others [2015] eKLR” and subsequent decisions by Kenyan courts.
- v. The court has jurisdiction to direct the Petition to be amended into a Plaint and allow the Respondents and the interested parties to file replies by way of Defence and Counter - Claim.



50. In examining the alleged grounds posed out by the 2<sup>nd</sup> Respondent, the Court will examine the Petition and the prayers made by the Petitioners and whether or not the issues addressed amount to issue that should be raised for adverse possession. The Petitioners sought the following prayers:-

- i. A declaration that the demolition by the Respondent's is illegal, irregular, unprocedural and contrary to Article 26, 27(2) (4) & (6) Article 28, Article 29, Article 39, Article 43, Article 7, Articles 56, 57 and 245 of the Constitution of the Republic of Kenya and is therefore null and void.
- ii. An order restraining any purported demolition and/or forceful eviction by the Respondent against the Petitioners.
- iii. A declaration that the Petitioners herein are entitled to the full protection from discrimination and the same right has been violated and they are entitled to full compensation as a result of loss suffered during and after the illegal demolition of their structures.
- iv. A declaration that the Petitioners herein and other members of the public are entitled to the full enjoyment of the right to economic and social rights that are about to be violated and are already violated.
- v. An order that the costs of the reinstatement of the petitioners structures and/or houses and/or value of the petitioners' structures and/or houses be borne by the Respondents.
- vi. General damages for unlawful eviction, injury, loss and damage caused and the violation of human rights.
- vii. Special damages amounting to Kshs. 200,000/-.
- viii. Exemplary damages.
- ix. Costs of this Petition.

51. The 2<sup>nd</sup> Respondent through the Replying affidavit of Joseph Manzi Muniyithya, has averred that it was admitted by all sides that at the time of filing this petition his client was one of the registered owners of Plot MN/I/11352 and MN/I/11353 ("the suit property"). This was confirmed by the Petitioners in their own pleadings and a fact he wished to overturn through these proceedings. Part of the suit property has been sold and transferred to the 4<sup>th</sup> Intended Respondent. This fact is known to the Petitioners and forms part of the Petitioners documents. It is not contested that the Purchaser is the 4<sup>th</sup> Intended Respondent. According to the 2<sup>nd</sup> Respondent on the face of the prayers, there were no prayers for declaration that the petitioners are the registered or beneficial owners of the property.

52. The Deponent averred that he had received instructions from his client that she wished to cross examine the Petitioners at a full hearing. It was within his knowledge that in this petition directions were given that the same be determined by way of written submissions. Indeed, it was within his knowledge that the Petitioners had filed and served their written submissions. Equally, it was within his knowledge that they had filed and served their clients written submissions. As at that moment, he knew as a lawyer that there was no room for them to cross examined the Petitioners. He had equally received instructions from his client to request the Court to allow her to file a bundle of documents and summon several witnesses in support of her case. In this case and as he had explained, there was no room to file witness



statements and bundle of documents given that the Petition is to be determined by way of written submissions.

53. The relevant provisions that grant the Environment and Land Court jurisdiction are Article 162(2) of the Constitution which provides as follows:

“ 162.

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to
  - (a) employment and labour relations; and
  - (b) the environment and the use and occupation of, and title to, land.
  - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

54. Pursuant to provisions, the Environment and Land Court Act was enacted which elaborates on the jurisdiction of the Environment and Land Court in the provision of Section 13 thereof as follows:

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
  - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - (b) relating to compulsory acquisition of land;
  - (c) relating to land administration and management;
  - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - (e) any other dispute relating to environment and land
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

55. Under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a Petitioner must disclose facts relied upon, constitutional rights and freedoms violated, nature of injury caused, capacity to bring the petition, details relating to related civil/criminal matter and the reliefs sought. This Honourable Court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of



the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided. Further, it is important to fathom that the Constitution is “a living instrument having a soul and consciousness of its own”. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

56. The threshold of what amounts to constitutional Petition, and has been elaborately submitted by all the Learned Counsels herein, was set out in “Anarita Karimi Njeru (Supra) and “Trusted Alliance Society of Human Rights – Versus - Attorney General & 5 Others [2013] eKLR”. Trevalyan J (as he then was) and Hancox J (as he then was) stated as follows:

“We would however again stress that if a person is seeking redress from High Court on a matter which involves a reference to the Constitution it is important (if only to ensure that justice is done to his/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

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

57. 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”.

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

58. In the case of:- “Meme – Versus - Republic [2004] 1 E.A. 124”, the court held a Petitioner must set out with reasonable degree of precision the complaint and the manner in which the rights have been infringed with clear focus on fact, law and the Constitution. This was the same position in the case of “Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & Others [2013] eKLR” and “John Mbogua Getao – Versus - Simon Parkoyiet Mokare & 4 others [2017] eKLR”.

59. The Petitioner is required to demonstrate that an impugned decision or action violates or threatens to violate the bill of rights or the Constitution for that matter. Its this Honourable Court’s view that a claim under substantive law, and the proper course is to bring the claim under the law and not the constitution. It is the view of this court that the Petitioners’ claim cannot be elevated to constitutional questions as they seek the court to believe. The several provisions under the Civil Procedure Act, Cap.21 and the Land Act afford a robust procedure and remedy which is an efficacious and satisfactory response to the Petitioner’s grievances.

60. In saying so, I seek refuge from the case of:- “Bethwell Allan Omondi Okai – Versus - Telkom (K) Ltd (Founder)& 9 others (2013) eKLR” Lenaola J (as he then was) said:-

“While I am alive to this Court’s unlimited jurisdiction under Article 165 (3) (a) of the Constitution, I do not think as can be seen elsewhere above that the Petitioner has raised



any constitutional matters to warrant the intervention of the Court under Article 165 (3) (a). In any event, this Court in *International Center for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta and Others*, Petition No. 552 of 2012 held that the unlimited original jurisdiction of this Court could not be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances such as the one raised by the Petitioners. The Court of Appeal has also upheld this reasoning in *Speaker of National Assembly – Versus - Njenga Karume* [2008] 1 KLR 425, where it held that:-

“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

61. This Honourable Court in the instant case finds that it must guard against improper transmissions of normal disputes or ordinary issues of litigation being clothed in Constitutional Petitions. The Court is alive to the existence of alternative remedy or procedure in bringing the Claim by the Petitioners before Court that may not oust the jurisdiction of the Court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand. It was held in the High Court case of “*Bernard Murage – Versus - Fineserve Africa Ltd & 3 others* (2015) eKLR” that:

“Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy be pursued first”

62. It is a principle that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of “*Anarita Karimi Njeru* (supra)” as discussed above. The Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.

63. In the case of “*Dr. Rev. Timothy Njoya – Versus - The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013*” stated;

“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated.”

64. On perusal of the Petitioners pleading, the evidence as well as the submissions of the Parties, it is my critical and considered view that the Petitioners have not met the requirements of a constitutional Petition. Although the Petitioners have pleaded provisions of the Constitution, they have not demonstrated to the required standard how their individual rights and fundamental freedoms were violated, infringed or threatened by the Respondents. They have not adduced any evidence to demonstrate the alleged violations. The issues in question here are adverse possession and there are procedures to bringing such claims before Court.

65. Going back to the issue of striking out the suit, it should be in the clearest of cases. As it would be unfair that failure to provide the documents in questions would amount to or lead to the dispensation of the suit at this preliminary stage a fact that would be against the principles of natural justice and fair



hearing. The provision of Articles 25 ( c ), 47 and 50 (1) of the Constitution of 2010 attest to that legal principle. Article 50 ( 1 ) provides:-

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

66. The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed or where in this case the matter does not raise any constitutional issues. It is therefore incumbent that when the court is called upon, like in this case, to determine whether a party can file a fresh suit after the first one has been dismissed or struck court, the court should look at the circumstances of each case to arrive at a decision.
67. Be that as it may I find the notice of application dated 27<sup>th</sup> January, 2024 is meritorious and proceed to allow it as prayed. Resultantly, having allowed the striking out of the Petition is will not be imperative for this Court to examine the notice of motion application dated 24<sup>th</sup> October, 2023 as the Court is not seized with jurisdiction any more and downs it pen.

ISSUE No. b). Who will bear the Costs of Notices of motion applications dated 27<sup>th</sup> January, 2024 and 24<sup>th</sup> October, 2023.

68. It is well established that the issue of Costs is at the discretion of the Court. Costs meant the award that a party id awarded upon the conclusion of a legal action or proceeding in any litigation. The provision of Rules 26 (1) and ( 2 ) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practices and Procedure Rules), 2013; Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By the events it means the outcome or result of the said legal action.
69. In this case, Court finds that the Petition instituted by the Petitioners fails to meet the fundamental threshold of a Constitutional Petition. Thus, following the fact that the application by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are found to be meritorious, they shall have the costs of the said applications.

## **VII. Conclusion & Disposition**

70. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest and the framed issues with regard to the Preponderance of probability and the balance of convenience. Clearly, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent/Applicant have established a case against the Petitioners/Respondents. For that reason, therefore, I do proceed to order the following:-
- a. THAT the Notice of Motion application dated 27<sup>th</sup>\*January, 2024 be and is hereby found to have merit and is hereby allowed in entirety with costs.
  - \*\*b. THATthe Notice of Motion application dated 24<sup>th</sup>October, 2023 stand undetermined as it has been overtaken by events and therefore be and is hereby struck out.
  - c. THAT the Petition dated 24<sup>th</sup> June, 2022 be and is hereby struck out for lacking a constitutional basis.
  - d. THAT the costs of the Notice of Motion application dated 24<sup>th</sup> October, 2023 and application dated 27<sup>th</sup>\*January, 2024 are awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for participating in them.

**IT IS SO ORDERED ACCORDINGLY.**



RULING DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND AT  
MOMBASA THIS .....15<sup>TH</sup> ..... DAY OF .....MAY.....2024.

.....

**HON. MR. JUSTICE L. L. NAIKUNI,**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

**Ruling delivered in the presence of:**

- a. M/s. Firdaus, the Court Assistant.
- b. No appearance for the Petitioners/Respondents.
- c. No appearance for the 1<sup>st</sup> & 2<sup>nd</sup> Respondent/Applicant.

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