



Ragen (Suing in the Public Interest and on His Own Capacity and on behalf of Mwakirunge Community Residents) v Nato & 2 others (Miscellaneous Application 40 of 2022) [2025] KEELC 590 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEELC 590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS APPLICATION 40 OF 2022
LL NAIKUNI, J
FEBRUARY 14, 2025**

BETWEEN

AINEA RAGEN (SUING IN THE PUBLIC INTEREST AND ON HIS OWN CAPACITY AND ON BEHALF OF MWAKIRUNGE COMMUNITY RESIDENTS) APPLICANT

AND

GODFREY NYONGESA NATO 1ST RESPONDENT

HASSAN ALI JOHO 2ND RESPONDENT

SAMSON KIBET 3RD RESPONDENT

RULING

I. Introduction

1. This Honorable Court was tasked to make a determination onto the Preliminary objection dated 6th July, 2022 raised by The County Attorney, for the 1st, 2nd and 3rd Respondents herein.
2. Upon service of the Preliminary objection, while opposing it, the Applicant responded to the Replying Affidavit sworn on 22nd July, 2022.

II. The 1st, 2nd and 3rd Respondents' case

3. The 1st, 2nd and 3rd Respondents' raised a preliminary objection was based on the grounds that the Application offended the provision of Order 1, Rule 13 of the Civil Procedure Rules, 2010. It provides that:-
 - a. Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner,



where there are more defendants than one, anyone or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

- b. The authority shall be in writing signed by the party giving it and shall be filed in the case.

III. The Response by the Applicant

4. The Applicant responded to the Preliminary objection through a 31 Paragraphed Replying Affidavit sworn by Ainea Ragen on 22nd July, 2022. The Applicant averred that:
 - i. Mwakirunge community residents were individuals, farmers, families, natives, who were residents of Mwakirunge within the County of Mombasa and had a common culture, unique mode of livelihood and socio-economic interest.
 - ii. On 9th May, 2022, the Deponent filed an application/Petition being no. ELC PET. E017 of 2022 under certificate of urgency seeking this Honourable court's order stopping further dumping of wastes in Mwakirunge dumping site.
 - iii. On the same day of 9th May 2022, the Honourable Court issued a temporary injunctive orders restraining the County Government of Mombasa among other parties from further dumping wastes of any nature or form in Mwakirunge in the publicly known Mwakirunge dumpsite pending hearing and determination of the filed Petition referenced here above.
 - iv. The Applicant served the order upon all the Respondents in the referenced matter as stated in Paragraph 3 here above who appended their respective signatures and organization's stamps on the return copy.
 - v. The Applicant relied on the following grounds of opposition to the preliminary objection:-
 - a. When an individual or organization has been taken to court for a violation of law and a ruling or an order is made against them, the law has provided for avenues of appeal within a specific timeline which was 14 days. The 1st and 2nd Respondents never challenged the same order in court by filing for an appeal within the stipulated legal timelines if they were dissatisfied with the order, but continued to disobey the same court order by their continued dumping of wastes on Mwakirunge, publicly known as Mwakirunge dumpsite.
 - b. For a court of law to make a determination on a matter, the court bases its determination upon perusing facts and evidences brought before it and that's why a certificate of urgency facility had been provided for in the justice system that any person can institute court proceedings under certificate of urgency and the courts listens and makes a determination as is the case that the said orders was issued.
 - c. The said order was issued on 9th May 2022 and all the Respondents served on 12th May 2022. It had taken the 1st and 2nd Respondents 54 days to act. Because the ONLY document from them challenging the order and the application was filed at the court on 6th July 2022. Why did it have to take the 1st and 2nd Respondents 54 days before acting if they were dissatisfied with the said court order.
 - d. The preliminary objection and its subsequent supporting affidavit of the 1st and 2nd Respondents should be dismissed by the Honourable for failure to appeal against the said order within the legal timelines of 14 days of appeal.



- e. It was on record that on 20th June 2022, the Counsel for the 1st and 2nd Respondents was in court and the Honourable judge sought to know from her WHY her clients were not obeying the said order issued by the Honourable court. The Counsel for the 1st and 2nd Respondents did not issue any substantive reason for the disobedience of the said court order by her clients. Upon being pressed further during the proceedings on the same date before the court, the said counsel lied on record that her client had responded to both the application and the order and boldly told the court that she had already filed a response at the court registry. The Honourable court should note that I was never served with the purported documents, neither was any existing documents filed at the court's registry by the counsel for the 1st and 2nd respondents as the ONLY record of documents filed by the respondents is dated 6th July 2022 as shown in their stamped supporting affidavit. There is no any other document filed on or before 20th June 2022 by the Respondent's Counsel either challenging the said order or responding to the application that led to the issuance of the said order.
- f. Therefore, the contents of Paragraph 6 of the supporting affidavit to the preliminary objection of the 1st and 2nd Respondents was deceptive, lacks merit and should be dismissed by the Honourable court.
- g. Mwakirunge dumpsite began operating around year 2007 illegally without relevant licenses by the National Environment Management Authority's in contravention of Sections 58, 60, 63, 87, 88, 90 of the Environmental Management and Co - ordination Act herein EMCA.
- h. The National Environment Management Authority herein NEMA on 26th April 2011 following an EIA study report submitted to it by the proponents of Mwakirunge dumpsite, who were by then the defunct Municipal Council of Mombasa, gave a technical advisory to the proponents to seek and alternative site. Annexed to this reply affidavit and Marked as "RC - 1" was NEMA letter in response to my request for copy of EIA license.
 - i. Kenya Civil Aviation Authority, Kenya Airports Authority and Kenya Airways all objected to the dumping of wastes at Mwakirunge the publicly known as Mwakirunge dumpsite stating that the dumpsite sits on Aircraft flight path to Moi International Airport and that a bird strike could happen any time. Annexed herein to this Reply Affidavit and marked as "RC - 2" dated 29th December 2011, "RC - 3" dated 14th June 2011 and "RC - 4" dated 22nd June 2011 were their letters of objections respectively.
- vi. On 23rd November 2019, Mwakirunge community residents wrote a petition addressed to the County Assembly of Mombasa seeking the intervention of the assembly in addressing grave environmental human rights concerns raised by the residents but the Petition fell on deaf ears. The copy of the said Petition was annexed to this Reply Affidavit and marked as "RC - 5".
- vii. An independent research titled; The appalling state of the mwakirunge dumpsite, carried out by Actionaid Kenya and published in year 2015 a report which was copied to COunty Government of Mombasa detailed serious environmental human rights violations showing the following:-
 - a. Rape



- b. Several deaths
- c. Fire
- d. Effect on children
- e. Drug abuse
- f. Resistance of access to justice for Mwakirunge community residents by County Government of Mombasa and shadowy profiteering business persons.
- g. Land violation
- h. Pollution

Copy of the research report was annexed to this affidavit and Marked RC-6.

viii. The same year 2015, a research carried out by Kenyatta University students School of Environmental Studies and commissioned by ActionAid on Mwakirunge dumpsite, a report which was copied to County Government of Mombasa, the researchers identified the following major negative impact faced by Mwakirunge community residents as a result of the dumpsite:

- a. The dumpsite has brought disease like Malaria, Typhoid, Diarrhea, Bilharzia, Amoeba, Respiratory infections, Skin diseases, Eyes/Nose irritation and burns among others.
- b. Air pollution
- c. School dropouts
- d. Moral decay
- e. Insecurity
- f. Burglary on nearby homes
- g. Marriage break ups

Copy of the report by Kenyatta University Students School of Environmental Studies was annexed to this reply affidavit and Marked RC-7.

ix. The supporting affidavit by the 1st and 2nd Respondents paragraphs 8, 9, 10 in support of the Preliminary Objection was deceptive, misleading and should be dismissed by the Honourable Court because the Environmental human rights abuses and violations at Mwakirunge dumpsite had been happening for the past 14 years under supervision of the 1st and 2nd Respondents and they also refused to act on advisory by legally constituted statutory bodies? AND he had also shown in this affidavit the advisory reports by various statutory bodies including KCAA, KAA and National Aircraft Carrier KQ AND how Mwakirunge community residents and Actionaid Kenya documented these violations.

x. What exactly has stopped County Government of Mombasa from seeking an alternative land for the past 14 Years or from year 2011 when KCAA, KAA and KQ raised objections? Were the 1st and 2nd Respondents waiting for an Aircraft accident to happen then start blame games? Were the 1st and 2nd Respondents waiting for deaths, sicknesses and moral decay among Mwakirunge residents to become pandemic before they act? What personal interest did the 1st and 2nd Respondents have in this dumpsite that they could not purchase an alternative land



using public money at their disposal when Mombasa county and its environs have plenty of unused land?

- xi. Did the 1st and 2nd Respondents had to wait all those years for the Application and Petition reference ELC PET E017 of 2022 to be instituted against County Government of Mombasa at the Honourable court before they respond by shedding “crocodile tears” before the court on how other Mombasa residents will suffer if the order was obeyed?
- xii. Does *the constitution* and relevant laws permit violation of one person’s rights to better the other person’s rights? The 1st and 2nd Respondents want this court to believe that it was right for them to violate the rights and fundamental freedoms of Mwakirunge community residents to protect the rights of other Mombasa residents.
- xiii. By their behavior as shown in this Reply Affidavit under the contents of Paragraphs 18,19 and 20, the 1st and 2nd Respondents have gone against the very foundation of Articles 21, 27, 28, 42, 43, 47 (1)(2), 56, 63, 69, 75 and 232 of the 2010 Constitution.
- xiv. In his preliminary investigations to ascertain the ownership of the land on which the dumpsites sat on, he wrote a letter to the County Land adjudication and settlement officer, copy of the letter was annexed to this affidavit and Marked as “RC – 8”. The officer did not provide any documentation as proof of ownership of the land.
- xv. His further investigations took him to the office of the Regional surveyor of Kenya Coast region seeking a copy of Registry Index Map for the land where the dumpsite sites. The Survey officer based at 12th floor Bima towers Mombasa searched their records and could not locate the Map and only concluded that the Land has not been surveyed, nor planned for any use as it belonged to the members of the community which occupied it, and therefore the actions by the defunct Municipal of Mombasa and subsequently by the County Government of Mombasa was a hostile takeover without due regard for *Community Land Act* and customary land rights.
- xvi. In Paragraph 16 of the Respondents’ affidavit in support of the preliminary objection, the 1st and 2nd Respondents are relying on Order 1 Rule 13 of the Civil Procedure Rules and he responded as follows:-
 - a. In his suit reference ELC MISC. E040 OF 2022, as the applicant, he had stated that apart from suing in the public interest and on behalf of Mwakirunge community residents, he had also shown that he was suing in his Own Capacity. And therefore this gives him leeway to act also as an individual and legally sue for contempt proceedings against the respondents in this suit pursuant to Articles 22(1)(2)and 258(1)(2) of the 2010 constitution.

“Ainea Ragen (Suing in the public interest on his own capacity and on behalf of Mwakirunge community Residents) Applicant”
 - b. Pursuant to Article 159(1)(2) of *the constitution* on Judicial authority states:
 - (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
 - (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles
 - (a) Justice shall be done to all, irrespective of status;



- (b) Justice shall not be delayed;
- (c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- (d) Justice shall be administered without undue regard to procedural technicalities.

The annexed copies of letters from KCAA, KAA, KQ, Mwakirunge community residents showed that there was an attempt to find an alternative dispute resolution in line with Article 159(2)(c) but the 1st and 2nd respondents deliberately refused to heed to their concerns because of vested personal interests.

xvii. On the merits of the case versus the technicalities the Deponent averred as follows:-

- a. The matter before the Honourable court touched on the rights and fundamental freedoms of Mwakirunge community residents which the 1st and 2nd respondents for several years have violated and continue to violate by virtue of their constitutional office AND for the respondents to invoke order 1 rule 13 of the civil procedure rules in support of their preliminary objection is a lame excuse. *The constitution* is SUPREME pursuant to Article 2 of the 2010 constitution.
- b. Article 159(2)(d) Justice shall be administered without undue regard to procedural technicalities.
- c. The proceedings before this court commenced out of a Constitutional Petition where rights and fundamental freedoms were and continue to be violated AND not a proceeding commenced under the Civil Procedure rules. Constitutional petitions were governed by *the constitution* and practice and procedure rules. He referred to the case of:- “Lynete Wambui Gitau – Versus - Kenya Methodist University (Kemu) (Petition 5 of 2020) Ruling before Justice JM Mativo.
- d. Rights and fundamental freedoms under the Bill of rights in *the constitution* were not granted by the state nor by any statutory organ of the state nor by any individual pursuant to Article 19(3)(a) and Article 19 (2) of *the constitution* states:
The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the Dignity of Individuals and Communities and to promote social justice and the realization of the potential of all human beings.
- e. Under Article 20(3)(b) of *the constitution*,
In applying provision of the Bill of Rights, a court shall-(b) adopt the interpretation that most favors the enforcement of a right or fundamental freedom.
- f. The proceedings before this Honourable court proceeded out of a constitutional petition, the Honourable court should be guided by *the constitution* of Kenya (Protection of Rights and Fundamental freedoms) and Practice and procedure rules which govern constitutional petitions as opposed to civil procedure rules. The order issued by the Honourable court was addressing a constitutional violation by the respondents. The respondents using power donated to them by the sovereign citizens of Kenya pursuant to Article 1 of the 2010 constitution violated and continue to violate the rights and freedoms of the same sovereign citizens.



- g. Article 159(2)(a)(b) of *the constitution* 2010:
 - (a) Justice shall be done to all, irrespective of status;
 - (b) Justice shall not be delayed.
- h. The 1st and 2nd Respondents preliminary objection is a scheme that if entertained by the Honourable court, will give impetus to the respondents and sets a Jurisprudence that will empower the would-be violators of rights and fundamental freedoms of the sovereign citizens of Kenya.
- xviii. The 1st and 2nd respondent's affidavit in support of the preliminary objection in belief that the order given by the Honourable court prioritize the residents of Mwakirunge at the expense of all other Mombasa residents was false for the following reasons:

Moral Questions?

- a. Should the Honourable court entertain a state entity and state officers who are bent on using their constitutional offices to perpetuate rights abuse of Mwakirunge residents just to meet the needs of other Mombasa residents? This argument goes against the spirit of Article 159(2)(a) which provides that justice shall be done for all irrespective of status and Article 47 (Fair administrative action). Moreover, the respondents have delayed justice for the residents of Mwakirunge for 14 years through intimidation and lack of substantive action irrespective of documented environmental human rights violations.
- b. Are Mwakirunge community residents the children of a “lesser God”? All are equal before the law.
- c. AND is the law only applied to other Mombasa residents and not Mwakirunge community residents? AND is the rights and fundamental freedoms of Mwakirunge residents lesser and inconsequential vis-a-vis the rights of the urban Mombasa residents. This goes against the spirit of Article 2 (Supremacy of *the constitution*) and Article 27 (Equality and freedom from discrimination).
- d. Does operating an illegal waste dumping site for 14 years where medical wastes, toxic chemicals, used condoms, aborted fetuses among other dangerous substances are dumped without any relevant NEMA licenses and where loss of lives, sicknesses, numerous environmental human rights violations have been recorded a merit that the Honourable court should consider in this suit? His response was yes. The balance tilts in favour of the MERIT of this suit as opposed to any technicality as canvassed by the 1st and 2nd respondents in their preliminary objection.
- xix. The preliminary objection and subsequent supporting affidavit filed by the 1st and 2nd Respondents were defective, lacks merit and in bad faith as the 1st and 2nd Respondents only tries to seek permission from this Honourable court to continue perpetuating environmental human rights violations against Mwakirunge community residents.



- xx. The Honourable Court should not entertain the preliminary objection and supporting affidavit by the 1st and 2nd Respondents because they have proved to be non-law-abiding state/public officers. Their actions by defying technical advisory from NEMA, KCAA, KAA, Kenya Airways and several pleas by residents of Mwakirunge including a petition to the County Assembly of Mombasa against dumping of wastes at Mwakirunge, a dumpsite which has been operating for 14 years without any relevant licenses was a serious violation of Article 10(1) (2) of the 2010 constitution on National values and principles of governance AND these are enough grounds to dismiss the preliminary objection and its subsequent supporting affidavit.
- xxi. By the 1st and 2nd Respondents supporting affidavit to the preliminary objection seeking the Honourable court's order to dismiss with costs my application for contempt against them, shows the 1st and 2nd Respondents was ignorant of the law. That pursuant to Section 18 (a) (v) of the *Environment and Land Court Act* empowers the Honourable court that:-
- in exercise of its jurisdiction under this Act, the Court shall be guided by the following principles-
- (v) the polluter pays principle
- xxii. The applicant and or Mwakirunge community residents were not the environmental polluters in this suit. As a matter of truth and fact, the applicant and Mwakirunge community residents were only fulfilling a constitutional obligation of protecting the environment for the benefit of present and future generations pursuant to Article 42(a) of *the constitution* 2010. The Honourable should abide by the polluter pays principle.
- xxiii. In the interest of the public and in the protection of rights and fundamental freedoms as enshrined in the 2010 constitution of the republic of Kenya, the preliminary objection (PO) and subsequent supporting affidavit filed by the 1st and 2nd respondents be dismissed and that the application of Contempt of Court proceedings he filed on 28th June 2022 be allowed to proceed and prayers sought be granted.
- xxiv. The Affidavit sworn in opposition to the preliminary objection filed by the 1st and 2nd Respondents.

IV. Submissions

5. On 23rd March, 2023 while all the parties were present in Court, they were directed to have the Preliminary objection dated 6th July, 2022 be disposed of by way of written submissions. Unfortunately, by the time the Court was penning down this Ruling, it had not as yet accessed any submissions whatsoever. Nonetheless, a ruling date was reserved on Notice by Court on its own merit accordingly.

V. Analysis & Determination.

6. I have carefully read and considered the pleadings herein, the few cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
7. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
- a. Whether the Preliminary objection dated 6th July, 2022 is merited?
 - b. Who will bear the Costs of Preliminary objection dated 6th July, 2022.



Issue No. a). Whether the Preliminary objection dated 6th July, 2022 is merited

8. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter herein being:-
 - a. Whether the Preliminary objection meets the standards for a Preliminary objection.
 - b. Whether the Applicant has the capacity to institute the suit in the public interest, on his own capacity and on behalf of Mwakirunge community residents.
9. The threshold for a preliminary objection was set out by the Court of Appeal in the locus classicus case of “Mukhisa Biscuits Manufacturing Co. Limited – Versus - West End Distributors (1969) EA 696 at 700” wherein Law, JA stated that;

“.....a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
10. Newbold, P further held as follows:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”
11. The Supreme Court in the case of “Hassan Ali Joho & Another – Versus - Suleiman Said Shahbal & 2 Others, Petition NO. 10 OF 2013, [2014] eKLR” re-affirmed the principle as set out in the Mukhisa Case stating as follows;

“ A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
12. I note that the 1st, 2nd and 3rd Respondents’ objection is based on two points of law. I will apply this test to each of the objections as I consider them. The first limb of the objection is on “the locus standi”. This is an issue that is a point of law that is pleaded in the pleadings and may dispose of the suit if proved. As such it is an issue that the court can properly determine as a preliminary objection.
13. The Applicant has averred in his response that he filed the suit under public interest on his own behalf and the behalf of the residents of Mwakirunge. The Applicant has clearly brought the suit on his own behalf and also on behalf of the residents of Mwakirunge Community. The residents of Mwakirunge



Community all have an interest. The suit is thus brought on behalf of other persons who have a stake in the outcome.

14. The Civil Procedure Rules, 2010 envisages circumstances in which there can be more than one person with an interest in a claim and makes provision for how the court is to be moved in such instances;
 - a. Order 1, Rule 1 of the Rules provide...” All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.”
15. From my reading of this section Plaintiffs suing under this Rule would sue in their own names. The provision of Order 1 Rule 8 makes provision for another scenario in which the court may be moved in a case with several Plaintiffs.
 - “(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
 - (2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.
 - (3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the court to be made a party to such suit.”
16. The clear interpretation of this Rule is that a notice would be issued to all parties before filing suit who would then have an opportunity to apply to be enjoined in the suit. Lastly, the provision of Order 1 Rule 13 of the Rule provides:-
 - “1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
 2. The authority shall be in writing signed by the party giving it and shall be filed in the case.”
17. This rule requires that where one is filing on behalf of other Plaintiffs there should be a written authority. It is noteworthy that the provision of Order 1 Rule 13 (2) is couched in mandatory terms. This is the section that forms the basis of the Preliminary Objection of the Respondents.
18. Having determined from the outset that the Plaintiff has brought this suit in which others have an interest, the question then is whether the Plaintiff has complied with the provisions of Order 4 Rule 4 and Order 4 Rule 4 of the Civil Procedure Rules which provides that:-

“Where the Plaintiff sues in a representative capacity the Plaintiff shall state the capacity in which he sues and where the Defendant is sued in a representative capacity the plaintiff shall



state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises”.

19. The Definition of “Public Interest Litigation” in The Black’s Law Directory the 10th Edition describes public interest litigation as follows:-

“Public Interest Litigation means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.”

20. In the case of “Kenya Anti-Corruption Commission – Versus - Deepak Chamanlal Kamni and 4 others, [2014] eKLR” where it was held that:

“.....a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large.”

21. Public interest litigation is essentially a cooperative or collaborative effort by the Applicant, the State or public authority and the Court to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society.

22. From the contents of the Paragraph 1 of the Application herein, it is clear that the suit is brought in public interest litigation as the legal action initiated in this claim is purely for enforcement of public interest or general interest in which the public or class of community have pecuniary interest or some interest by which their legal rights or liabilities are affected. The whole society has a stake in this claim in which the legal rights or liability are threatened and this claim purely is for advancement of the cause of minority or disadvantaged groups or individuals and is not for Applicant’s personal gain.

23. The provision of Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides:-

“26.

- (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.”

24. In the case of “Feisal Hassan & 2 others – Versus - Public Service Board of Marsabit County & another [2016] eKLR” it was stated that:-

“3. In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in *the Constitution*, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his



petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of *the Constitution*. Indeed, the rights of access to court under Article 22 and 258 of *the Constitution* for the enforcement, respectively, of the Bill of Rights and the other parts of *the Constitution* are in the same terms.” [Emphasis added]

25. Further, in the case of: “John Harun Mwau & 3 Others – Versus - Attorney General & 2 Others [2012] eKLR” it was held that:-

“180. In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.”

26. It was held in the case of “Dindi Oscar Okumu – Versus - Robert Pavel Oimeke & 5 others [2021] eKLR” that:-

“In considering the public and intention of having public interest litigation emerges clearly that the Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The Courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren’t violated. *The constitution* envisages the judiciary as “a bastion of rights and justice.”

27. In any event, this Honourable Court goes by the principles that parties have to be heard on their respective claims especially if the claim touches on the environment and violations of human rights. From the response by the Applicant, it is evident that there has been serious environmental human rights violations which in turn have prevented the residents of Mwakirunge Community from accessing justice.

28. For the reasons and the authorities advanced above, I find that the Preliminary objection founded by the Respondents is not only unfounded, baseless but also unmeritorious. Therefore, it must fail entirely.

Issue No. b). Who will bear the Costs of Preliminary objection dated 6th July, 2022.

29. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means



the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

30. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
31. In this case, this Honourable Court has reserved its discretion to award the Applicant the costs to be borne by the Respondents whose objection has failed accordingly.

VI. Conclusion & Disposition

32. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the omnibus application, this court arrives at the following decision and makes the orders below:-
 - a. That the Preliminary objection dated 6th July, 2022 by the County Attorney for the 1st, 2nd and 3rd Respondent herein be and is found to be unmeritorious and the same is hereby sustained.
 - b. That the Applicant shall have the costs of the Preliminary Objection dated 6th July, 2022 to be paid by the 1st, 2nd and 3rd Respondent.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS 14TH DAY OF FEBRUARY, 2025.

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

Ruling delivered in the presence of:

- a. M/s. Kalekye, the Court Assistant.
- b. Mr. Aenea Rangen acting in person as the Applicant.
- c. No appearance for the 1st, 2nd and 3rd Respondents.

