



Ng'anya & 2 others (All suing on their own behalf and on behalf of 27 others) v Mukabana (Being sued as administrator of the Estate of Peter Keya Were-Deceased) & 5 others; National Environment Management Authority (Interested Party) (Environment & Land Petition 67 of 2019) [2024] KEELC 6866 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6866 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 67 OF 2019**

OA ANGOTE, J

OCTOBER 17, 2024

IN THE MATTER OF INFRINGEMENT AND/OR VIOLATION OF THE PETITIONERS CONSTITUTIONAL RIGHTS CONTRARY TO ARTICLES 19, 21(1), 22(B), 23, 27(4), 28, 29, 40, 40(4) 42, 47(2), 70(1), AND 165(3) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

**CHRISTOPHER OWINO NG'ANYA 1ST PETITIONER
AGGREY MAGANGA APAMO 2ND PETITIONER
CATHERINE ODERO 3RD PETITIONER
ALL SUING ON THEIR OWN BEHALF AND ON BEHALF OF 27 OTHERS**

AND

**NAMAN NDONJI MUKABANA (BEING SUED AS ADMINISTRATOR OF THE ESTATE OF PETER KEYA WERE-DECEASED) 1ST RESPONDENT
EVANS OCHIENG OTIENO, JUDITH GRACE ODHIAMBO, EVANS MUKABANA, KENNEDY OCHIENG T/A OFFICIALS & MEMBERS OF KASARANI YOUTH PANORAMA ASSOCIATION (BEING SUED AS AGENTS OF THE ESTATE OF PETER KEYA WERE-DECEASED) 2ND RESPONDENT
EVANS OCHIENG OTIENO, JUDITH GRACE ODHIAMBO, EVANS MUKABANA, KENNEDY OCHIENG T/A OFFICIALS & MEMBERS OF BAMAHO DEVELOPMENT GROUP PROJECT (BEING SUED AS AGENTS OF THE ESTATE OF PETER KEYA WERE-DECEASED) 3RD RESPONDENT
KENYA BUILDERS CONCRETE CO LTD 4TH RESPONDENT
CITY COUNTY GOVERNMENT OF NAIROBI 5TH RESPONDENT
INSPECTOR GENERAL OF POLICE 6TH RESPONDENT**



AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

JUDGMENT

Background

1. Vide an Amended Petition dated 6th March, 2020, the Petitioners seek the following reliefs against the Respondents, jointly and severally;
 - i. A declaration that the Petitioners' rights under Articles 19, 21(1), 27(4), 47(2), 22(b), 23, 28, 29, 40, 42, 70(1), 40(4) and 165(3) of *the Constitution* of Kenya, 2010 have been infringed by the 1st, 2nd, 3rd and 4th Respondents jointly and severally.
 - ii. A declaration that the demolition of the Petitioners' houses by the 4th Respondent in collusion with the 6th Respondent was illegal, malicious and contravened the Petitioners rights under Articles 27(4), 28, 29, 40(1), 47 and 50 of *the Constitution* of Kenya, 2010.
 - iii. An order that the Petitioners are entitled to general and exemplary damages as against the 4th and 6th Respondents jointly and severally for illegal demolition of the Petitioners' houses and for violation of the Petitioners rights under Articles 27(4), 28, 29, 40(1), 47 and 50 of *the Constitution* of Kenya, 2010.
 - iv. An order for compensation to the Petitioners against the 4th Respondent for material loss and damage caused to their respective parcels of land or plots totaling Kenya Shillings Sixty-Two Million, Four Hundred and Twenty-Four Thousand Nine Hundred and Ninety-Nine (Kshs 62, 424, 999/=).
 - v. A declaration that the erection of a parameter wall across Ngong-Nairobi River passing through the Njiru-Mihango Estates and the underlying sewer line by the 4th Respondent in collusion with the 5th Respondent was in violation of the Petitioners rights to a clean and healthy environment enshrined under Articles 42 and 70(1) of *the Constitution* of Kenya, 2010.
 - vi. An order directed to the 5th Respondent and the Interested Party to demolish the perimeter wall erected across Ngong-River passing through the Njiru Mihango Estates and the underlying sewer line within 14 days after Judgment.
 - vii. Costs of and incidental to this Amended Petition.
 - viii. Any further relief or order that the Court shall deem just and fit to grant.
2. In support of the Petition, the Petitioners relied on the joint Affidavits of Christopher Owino N'ganya, Aggrey Maganga and Catherine Odero, the 1st -3rd Petitioners herein dated the 13th December, 2019 and 6th March, 2020.
3. Vide the joint Affidavit of 13th December, 2019, the 1st -3rd Petitioners deponed that they are the beneficial owners of land of different measurements having purchased the same from the 1st -3rd Respondents on diverse dates between the year 2010 to 2012; that the 2nd and 3rd Respondents sold them the plots as agents of the 1st Respondent, an administrator to the Estate of Peter Keya Were, the suit parcels original beneficial and that they were further informed that the deceased was prior to his



- demise in the process of formalizing the registration process of the subject land with the defunct City Council of Nairobi.
4. It was their deposition that during the purchase of the properties, they executed sale agreements with the 2nd and 3rd Respondents who received the purchase price, most of which was in cash and that they thereafter took possession of their respective plots after being issued with share certificates which categorized them as either members of Kasarani Youth Panorama Association or Barmaho Development Group Housing Project, which groups were responsible for taking care of their general welfare and pursuing the process of formalization and registration of the titles.
 5. According to the Petitioners, with the permission of the 1st, 2nd and 3rd Respondents they extensively developed their property with a view to constructing permanent houses and at no time did they face any opposition in that respect; that in 2018 and 2019, the 2nd and 3rd Respondents summoned them for a meeting and demanded that they add Kshs 50,000 each for the sub-division of their respective parcels and that they return their individual sale agreements for issuance of amended ones.
 6. Upon the return of the sale agreements, they averred, they were issued with amended agreements in which the year of execution had been changed from 2010/2011 to 2018/2019; that the explanation they were given was that the County Government had demanded through the 1st Respondent that all sale agreements be amended to read at least 2 years prior to the process of registering their respective plots before issuance of title deeds could be initiated and that they were assured that by the close of 2020, they would be in possession of their respective title deeds.
 7. It is the Petitioners' case that on diverse dates at night on the first and second weeks of September, 2019, the 4th Respondents' employees, servants and officials, with the support of police officers from Kayole Police station, acting without any Court Order arbitrarily descended on their developed plots and began demolishing the developments thereon including the perimeter walls demarcating their respective plots and that despite their pleas, the officers and the 4th Respondent's officials were unwilling to talk to them.
 8. They deponed that they later learned that in the first week of October, 2019, some of the plot owners whose houses had been on the verge of demolition had moved the Court vide Milimani CMCC No 7182 of 2019-Amos Okoyo & 4 Others vs Kenya Builders Concrete Company Limited in which the Court issued injunctive orders restraining the evictions.
 9. It is the Petitioners' case that the evictions persisted despite the orders aforesaid, and a protest letter was written to the Inspector General on the 24th October, 2019 but the demolitions continued aided by the police and that the evictions were highly detrimental to them, some taking place at night when most of them and their young families were in the houses.
 10. According to the deponents, they discovered vide the 4th Respondent's pleadings in Milimani CMCC No 7182 of 2019 that there had been a protracted Court dispute in ELC Case No 1001 of 2013 where the 1st and 4th Respondents were fighting over ownership of the suit property and that they instructed Counsel to urgently have them enjoined in Milimani CMCC 7182 of 2019, but the Motion is yet to be determined.
 11. According to the Petitioners, despite having extensively developed their plots, they have not been made aware of the existing cases which includes ELC 1001 of 2013 nor been made parties thereto and that the demolition of their properties without any Court order or notice violated their rights to humane treatment and fair hearing as espoused in Articles 28 and 50 of *the Constitution* as well as their rights to property protected under Articles 40 and 40(4) of *the Constitution*.



12. Further, it was averred, the actions by the police officers went contrary to their rights to be protected by law enforcement officers as expressed under Article 29 of *the Constitution* and that the officer's decision to assist the 4th Respondent rather than them was discriminatory contrary to Article 27(4) of *the Constitution* and infringed on their right to fair administrative action as provided under Article 47 (2) of *the Constitution*.
13. They urge that the 4th Respondent who operates a quarry along Ngong-Nairobi has at all times been aware of their purchase and development of the suit property; that if it was the rightful owner of the suit property, it should have challenged their occupation and developments at its initial stages and that having failed to do so, it made them believe that there were no claims over the suit property thus breaching their right to legitimate expectation.
14. The Petitioners further stated that after discovering the 4th Respondents' claim over the suit property, they proceeded to investigate the same and their investigations revealed that the 4th Respondent recently erected a perimeter wall across the Nairobi-Ngong River passing through the Mihango-Njiru Estates; that the Nairobi City County and NEMA did not give the requisite approvals for the perimeter wall and that if at all any permission was given, the same was fraudulently procured.
15. It was the Petitioners' deposition vide the joint affidavit of 6th March, 2020 that they authorized their advocates to amend the Petition to include a prayer for special damages regarding material loss for their respective houses; that whereas they had in paras 11-17 of the Affidavit in support of the original Petition pleaded the value of their respective houses, they were unable to plead the total loss because they could not raise the filing fees in that respect and that they accordingly pray to be compensated the total cost of Kshs 62, 424, 999 as follows:



Christopher Owino N’ganya	3, 535,000/=
Aggrey Maganga Apamo	2, 970,000/=
Catherine Odero	3, 524, 358/=
David Nzivo Makau	2, 197, 200/=
Stephen Makari Nyabanyo	2, 362, 850/=
Richmond Aguma Kiseko	3, 010, 810/=
Fredrick Otieno Odongo	2,404, 800/=
Esther Njoki Nderitu	980,000/=
Paytrick Otieno Ngesa	1, 444, 800/=
James Anyona Ogembo	645,000/=
Vera Aluoch Muga	1, 618,000/=
Morgan Otieno Kadweya	1, 872, 200/=
Denish Ochieng Okebe Ndong	1, 580,000/=
Douglas Mageto Kibagendi	826,000/=
Fransisach Katindi Wambua	1, 991, 905/=
Samson William Bwire	1, 801, 350/=
Martin Mwenda Nyaga	1,801, 390/=
Anne Kaleha Lumbasio	1, 640,330/=
John Ithau Musau	3, 011, 360/=
Sostine Tabu Wamayuyi	3, 559,666/=
Hesbon Odhiambo Eric	2, 571, 710/=
Jared Odhiambo Dimo	1, 785, 800/=
Wycliff Oyugi Opiyo	2, 227, 850/=
Churchill Adiema	2, 716, 500/=
Thomas Midialo	2, 128, 300/=



Jared Moseti Oyueri	2, 790, 200/=
Lilian Awuor Akeyo	2, 509, 650/=
Denis Mwema	2, 018,000/=
Samson Keya Sakala	900,000/=

16. The 2nd Respondent filed a response to the Petition on the 25th July, 2021. Vide the response, they denied the assertions as set out in the Petition stating that some of the Petitioners are their members and possess membership numbers which were issued to them after payment of subscription fees and that all monies paid to them by the Petitioners were towards subscription and not the purchase of any property as alleged.
17. According to the 2nd Respondent, no sale agreements were executed by its officials purporting to sell plots to the Petitioners herein nor its other members and that as far as the issue of ownership of LR. No 7086 is concerned, the 2nd Respondent has, through its officials, sued for adverse possession against the 1st and 4th Respondents herein in Nairobi ELC 645 of 2017, which suit is yet to be heard and determined.
18. The 2nd Respondent asserts that whereas indeed the Petitioners were in occupation of, and substantially developed their respective plots prior to the filing this Petition, they did not give the Petitioners permission to enter the suit property noting that their claim over the property has yet to be determined by the Court and that they have never held themselves out as agents of the 1st Respondent for purposes of selling plots to the Petitioners.
19. It is the 2nd Respondent's position that the Petitioners have failed to demonstrate how they have infringed on their rights and as such are not entitled to the orders sought as against them: that they obtained a Court Order on the 22nd October, 2019 in Nairobi CMCC No. 7182 of 2019 prohibiting the 4th and 6th Respondents from demolishing the Petitioners' houses which order was served upon them; that the aforesaid invasion and demolitions were illegal and in contempt of Court Orders and that further, the 6th Respondent was also aware of the dispute having been informed of the same vide a letter dated 7th June 2019.
20. According to the 2nd Respondent, the Petitioners indeed made an application to be joined as parties in Milimani CMCC 7182 of 2019; that some of the Petitioners, being its members have been aware of the other cases contesting ownership especially the ones instituted by them and that allegations to the contrary are untrue.
21. It is contended by the 2nd Respondent that some of its officials have constructed houses on LR. No. 7086 and it would never act in any manner that would be prejudicial to its rights and/or those of its members; that indeed, the demolition of the Petitioners' houses was in violation of their constitutional rights and that the 4th Respondent has no claim over ownership of parcel LR. No. 7086 having been allocated another site in Athi River as evinced by letter dated 5th March 2001.
22. The 2nd Respondent concurs with the Petitioners that the 4th Respondent has at all times been aware of the Petitioners and its other member's occupancy of the suit property and has witnessed them develop their respective plots without raising any issues and that the 4th Respondent has further illegally erected a wall across the Nairobi Ngong River which violates the Petitioners' rights to a clean and healthy environment.



23. The 2nd Respondent urged that it has been wrongfully sued in this Petition, there being no evidence that it has acted in cahoots with any of its co-Respondents to infringe on the Petitioners' constitutional rights.
24. The 4th Respondent filed an Answer to the Petition on the 19th February, 2020 supported by the Affidavit of Dinesh Premji Patel, the 4th Respondent's Director of an even date. He deponed that the suit property, L.R 7086, is the subject of various suits to wit CMCC No 4642 of 2018-Wellington Onyango vs Kenya Builders & Concrete Co Ltd; CMCC No 4462 of 2013-Naman Ndonji Mukabana vs Lalji Devshi Patel & Another, ELC No 583 of 2017-Kasaraani Youth Panorama Association vs Kenya Builders Concrete Co Ltd, ELC No. 645 of 2017, ELC No. 646 of 2017 and ELC No 1001 of 2013.
25. According to Mr. Patel, on 18th September, 2019, the Court [Justice Eboso] directed that all the aforementioned matters be mentioned before him with a view to consolidating the same and avoiding multiplicity; that the Petitioners as well as other fraudulent claimants continue to defy the Court Orders of 24th October, 2014 in which the Court restrained interference with the suit property and that the Petitioners have undertaken numerous schemes seeking to frustrate the 4th Respondent's operations and quiet enjoyment of the property including institution of NET Appeal 001 of 2019 which they failed to prosecute leading to its dismissal.
26. The 4th Defendant's Director deposed that vide the Affidavit in support of the Petition dated the 13th December, 2019, the Petitioners admit to being aware of ELC 1001 of 2013 and cannot feign ignorance of lawful orders issued in that respect; that the receipts purporting to be for building materials all bear dates after the issuance of the orders of 24th October, 2014 and that it is deceitful and fraudulent for the Petitioners to claim that the developments carried out on the property between 2010 and 2012 were undertaken through the purchase of building materials purchased in 2013-2018 as borne by the receipts adduced by the Petitioners.
27. According to the 4th Respondent, none of the documents relied on in support of ownership of the plots make reference to L.R 7086 and that the Petitioners have no enforceable rights over the property capable of being enforced.
28. The 5th Respondent filed Grounds of Opposition as against the Amended Petition on the 20th September, 2022. It was premised on the grounds that:
 - i. The Amended Petition is incompetent, lacks merit, ill conceived, fatally defective, and an abuse of the due process of the law and cannot be allowed as drafted.
 - ii. The Amended Petition ought not be considered in the manner in which it has been presented before this Honourable Court given that the Petitioners have failed to demonstrate the manner in which the 5th Respondent infringed the constitutional provisions as raised in the Amended Petition.
 - iii. The Amended Petition ought not be considered in the manner in which it has been presented before this Honourable Court given that the particulars as to the manner of violation of the Petitioners guaranteed rights have not been articulated.
 - iv. That at paragraph 16(b) and (c), the Amended Petition raises issues of fraud against the 5th Respondent. However, the alleged fraud has not been specifically pleaded neither has it been proved by either documentary evidence or otherwise. As such, no particulars of fraud have been demonstrated against the 5th Respondent.



- v. The Amended Petition offends the sub judice rule and it is an abuse of Court process, the Petitioner having mentioned that there are pending suits, Milimani CMCC 7182 of 2019-Amos Okoyo & 4 Ors vs Kenya Builders Concrete Company Ltd and ELC 1001 of 2013 all dealing with the same subject matter L.R No 7086(Org .No 6825/1)which is also a subject matter in the Amended Petition.
 - vi. That in view of the above, the Amended Petition herein and in the totality of the foregoing, the Amended Petition lacks any foundation/basis, is unmerited, premature and is only fit for dismissal with costs.
 - vii. That it is therefore in the interests of justice and fairness that the Amended Petition be dismissed with costs to the 5th Respondent.
29. No other party filed a response to the Petition.

Submissions

30. The Petitioners filed submissions on the 29th January, 2024. Counsel submitted that the Petition meets the constitutional test as set out in the Anarita Karimi Njeru vs Republic(1976-1980)KLR 1272 and replicated in *the Constitution* of Kenya(Protection of Rights and Fundamental Freedoms)Practice and Procedure Rules, 2013 to wit, a person claiming a constitutional violation should set out with precision the provisions alleged to have been infringed and the manner thereof and that in the circumstances, the Petition describes the parties, gives the legal and factual basis of the Petition and sets out the contraventions and manner thereof.
31. According to Counsel, the Amended Petition does not offend the sub judice rule, hinged on Section 6 of the *Civil Procedure Act*; that the Petitioners herein are not parties to the suits referenced by the 5th Respondent who has in any event not enclosed the pleadings in the aforesaid case to enable the Court interrogate the issue.
32. It was submitted that the Petitioners have proved that they purchased various plots of land situate within L.R No 7086(Orig No 6825/1) from the 1st -3rd Respondents on diverse dates and are bonafide purchasers thereof; that subsequently, the demolition of their houses by the 4th Respondent, supported by officers from the Kayole Police Station was illegal and a violation of their constitutional rights protected under Articles 27 and 40(1) of *the Constitution* and that having been present and aware of the Petitioners developments of their property, the 4th Respondent is estopped from disputing ownership of the property.
33. Counsel contended that further, the erection of a permanent wall across the Ngong-Nairobi River violates the Petitioners rights to a clean and healthy environment protected by Article 42 as it interferes with the free flow of the river and sewer line and that the 5th Respondent knowingly and illegally allowed the aforesaid construction. Reliance in this respect was placed on the case of Castle Rock Gardens Management Limited vs Attorney General & 4 Others [2018] eKLR.
34. Counsel asserts that the demolition of the Petitioners houses, by the 4th Respondent with the support of the police without any Court Order or notification amounted to a violation of their rights to dignity and fair hearing as protected under Articles 28 and 50 of *the Constitution*; that the Officers who supervised the demolition of their houses also infringed on their right to security encapsulated under Article 29 of *the Constitution* and that the 5th Respondent exhibited double standards by aiding the 4th Respondent rather the Petitioners which was discriminatory contrary to Article 27(4) of *the Constitution* and Article 47 which mandates fair administrative action.



35. According to Counsel, the unlawful demolition of their houses without compensation was contrary to their rights to property under Article 40(1) and 40(4) of *the Constitution* and that in *Fatuma Khamis Bilal & 3503 Others vs Kenya Railways Corporation and 60 Others*[2021]eKLR, the Court found that demolitions and forceful evictions undertaken without a Court order contravened Article 47 of *the Constitution*.
36. It was submitted that that the 4th Respondents failure to challenge the development at the initial stages violated the Petitioners rights to legitimate expectation; that having established the constitutional violations alleged, the Petitioners are entitled to general and exemplary damages as against the 4th and 6th Respondents; that the Respondents should bear the costs of the Amended Petition.
37. The 5th Respondent filed submissions on the 9th July, 2024. Counsel submitted that the 5th Respondent is not constitutionally mandated with the protection of the environment as alleged by the Petitioner and the same falls within the ambit of NEMA as expressed by Article 69(f) of *the Constitution*, Section 9 of EMCA and as affirmed by the Court in *Republic v National Environment Management Authority & Another Ex-parte Philip Kisia & City Council of Nairobi* [2013]eKLR.
38. Nonetheless, Counsel avers, if the Petitioners were aggrieved by any action/inaction by the 5th Respondent, their recourse lay in the procedure set out in the Physical Planning and Land Use Act. Reliance in this respect was placed on the case of the *National Assembly v Hon James Njenga Karume*[2008]1KLR.
39. Counsel submitted that, by the Petitioners own admission, the 4th Respondent did not obtain the requisite approvals before constructing a perimeter wall adjacent to the Nairobi-Ngong River; that this being so, the allegations of collusion between the 4th and 5th Respondent in the obtaining of non-existent approvals has no foundation and has in any event not been proven; that it is a stranger to this Petition as the original registered beneficial owner is Peter Keya Were(deceased) and notwithstanding that it is the Head Lessor, which assertion has also not been proved, the rightful party is the original registered beneficial owner.
40. Counsel submitted that the 5th Respondent cannot destroy the impugned perimeter wall as sought as this would be tantamount to destruction of property and that the Petition is incompetent, lacks merits and warrants dismissal.
41. No other party filed submissions [As at 6th October, 2024]

Analysis and Determination

42. Having considered the pleadings, evidence and submissions, the issues that arise for determination are:
 - i. Whether the Petitioners have the requisite locus to institute this Petition?
 - ii. Whether the Petition meets the specificity test?
 - iii. Whether the Petition contravenes the doctrine of sub judice?
 - iv. Whether the Petitioner has demonstrated the alleged violations and/or threats of violations to its rights protected under Articles 27(4), 28, 29, 40(1) 42, 47 and 69 of *the Constitution*?
 - v. What are the Appropriate reliefs?



43. The term Locus Standi means a place of standing. In the case of Law Society of Kenya vs Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the Court held that:
- “Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others v City Council of Nairobi [1982] KAR 229, the Court also held that;
- “the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
44. Elucidating on this principle, the Court of Appeal in the case of Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission & 9 others [2016] eKLR stated thus:
- “ Articles 22 ,258 and 260 of *the Constitution* are cited to make the point that historical common law restrictions on the standing have been overhauled by *the Constitution* of Kenya, 2010....The three Articles give an enlarged view of locus standi to the effect that every “person” including persons acting in the public interest, can move a court of law contesting infringements of any provision in the Bill of Rights or *the Constitution*. Each of the first two Articles starts with the phrase “Every person has the right to institute court proceedings.” They also provide that that person may either bring the proceedings as an individual in his/her own interest. He/she can, in addition bring proceedings in many other capacities, on behalf of persons who cannot act in their own name, or as a member of or in the interest of a group or class of persons, or, like in the above cited Supreme Court case of Mumo Matemo (supra), acting in the public interest or, finally an association acting in the interest of one or more of its members can also institute court proceedings for the enforcement of the Bill of Rights.”
45. Vide its Answer to Petition, the 4th Respondent contends that the Petitioners do not have the requisite locus to institute the suit. It asserts that the Petitioners have no property rights and subsequently no constitutional safeguards capable of being breached by the 4th Respondent as alleged.
46. The Petitioners maintain that *the constitution* grants them due standing to institute a suit seeking redress for violations of their constitutional rights.
47. Indeed, in the present case, the Petitioners have invoked their rights under Article 22(1) and 258 of *the Constitution* which entitles every person with the right to initiate proceedings claiming that a right or fundamental freedom in the Bill of Rights has been threatened, denied, violated or infringed, as well as Article 70 of *the Constitution* which grants any person the right to commence proceedings for the enforcement of the right to a clean and healthy environment.
48. Considering the 4th Respondent’s argument, it centers on the Petitioners’ lack of property rights, contending that without such rights, they cannot claim any constitutional breaches. The nature of this contention touches on whether the Petitioners have demonstrated any rights and subsequent breaches of these rights, a vastly different argument from whether or not they have legal standing to institute the suit. This distinction is crucial as the question of whether alleged violations have been proven is subject to a merited determination by the Court.
49. Consequently, the Petitioners locus standi has not been undermined, and they retain the right to bring this suit before the Court.



50. It is now settled that there is a basic threshold that constitutional petitions must adhere to. The Court in *Anarita Karimi Njeru v Republic* [1979] eKLR, set out the test in this regard holding:
- “...If a person is seeking redress from the 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 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.”
51. This principle was affirmed by the Court of Appeal in the case of *Mumo Matemu vs 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
- “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.”
52. Speaking to the same, the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 others* [2014] eKLR stated as follows:
- “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 v 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.”
53. The 5th Respondent asserts that the Petition does not articulate the manner of violation of the Petitioners’ rights.
54. In response, the Petitioners maintain that they have duly laid out the legal and factual foundation of the Petition, laying out the alleged constitutional violations and the manner in which the violations occurred.
55. Considering the Amended Petition, it is the Petitioners’ case therein that they are the bonafide purchasers of their distinct plots purchased from the 1st -3rd Respondents and that despite their ownership aforesaid, the 4th Respondent, aided by the Police under the command of the 6th Respondent violently demolished their houses without any lawful cause or prior notice in violation of their rights. Further, that the 4th Respondent has erected a perimeter wall which is interfering with the natural flow of the Nairobi-Ngong River and the sewer line serving them.



56. The Petitioners contend that these actions violated their rights to inter-alia property, dignity, freedom and security of the person, legitimate expectation, fair administrative action, and clean and healthy environment.
57. In the Court’s view, these allegations are specific enough to meet the test espoused in the Anarita Kirimi (supra), Mumo Matemu (supra) and Communication Commission of Kenya (supra) cases. The Petitioner has averred which provision it deems has been contravened and how the same was contravened.
58. The challenge on the failure to plead violations and threatened violations with clarity and specificity fail.
59. Sub judice, is a principle of law that acts to bar a Court from trying a matter whose issues are similar to those pending before another Court of competent jurisdiction between the same parties canvassing it under the same title. It finds roots in Section 6 of the *Civil Procedure Act* which provides thus:
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
60. In Kenya National Commission on *Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017)* [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling) the Supreme Court of Kenya stated as follows with regard to sub judice:
- “The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
61. It is clear from the foregoing that to make a finding of sub judice, the Court must be convinced that there exists more than one suit, over the same subject matter, both pending before courts of competent jurisdiction and that the suits are between the same parties or representatives.
62. The 4th and 5th Respondents contend that this Petition violates the principle of sub-judice as the property which forms the subject matter herein, L.R 7086(ORG. 6285/1), is the subject of several other matters to wit Milimani CMCC 7182 of 2019-Amos Okoyo & 4 Others vs Kenya Builders Concrete Company Ltd and ELC No 1001 of 2013-Kenya Builders & Concrete Co Ltd v Naman Ndonji Mukabana.



63. Further reference was made to CMCC No 4642 of 2018-Wellington Onyango vs Kenya Builders & Concrete Co Ltd; CMCC No 4462 of 2013-Naman Ndonji Mukabana vs Lalji Devshi Patel & Another: ELC 583 of 2017-Kasarani Youth Panorama Association vs Kenya Builders & Concrete Co Ltd: ELC 645 and 646 of 2017.
64. In response to these assertions, the Petitioners state that they are not parties to any of the aforementioned suits and that the 5th Respondent has in any event not enclosed the pleadings in respect of the matters alleged to enable the Court interrogate the same.
65. The Court has considered the evidence in this respect. Indeed, the 5th Respondent has not enclosed any pleadings. Nonetheless, the 2nd and 4th Respondents have adduced some pleadings and Rulings in respect of CMCC 7182 of 2018, CMCC 4642 of 2018: ELC 645 of 2017 and ELC 1001 of 2013 which the Court will consider.
66. Beginning with ELC 645 of 2017, the same was instituted by the 2nd Respondent herein as against the 1st and 4th Respondents' in which they claim the suit property herein from them by way of adverse possession. ELC 1001 of 2013 was instituted by the 4th Respondent herein as against the 1st Respondent in which they each claim ownership of the suit property.
67. CMCC 4642 of 2018 was filed by Wellington Onyango against the 4th Respondent whereas CMCC 7182 of 2018 was instituted by Rosemary Katema & 4 Others as against the 4th Respondent. The precise claims in the aforesaid cases are unclear as no primary pleadings were annexed but it has been deponed that dispute is with respect to the suit property. CMCC 4642 of 2018 was however dismissed on the 13th December, 2018.
68. Considering the foregoing, it is noted that apart from Churchill Adiema who is one of the Plaintiffs in CMCC 7182 of 2019 as well as a Petitioner herein, the other Petitioners are not parties to the other suits. As regards the subject matters, all the other matters are civil suits revolving around the ownership of the suit property.
69. In contrast, herein, whereas the Petitioners do indeed claim to be bonafide purchasers of the suit property, they do not contest the ownership of the properties as against any other party. They seek redress for constitutional violations arising demolition of their properties thereon. They further allege violation of the right to a clean and healthy environment occasioned by the 4th Respondent's construction of a wall adjacent to Ngong River.
70. Ultimately, it is the finding of the Court that the Petition does not contravene the doctrine of sub judice.
71. As aforesaid, it is trite that for a party to succeed in a claim of violation of a constitutional right, such a party must set out clearly the violation in respect of which it seeks redress. Further, there is also the issue of discharging the burden of proof under Sections 107(1), (2) and 109 of the *Evidence Act*. The aforesaid provisions state as follows:

“ 107.

- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



And

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

72. Article 22(3)(d) of *the Constitution* provides that in determining matters brought under Article 22, the Court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. The Court will be guided by the above principles in the determination of the alleged violations of the Petitioners’ rights.
73. By way of a brief background, it is the Petitioners’ case that they are the bonafide owners of respective parcels of land situate within L.R 7086 having purchased the same from the 2nd and 3rd Respondents as agents of the 1st Respondent; that after purchasing the property, they carried out developments thereon, which developments were demolished by the 4th Respondent under the supervision of the 6th Respondent and that the demolition was illegal and violated their rights.
74. They contend that further, the 4th Respondent has erected a perimeter wall which interferes which the natural flow of the Nairobi-Ngong River and the sewer line violating their right to a clean and healthy environment.
75. On its part, the 2nd Respondent asserts that while some of the Petitioners are its members, it did not sell or purport to sell to it any portions of the suit property not having any claim to it themselves and that they have not colluded with the other Respondents to violate any of the Petitioners rights.
76. They concede that whilst not with their permissions, the Petitioners undertook developments on the suit property which developments were illegally destroyed and in breach of Court orders restraining the evictions. They also state that the 4th Respondent’s perimeter wall violates the Petitioners rights to a clean and healthy environment.
77. The 4th Respondent states that the 1st-3rd Respondents have no proprietary interests in the suit property capable of being transferred to the Petitioners and as such the Petitioner has no proprietary rights capable of being protected and that the Petitioners put up structures on the property in breach of existing Court orders issued in ELC No 1001 of 2013 on the 24th October, 2014.
78. The 5th Respondent states that the Petition is baseless and it is wrongly enjoined herein the claims against it being unfounded and that the Petition has no merit and should be dismissed in its entirety.
79. To begin with, while the Petitioners assert that they are the bonafide owners of the suit property, they seek no claim in this respect. On the contrary, they concede that the proprietorship of the suit property is the subject of litigation. Vide their letter dated the 15th November, 2019 addressed to the Nairobi City County, they indicate;
- “It would therefore appear to us that two(rival)parties, that is Kenya Builders & Concrete Ltd & Naman Ndonji Mukabana (being an Administrator to the Estate of Peter Keya Were) are fighting over the subject parcel of land.”
80. They also sought from the County information as to the current legal/beneficial owners of the suit property as per their records.



81. Similarly, the 2nd Respondent from whom the Petitioners claim their title, concede to not having any title to the suit property stating that they have instituted a suit claiming the same by way of adverse possession. The above notwithstanding, it is uncontested that the Petitioners took up individual plots of the subject parcel of land. It is also uncontested that they were removed from the aforesaid parcels by the 4th Respondent.
82. The question before this Court is whether the manner of their removal from the property violated their constitutional rights and by whom. The Court is cognizant of the fact that the Bill of Rights applies both vertically as against the state, and horizontally against private persons, and that in appropriate cases, a claim for violation of a constitutional right can be brought against a private individual/entity.
83. The Court will determine the alleged breaches in the manner extrapolated by the Petitioners. The Petitioners opine that the 4th Respondent's claim on the property has breached their legitimate expectation. They contend that the 4th Respondent owns a quarry situate across the suit property and were at all times aware when the Petitioners occupied the property and began construction thereon.
84. They opine that the 4th Respondent should have made them aware of its claim on the property sooner and having failed to do so, they had a legitimate expectation that there were no claims on the suit property. The 4th Respondent did not respond to this assertion.
85. Speaking to what constitutes legitimate expectation, the Supreme Court in *Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* [2014] eKLR stated thus:

“[263]“Legitimate expectation” is a doctrine well recognized within the realm of administrative law, as is clear from the English case, *In re Westminster City Council*, [1986] A.C. 668 at 692 (Lord Bridge):

“...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation”.

[264]In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. [265]An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.”

86. The Court further stated:

“An illuminating consideration of the concept of “legitimate expectation” is found in the South African case, *South African Veterinary Council v Szymanski* 2003(4) S.A. 42 (SCA) at [paragraph 28]: the Court held as follows:

“The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation include the following:

- i. The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': *De Smith, Woolf and Jowell* (op cit [Judicial Review of Administrative Action 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public



administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

- ii The expectation must be reasonable: Administrator, Transvaal v Traub (supra [1989 (4) SA 731 (A)] at 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8-037).
- ii. The representation must have been induced by the decision- maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); Attorney- General of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350h - j.
- iii. The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: Hauptfleisch v. Caledon Divisional Council 1963 (4) SA 53 (C) at 59E - G.”

This was also referred to with approval in Walele v. City of Cape Town and Others; 2008 (6) S.A 129 (C.C.) paragraph 41.2 The emerging principles may be succinctly set out as follows: a. there must be an express, clear and unambiguous promise given by a public authority; b. the expectation itself must be reasonable c. the representation must be one which it was competent and lawful for the decision-maker to make;and (d) there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.”

- 87. The principle cannot work as against the 4th Respondent in the manner envisaged by the Petitioners. The 4th Respondent's right to property is constitutionally protected. The doctrine of legitimate expectation cannot override or diminish this right. As such, even if the Petitioners believed that the 4th Respondent was aware of their occupation of the property, this cannot lead to a lawful loss of the 4th Respondent's property rights under *the Constitution*. This plea fails.
- 88. It is the Petitioners' case that the actions of the police officers from Kayole Police Station under the command of the OCS, in aiding the 4th Respondent to carry out the evictions, despite them having sought the OCS' protection was discriminatory contrary to Article 27(4) of *the Constitution*. Further, it was argued that no written notice was given to them prior to the eviction violating their right to a fair administrative action contrary to Article 47 of *the Constitution*.
- 89. Article 27 of *the Constitution* prohibits discrimination. It provides as follows:

“27.

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2)
- (3)
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”



90. In *Gichuru v Package Insurance Brokers Ltd* [2021] KESC 12 (KLR), the Supreme Court adopted the definition of discrimination as espoused in the case of *Peter K Waweru vs Republic* [2006] eKLR thus:

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

91. Further, in *Willis vs The United Kingdom*, No. 36042/97, ECHR 2002 – IV and *Okpiz v Germany*, No. 59140/00, 25th October 2005, the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations.

92. Considering the circumstances, it has indeed not been controverted that the OCS Kayole provided protection to the 4th Respondent’s officials as they undertook the demolition of the Petitioners’ properties. However, whereas they claim double standards, the Petitioners have not demonstrated that this constituted differential treatment based on any of the prohibited grounds mentioned in Article 27(4) of *the Constitution* on which they found their claim. This plea fails.

93. On the other hand, Article 47 of *the Constitution* provides for fair administrative action. It states:

- “(1) 1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

94. This is replicated in Sections 4(1), (2) & (3) of the Fair Administrative Actions Act, 2015, which make provision for the right to fair administrative action which includes inter-alia, the right to be given reasons for any administrative action, and where an administrative action is likely to affect the fundamental rights and freedoms of any person, requires the administrator to give the person among others sufficient notice, and an opportunity to be heard and make representations.

95. Discussing the import of Article 47, the Court of Appeal in the case of *Benson Wekesa Milimo v National Land Commission & 2 others* [2021] eKLR stated thus:

“In addition, Article 47 of *the Constitution* provides a right to fair administrative action. This right includes, amongst others, the right to administrative action that is lawful, reasonable and procedurally fair, and the right to have prior adequate notice of the nature and reason for the proposed administrative action, and an opportunity to be heard.”

96. It has not been controverted that no notices were issued to the Petitioners prior to the demolition of their developments on the property. The 4th Respondent in this respect has made reference to Court Orders issued in ELC 1001 of 2013. Apart from the fact that the Petitioners were not parties to this



suit, the aforesaid Court orders were injunctive, and not eviction orders. This means that any reliance on this Court order to justify the eviction is legally unfounded.

97. The *Land Act*, 2012 is clear on the manner of evictions, even as against trespassers and or illegal occupiers of land. Section 152E provides as follows:

- “(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
- (2) The notice under subsection (1) shall—
- (a) be in writing and in a national and official language;
 - (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 - (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area”

98. Whereas the evictions and demolitions were indeed undertaken without the requisite notice, did this violate the Petitioners’ right to fair administrative action. *The Constitution* does not give a definition of what ‘administrative action’ is. The FAAA itself also does not exhaustively define this term. ‘It only states at Section 2, ‘administrative action’ includes:

- “i.the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
ii.any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”

99. On the other hand, Section 2, defines an “administrator” as “a person who takes an administrative action or who makes an administrative decision.

100. The definition of administrative action as set out under Section 2(ii) is broad and includes acts or decisions by any person or authority that affect legal rights. In the circumstances herein, it is uncontested that police officers were involved in the eviction process, through their provision of security to the 4th Respondents. This can be deemed as an administrative action.

101. The eviction having been undertaken without any requisite notice, the Court finds that the Petitioners’ right to fair administrative action was contravened. Further, it is the finding of this court that the provision of section 152 E of the *Land Act* which I have discussed above was contravened by the 4th Respondent.

102. The Petitioners have also alleged that Articles 28 and 50 of *the Constitution* on human dignity and right to a fair hearing has been breached by the Respondents. Under this head, the Petitioners state that the demolition of their houses without any Court Order, notification by the 4th Respondent and without



them being made parties to any of the existing cases violated their right to a fair hearing as they were condemned unheard, and that they were treated in an inhumane manner violating their right to dignity.

103. Article 28 of *the Constitution* provides as follows:

“Every person has inherent dignity and the right to have that dignity respected and protected.”

104. The African Charter on Human and Peoples’ Right (Banjul Charter) under Article 5 provides:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

105. Whereas Article 28 provides no definition of dignity, its role and importance as a foundational constitutional value has been emphasized in a number of cases. In the South African case of *S vs Makwanyane*, [1995] ZACC 3: 1995(3)SA 391(CC) in para[328] O’Regan J pointed out that “without dignity, human life is substantially diminished” and pronounced the prime value of dignity in the following terms:

“The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in chapter 3.”

106. In the case of *Satrose Ayuma & 11 others v Registered trustees of the Kenya Railways Staff retirement benefits scheme& 3 others* [2015] eKLR, the Court recognized that whenever evictions occur, they cause physical, psychological and emotional distress and they entail losses of means of economic sustenance and increase impoverishment. The Court further stated:

“In my judgment, and I reiterate the point, I referred to the UN Guidelines that have articulated conditions that must be undertaken during evictions and inter alia there must be presence of Government officials, neutral observers and that the evictions must not take place at night, in bad weather, during festivals or holidays, prior to any election, during or just prior to school exams and in fact preferably at the end of the school term or during school holidays.”

107. The Petitioners have deponed that a number of the demolitions were carried out at night affecting those who lived on the plots with their families. These assertions have not been controverted and in the circumstances, the Court finds that their right to dignity was indeed contravened.

108. Regarding the right to fair hearing, Article 50(1) of *the Constitution* states:

“(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.”



109. Expounding on this right, Njoki Ndungu, SCJ in the decision of *Evans Odhiambo Kidero & 4 Others vs Ferdinand Ndungu Waititu & 4 Others* SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014 [2014] eKLR held as follows:

“(257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of *audi alteram partem* (hear the other side or no one is to be condemned unheard) and *nemo iudex in causa sua* (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contents remain unsettled. (258) What then are the norms or components of a fair hearing? The Supreme Court of India, in *Indru Ramchand Bharvani & others v Union of India & others*, 1988 SCR Supl (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v Collector of Customs Calcutta & others* AIR 1962 Cal 460). (259) That court in *Union of India v JN Sinha & another*, 1971 SCR (1) 791 and *CB Boarding & Lodging v State of Mysore*, 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits.”

110. Considering this right vis a vis the Petitioners’ allegations, it has not been alleged that the demolitions and evictions were pursuant to any Court Order, arising from any of the suits concerning the property and that they were unheard in this respect. On the contrary, the Petitioners opine that the demolitions were arbitrary and illegal. In the circumstances, a violation under this head does not arise.

111. The Petitioners have further alleged violation of Article 29 of *the Constitution*. The Petitioners’ assertion under this head is that their right to be protected by law enforcement officers and their right to security was violated as their houses were demolished in the presence of police officers.

112. Article 29 of *the Constitution* guarantees the right to freedom and security of the person and provides that:

“29. Every person has the right to freedom and security of the person, which includes the right not to be—

- (a) deprived of freedom arbitrarily or without just cause;
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or



(f) treated or punished in a cruel, inhuman or degrading manner.

113. As regards their rights to freedom of security of the person, the Petitioners have not argued any of the elements enunciated therein. The fact of the officer's presence during the demolitions cannot by itself be said to be tantamount to a violation under this provision. This plea fails.
114. The Petitioners further allege that by demolishing their houses without a Court Order, and without affording them an opportunity to be heard before a competent Court of law, the 4th Respondent, in collusion with the police, deprived them of their right to property and that further, the lack of compensation for their demolished plots contravened Article 40(4) of *the Constitution*.
115. Article 40 sets out the constitutional protections to property and provides thus:
- “Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –
- a. of any description; and
 - b. in any part of Kenya”
116. In ensuring that the right to property ownership is not violated, Article 40(2)(a) provides:
- “Parliament shall not enact a law that permits the State or any person –
- b. to arbitrarily deprive a person of property of any description, or of any interest in, or right over, any property of any description; or
 - c. to limit, or in any way restrict the enjoyment of any right under this Article, on the basis of any of the grounds specified or contemplated under Article 27(4).”
117. However, these constitutional rights as guaranteed under the cited provisions are only in relation to property that has been legally acquired, and does not extend to property that has been unlawfully acquired. In that regard, Article 40(6) of *the Constitution* is instructive and provides that:
- “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”
118. As aforesaid, the Petitioners do not explicitly lay claim to the suit plots. Nonetheless, pursuant to Article 260(a) of *the Constitution*, property includes not only land, but permanent fixtures on, or improvements to, land. The Petitioners' houses being permanent fixtures on the plots constitute property and the demolition thereof without due process was a violation of their proprietary rights as protected under Article 40.
119. However, the demolitions were not a takeover in the nature of compulsory acquisition for which compensation is contemplated under Article 40(4) of *the Constitution*.
120. It is the Petitioners' case that the 4th Respondent has erected a perimeter wall across the Ngong-Nairobi River passing through the Njiru-Mihango Estates without the requisite approvals from NEMA and the Nairobi City County Government; and that the aforesaid perimeter wall crosses a sewer line adjacent to the Ngong River interfering with the free flow of the River and the sewer line.
121. Article 42 of *the Constitution* guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations, whereas Article



- 69, sets out the state's obligations with respect to the environment, which includes the elimination of processes and activities that are likely to endanger the environment.
122. In enforcing environmental rights, Article 70 (1) provides that one may apply to Court for redress if the right to a clean and healthy environment under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened. Article 70 (1) thus gives every Kenyan access to the court to seek redress in environmental matters.
123. Article 70 (3) of *the Constitution* provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury before seeking redress for breach of the right to a clean and healthy environment. This provision is replicated in Section 3(3) of the EMCA which allows any person who alleges that the right to a clean and healthy environment has been, or is being infringed or violated to apply to the Environment and Land Court in the public interest.
124. In *Adrian Kamotho Njenga v Council of Governors & 3 Others* [2020] eKLR, the Court while discussing this right stated as follows:
- “Article 42 of *the Constitution* guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by article 69. The right extends to having the obligations relating to the environment under article 70 fulfilled. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment.”
125. In the circumstances, while the existence of the wall has in itself not been controverted, the allegation that it is interfering with the normal flow of the River and/or the sewer line has not been substantiated.
126. The only evidence touching on this aspect is the letter to City Hall dated 15th November, 2019, Nairobi in which residents of Mihango Estate complain about the erection of a perimeter wall around the suit property. Their complaint in this respect is that the 4th Respondent has no right to put up the wall on the suit property in light of the rival claims on the ownership of the property.
127. Critically, there is no assertion in the aforesaid letter that the said perimeter wall has interfered with the flow of the river or the sewer line as alleged herein.
128. The Petitioners have merely stated that the perimeter wall is adjacent to the river without providing precise measurements of its proximity or any evidence, even in the form of photographs to substantiate their claim that it poses a risk to the natural flow of the river or interferes with the sewer line.
129. The claims that the construction of the wall was without the approval of the 5th Respondent and Interested Party and/or in cahoots with them has also not been substantiated. Ultimately, the claim of breach of the right to a clean and healthy environment cannot be sustained.
130. The Petitioners have sought several reliefs including declarations of violations of their constitutional rights, compensation for material loss and damages to the tune of Kshs 62, 424, 999/= and demolition of the perimeter wall erected across Ngong-Nairobi River.
131. The Court has found that that a number of the Petitioners' rights have been violated and will issue declarations in that respect. The Petitioners also seek general and exemplary damages for breaches of their constitutional rights as well as special damages for material damage to their respective plots of land.



132. The Court of Appeal in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017)* [2021] KECA 328 (KLR) (17 December 2021) (Judgment) succinctly discussed the principles guiding the award of damages in constitutional Petitions thus:

“The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.

17. Special damages on the other hand are awarded for losses that are not presumed but have been specifically proved and that can be quantified, such as out-of-pocket expenses or earnings lost during the period between the injury and the hearing of the action. The attendant common law rules of proof are also applicable, in the absence of specific rules that regulate awards of compensation in constitutional petitions. It is trite under common law in this regard that special damages must be specifically pleaded and proven.

As regards the other types of damages that can be awarded in constitutional petitions, nominal damages typically consist of an insignificant allocation awarded upon proof that the defendant has violated the plaintiff's legal and constitutional rights. They are awarded for the purposes of declaring and vindicating legal and constitutional rights, and do not require proof of harm. Punitive damages are awarded in addition to compensatory or nominal damages, and proof of a highly culpable state of mind is necessary to support an award of punitive damages. Punitive damages primarily serve penal and deterrent functions in cases of gross constitutional violations, as well as vindicatory function.”

133. The Court will be so guided.
134. Beginning with the claim for compensation for material loss and damage, the same is in the nature of special damages which as aforesaid must be specifically pleaded and proved. It is the Petitioners plea in this respect that they seek special damages for the demolition of their houses which they had developed and occupied prior to the demolition of their houses. They contend in this regard that they substantially developed their plots between the years 2010-2012.
135. The Court has considered the evidence in this regard which primarily consists of receipts evincing payments to the 2nd and 3rd Respondents for the plots and receipts for building materials. Considering the disputed ownership of the property, and the fact that the monies towards alleged purchase of the property were paid to the 2nd and 3rd Respondents, the same cannot lie as special damages in the circumstances.
136. Looking at the receipts for the materials, the same are primarily for the years 2018-2019 with a few for the years 2013, 2014 and 2016. Considering this as against the plea of the substantial development undertaken in the years 2010-2012, the Court finds that there is a disconnect. In other words the pleadings and the evidence are at odds.
137. Speaking to this, the Court of Appeal in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* [2014]eKLR cited with approval the decision of the



Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus:

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

138. This Court finds that the evidence in this regard is at variance with the pleadings on the issue and the same is for disregarding. As regards punitive and/or exemplary damages, the Court does not consider that the same is appropriate in the circumstances, there being no proof of a highly culpable mind, as expressed by the Court in Peter Ndegwa(supra).
139. Moving on to general damages, in light of the breaches found as against the 4th Respondent, the Court considers that the claim under this head is merited. In light of the above analysis and determination, the Petition partly succeeds in the following terms:
- i. A declaration does hereby issue that the demolition of the Petitioners’ houses by the 4th Respondent in collusion with the 6th Respondent contravened the Petitioners’ rights under Articles 28, 40(1) and 47 of *the Constitution* of Kenya.
 - ii. The Petitioners are hereby granted general damages for the violations espoused under (i) above to the tune of Kshs 10,000,000 to be borne by the 4th Respondent.
 - iii. All other prayers in the Petition not granted are consequently dismissed.
 - iv. The 4th Respondent shall bear the costs of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

O. A. ANGOTE

Judge

In the presence of;

Mr. Musungu for Petitioners

Ms Nassir for Mr. Kithi for 5th Respondent

No appearance for 1st – 4th Respondents.

Court Assistant - Tracy

