



REPUBLIC OF KENYA



**Ngetich v County Government of Bomet & 5 others (Environment and Land Constitutional
Petition E002 of 2020) [2023] KEELC 128 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 128 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E002 OF 2020

MC OUNDO, J

JANUARY 19, 2023

**IN THE MATTER OF ARTICLES 1, 2, 3, 19(2), 20(5), 21, 22, 23, 26,
27, 28, 29, 40 AND 47 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 1, 2, 3, 13, 19(2),
20(5), 21, 22, 23, 26, 27, 28, 29, 40, 42 AND 47 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF LAND ACT 2013

BETWEEN

TYSON KIPROTICH NGETICH PETITIONER

AND

COUNTY GOVERNMENT OF BOMET 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

MOI UNIVERSITY 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

**WILDORI BUILDING CIVIL ENGINEERING CONTRACTORS CO
LTD 6TH RESPONDENT**

JUDGMENT

1. The Petitioner's undated Petition of 2020 seeks the following orders;



- i. A declaration that the Constitutional rights of Right to Property, Protection from Discrimination, Right to fair protection of the law and right to Fair Administrative Action were violated by the 1st, 2nd, 3rd, 4th and 5th Respondents.
 - ii. A Declaration that the 4th Respondent did not follow the right procedure when issuing out subsequent titles with respect to land identified in Bomet town part development plan 2000 dated January 7, 2000 Ref No R336/2000 being parcel Nos 307 and 308 that harbors public stadium to Moi University and for that reason the same (sic).
 - iii. A declaration that the 2nd Respondent abdicated its role of holding public land in trust and ensuring that the same is not wasted.
 - iv. A declaration that the 1st, 2nd, 3rd, 4th, and 5th Respondents have violated the Petitioner's right to equal benefit of law under Article 27 of the Constitution, right to Fair administrative action under Article 47 of the Constitution, rights to fair hearing and article 50 of the Constitution and the rights to access justice under Article 48 of the Constitution.
 - v. An order of judicial review to quash any decision of the 1st, 2nd, 3rd, and 4th Respondents made pursuant to flawed, biased and unreasonable investigations and or recommendations that lead to the sell and or transfer of land identified in Bomet town part development plan 2000 dated January 7, 2000 Ref No 336/2000 being parcel Nos 307 and 308 that harbors public stadium to Moi University.
 - vi. An order of refund of all monies paid to the 6th Respondent by the 1st Respondent vide Bomet Tender No CGB/ADM/001/2017/18.
 - vii. That the tender awarded to the 6th Respondent vide Bomet Tender No CGB/ADM/001/2017/18 by the 1st Respondent be and is hereby revoked.
 - viii. Any other relevant orders as this honorable court might deem fit.
 - ix. Costs of the Petition
2. The Petition was supported by an affidavit sworn by the Petitioner, as a resident of Bomet County, on October 7, 2020.
 3. Alongside the said Petition, the Petitioner filed an application dated October 7, 2020 seeking injunctive orders against the Respondents restraining them from continuing to carry out further developments, construction, dealing, transferring and/or in any way disposing off the land identified in Bomet town part development plan 2000 dated January 7, 2000 Ref No 336/2000 being parcel Nos 307 and 308 that harbors a public stadium. The Petitioner also sought that the 1st Respondent be enjoined from releasing any monies to the 6th Respondent in relation to the contract vide Bomet Tender No CGB/ADM/001/2017/18.
 4. On the February 22, 2021, leave was granted to all the Respondents to file within 14 days, their respective responses to the Petition and the Notice of Motion dated October 7, 2020. By the July 29, 2021, the Petitioner had not effected service but had sought for more time to do so.
 5. The application was subsequently dispensed with by an order of status quo to the effect that no monies would further be released towards the construction of the impugned stadium, pending the hearing and determination of the Petition.
 6. The Petitioner's Petition stems from the allegation that the Petitioner, being a resident of Bomet County is aggrieved and brings this Petition as a public interest litigation matter. That public land



- identified as Bomet Town Development Plan 2000 dated January 7, 2000, Ref No R336/2000 being parcels Nos 307 and 308 on which the stadium stands, was awarded to Moi University by the 4th Respondent herein who went ahead and even issued titles to it without following the due process where no public participation was conducted.
7. That the National Land Commission the 2nd Respondent has not done much to ensure that the said land, being public land is protected but had just looked on as the due process of the law was being violated.
 8. That subsequently after awarding the said land to Moi University, the County Government of Bomet (1st Respondent) went ahead to construct a multimillion sports complex being Bomet International Association of Athletics Federations (IAAF) Stadium which project had been ongoing for the last four years or there about using public funds, without following the due process of the law. That the said land having been awarded to Moi University, the County Government had continued to commit moneys to develop the same parcel of land where another contract was entered into where over Kshs 257, 498,105/= was to be paid to the 6th Respondent .
 9. That Moi University no longer had any stake in Bomet County ever since Bomet University College was declared a charter of its own with its own leadership. That the conduct of the Respondents had thus grossly violated the Constitution which violation was likely to continue unabated unless this court intervened.
 10. That by failing to follow the procedures laid out for purposes of disposing, procurement, demolition of public properties development, the 1st, 2nd, 3rd, 4th and 5th Respondents had abdicated their Constitutional role and acted contrary to the intention and the spirit of Article 10 of the Constitution.
 11. The 4th and 5th Respondents filed their Memorandum of Appearance dated November 4, 2020 on November 15, 2020 through the office of the Honorable Attorney General, wherein vide their grounds of opposition dated March 21, 2022 and filed on an equal date, they had opposed the Petition deponing that it did not meet the threshold of a Constitutional litigation as it did not disclose any public law issue. That it did not indicate precisely the fundamental rights that had been infringed by the 4th Respondent, was incompetent defective and bad in law, vexatious, frivolous and scandalous. That's an issue of ownership was one to be determined by way of a civil suit and therefore the same should be struck out and/or dismissed for non-disclosure of a cause of action against the 4th Respondent and for being an abuse of the court process.
 12. The 1st Respondent through their Acting County Secretary filed their Replying Affidavit dated May 4, 2021 on the May 5, 2021 opposing the Petition to the effect that all allegations raised therein were denied as they were out rightly frivolous. That the Petition was founded on a procurement process. That the 1st Respondent had never donated land to the 3rd Defendant as alleged by the Petitioner and no evidence had been adduced by the Petitioner to support this contention or allegation.
 13. That the Honorable Court had pronounced itself that it was not best or competent to hear and determine matters on procurement process since there was a body, under the Public Procurement and Disposal Act, that was best suited to handle the same as was held in the case in Joseph K Kiptoo & Another vs Kericho Water & Sewerage Company Ltd [2016] eKLR and in Moses Kithinji vs HE Dr Mohammed Abdi Kuti [2020] eKLR.
 14. That the question of Land ownership in respect of Land Ref No 307 & 308 was well settled in Petition No 3 of 2016 County Government of Bomet vs Moi University (sic) and there had been no audit query by the Auditor General or the County Assembly of Bomet on the procurement process in respect of construction of the Stadium.



15. That the Petition had not disclosed any unconstitutionality with precision and the manner of violation of any articles of the Constitution and neither had it outlined the procurement procedures alleged to have been violated. That the same therefore violated the laid down principles on precision of Constitution Petitions as established in Anarita Karimi Njeru vs Republic [1979] eKLR and Mumo Matemo vs Trusted Society of Human Rights Alliance Civil APP 290/2012 (2013).
16. That the allegation of misuse of funds by the 1st Respondent could not be competently adjudicated upon by this Honorable Court since there were other state organs best suited to call into question any misappropriation of Public Funds. The 1st Respondent thus had sought that the Petition be dismissed in its entirety with costs.
17. The 6th Respondent also filed their Memorandum of Appearance dated October 4, 2021 on October 13, 2021 wherein vide their Replying Affidavit sworn on October 28, 2021 by the Director of the company and filed on the November 8, 2021, they had opposed the Petition whereby they had protested that the company had been served with the Petition nearly one year after it had been filed.
18. That they were strangers and adverse to the facts and claims by the Petitioner relating to either who owned the land known as Bomet town part development plan 2000 dated January 7, 2000 Ref No 336/2000 being parcel Nos 307 and 308, or the claim relating to the procedure, allotment and/or awarding of the said piece of land.
19. That following a tender advertised by the County Government of Bomet on the May 16, 2018 for the completion of the IAAF Stadium- Bomet in Tender No CGB/YS/001/2017/2018, their company had submitted their tender documents ('AAJ3') wherein after a competitive bid, they had been awarded the tender and had accepted the same and signed the contract with the 1st Respondent ('AAJ1') who had then handed over the uncompleted construction site to their company whose contract was for a term of three years with the completion scheduled for September 2021. That the completion had been delayed as funding to the project had been unjustly halted.
20. That the 1st Respondent and the Ministry of Public Works had conducted a non-destructive test on the site wherein they had given his company directions on how to complete the remedial works and despite the 6th Respondent having filed a certificate with the 1st Respondent, the same had not been fully settled to date.
21. The 6th Respondent's bone of contention was that the Petition had been discriminatory and biased to the effect that the initial contractors had not been joined as parties thereto and neither had there been attempts to stop and/or reverse payments already made to them.
22. That further the 6th Respondent had not been accused of contravention of any of the Petitioner's rights and therefore they were not a necessary party to the Petition. That no grounds had been adduced by the Petitioner as to why the 6th Respondent's tender should be revoked and neither had there been facts provided as to how due process was not followed in the awarding of the contract. That if indeed the tender, which was for the completion of the stadium, was awarded un-procedurally, there were statutory procedures to remedy the same and not through a Petition. That the court therefore lacked jurisdiction to grant declaratory orders against the 6th Respondent as sought by the Petitioner.
23. That the completion of the work was still pending because of lack of payment by the 1st Respondent's, and the 6th Respondent having expended resources, time and money in fulfilling its obligation as provided for under the tender awarded, it would be unjust for it not to be paid because of issues that existed between the Petitioner and the 1st Respondent for which the 6th Respondent was not privy to.



24. In rejoinder, the Petitioner by the Supplementary Affidavit sworn on February 17, 2022 deponed that despite there having been no response by the 3rd and 4th Respondents, it was their contention that allocation of the suit land did not involve public participation before transferring the land to the 3rd Respondent and no evidence had been tendered by the 4th and 5th Respondents to the contrary. That the allegations set out in the Petition were true and no evidence had been tendered to rebut the same. That the 2nd Respondent, being the sole allocating body had filed generic grounds of opposition which did not aid the court at all as the grounds had veered of the main issue and had failed to address the flawed process of allocating public land to the 3rd Respondent. That the Petition was founded on the flawed allocation process and the subsequent contract awarded to the 6th Respondent who had failed to exercise due diligence in investigating the matters concerning ownership on a land they intended to contract for construction works.
25. On the October 14, 2021, the court, pursuant to the provisions of Section 1B and 3A of the *Civil Procedure Act* had directed, for the expeditious disposal of the Petition, by way of written submissions which were to be filed within 21 days from that date and the matter was set for mention to confirm compliance and to take a date for judgment on the November 15, 2021.
26. Parties did not comply within the timelines as set by the court, and as late as the May 5, 2022, the 4th and 5th Respondents were yet to comply. As I write this judgment, only the Petitioner, and the 1st and 6th Respondents had complied. That notwithstanding I shall summarize their respective written submissions as herein under;

Petitioner's submissions

27. The Petitioner framed the issues for determination as follows;
- i. Whether the suit parcel was allocated to the 3rd Respondent without following due process?
 - ii. Whether public participation was conducted during the allocation process?
 - iii. Whether public funds are being committed towards an illegal contract between the 1st and 6th Respondent?
 - iv. Whether public participation was conducted before the said contract was awarded?
 - v. Whether the Petitioner is entitled to the reliefs sought?
 - vi. Who should bear the costs of this Petition?
28. On the first issue for determination, it was the Petitioner's submission that the allocation of the suit land was tainted with massive illegalities. That the present parcels of land were public land within the meaning of Article 62 (1) of the *Constitution* of Kenya, which land ought to vest in and be held by a County Government in trust for the people resident in the county, and thereafter be administered on their behalf.
29. That the suit land was therefore held by the 1st Respondent in trust for the people of Bomet County, while the 2nd Respondent's duty was to allocate and/or administer it on behalf of the 1st Respondent as was held in Nairobi High Court: *Petition No 413 of 2012 Serah Mweru Mubu vs Commissioner of Lands and 2 Others*.
30. That the allocation of public land by the National Land Commission had to be in line with Section 12 of the Lands Act and therefore it went without saying that the 2nd Respondent's grounds of opposition



filed on the October 12, 2021 neither justified the said transfer nor aided the court in reaching a logical conclusion, but rather it amounted to concealment of material facts.

31. That it was the Petitioner's contention that, the suit parcel being identified as Bomet Town Development Plan 2000 dated 7th January, Ref No R336/2000 being parcels numbers 307 and 308 had already been reserved for a public purpose and was not available for allocation as provided for under Section 12(2) (d) of the Land Act. That how the 2nd Respondent proceeded to allocate the same was shrouded in mystery.
32. The Petitioner relied on the decided case in Thika ELC Petition 9 of 2018 Consolidated with Petition 126 of 2017 Samuel Wainaina Kioi & Another vs the Registered Trustees Capuchin Fransiscan Fathers Kenya & 4 Others as well as the decided case in Malindi ELC Constitutional Petition No 19 of 2015, Farooq Imtiaz Mohammed Malik vs Director of Police Investments & 3 others to submit that since the allocation of the suit parcel was flawed in impropriety, that the Court ought to cancel the titles issued therein.
33. That in the alternative, since the main purpose was the construction of a public university, that the land may have been allocated following an alleged 'public request'. That section 27 of Part V of The Land (Allocation of Public Land) Regulations 2017, enumerated the process of allocation of public land through public request wherein in the present transaction, no such process was undertaken. The 2nd Respondent in its response merely stated that the allocation was for a public purpose and the 1st Respondent's response did not address the same process too whereas the 6th Respondent's response veered off the issue of the land in dispute and only concentrated on its contract with the 1st Respondent .
34. That no such allocation process was followed, and in the absence of such a lawful process, the allocation of the suit parcels could only be deemed as shambolic, irregular, illegal and an abuse of powers by the Respondents.
35. On the second issue for determination, the Petitioner submitted that contrary to the provisions of the Article 10 of the Constitution and Section 27(1) of The Land (Allocation of Public Land) Regulations 2017, no public participation had been conducted before allocation of the said land to the 3rd Respondent and therefore it is was not in doubt that the national values and principles of governance stipulated under Article 10 of the Constitution, had not been adhered to. Reliance was placed in the case of Patrick Musimbi vs National Land Commission & 4 Others [2016] and Advisory Opinion Reference No 2 between the National Land Commission & Attorney. General & 5 Others and Kituo Cha Sheria & Another (sic) to submit that the allocation process was flawed and without regard to the Constitutional tenets surrounding public participation.
36. On the third issue for determination the Petitioner submitted that indeed public funds were being channeled to aid the construction of a stadium which had emanated from an illegal contract between the 1st and the 6th Respondent and on a disputed land being Land Parcel 307 and 308, which land was already fraudulently allocated to Moi University, the 3rd Respondent herein as demonstrated in the first issue. That the channeling of public funds in aid of the construction of the stadium was meant to aid the raiding of public coffers.
37. On the fourth issue for determination the Petitioner's submission was that since there was no public participation involved, the said tender ought to be canceled and retendered in accordance with the provisions of the Constitution.
38. Submissions to the fifth issue for determination was that indeed the Petitioner was entitled the reliefs so sought. That further the application for judicial review was merited as the Petitioner had proven both



the illegality and procedural impropriety with regards to the flawed allocation process as was held in Nairobi High Court, Constitutional and Judicial Review Division, [*Miscellaneous Application No 338 of 2016, Republic vs Kenya Airports Authority*](#), and in Mombasa High Court, Judicial Review Division, *Judicial Review Application No 67 of 2018, Republic vs Public Administrative Board & 3 Others* wherein reliance was placed on the holding in [*Republic vs Public Procurement Administrative Review Board & 2 Others Ex-parte Highway Enterprises Limited*](#)(sic).

39. On the last issue for determination, the Petitioner relied on the provisions of Section 27 of the [*Civil Procedure Act*](#) to submit that costs should follow the cause.

1st Respondent's Submissions.

40. The 1st Respondent's submission was that they ought not to be faulted for any transaction involving the land in question since no evidence had been adduced on its involvement in the entire transaction. That for avoidance of doubt the 1st Respondent had never issued land to any party herein as alleged.
41. That in reference to the procurement issues, that the Court ought not to make a finding against the 1st Respondent for the reason that there were bodies competent to address the same in the first instance before seeking the intervention of the honorable court.

6th Respondent's Submissions.

42. The 6th Respondent's submission was to the effect that pursuant to the 1st Respondent having issued them with tender No CGB/YS/001/2017/2018 to complete the proposed Bomet IAAF stadium, which they had accepted and signed a contract thereto, and upon the 1st Respondent having handed over the construction site to them, the Petitioner now wanted the said Tender revoked.
43. The 6th Respondent framed their issues for determination as follows:
- i. Whether the Petitioner has prematurely invoked this Court's jurisdiction to hear and determine issues relating to advertisement, and issuance of Tenders.
 - ii. Whether the Petitioner has established impropriety in advertisement and issuance of the Tender being Bomet Tender No CGB/YS/001/2017/2018.
 - iii. Whether the Petitioner has established that the 6th Respondent has infringed and or is in Contravention of any Fundamental Rights and Freedoms under Article 3, 19(2), 20(5), 21, 22,23, 26, 27, 28, 29, 40 and 42 of the [*Constitution*](#).
44. On the first issue for determination it was the 6th Respondent's submission that it was settled law that where procedures and processes exist for resolution of disputes, such processes must be exhausted first before a party could approach court. That whilst the alternative dispute resolution mechanisms did not oust the Jurisdiction of the Court which is unlimited in order to allow all parties herein a right to Appeal to the High Court, Court of Appeal and if possible the Supreme Court of Kenya, the Petitioner had un-procedurally invoked the Jurisdiction of this Court.
45. That the issues before this Court were not novel in nature and had been considered by the High Court and Court of Appeal wherein the court of Appeal in *Civil Application No. NAI 213 of 1996 (96/95 UR) Kimeni Wanyoike vs Electoral Commission & Another [1995] eKLR* borrowing from a previous similar matter in [*Civil Application No NAI 92 of 1992 \(NAI 40/92 UR\) Speaker of the National Assembly vs James Njenga Karume \[1992\] eKLR*](#) had held that where there were special procedures when it came to matters of election that those procedures ought to be strictly followed. That the Applicant had not shown the court that the procedure he had adopted in coming to the Court was correct and on that



- score the court was also not satisfied that his appeal was arguable nor was it satisfied that in the end the Applicant would be without a remedy.
46. That the procedure was the hand maid of the law and under Section 28 of Public, Procurement and Asset Disposal Act, and the Public Procurement Administrative Review Board. That the *Public Procurement and Asset Disposal Act* 2015 ('PPAD Act') was empowered to review; hear and determine tendering and Asset disposal disputes and not the Constitutional Court.
 47. The 6th Respondent cited the case in *Petition No 392 of 2018 Okiya Omtatah Okiiti & another v Kenya Power and Lighting Company Limited (KPLC) & 4 others [2020] eKLR* wherein reliance had been placed on a five Judge bench of the Court in *International Centre for Policy and Conflict & 5 others vs The Hon Attorney General & 4 others [2013] eKLR* where the court had held that where there existed sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated Constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms had been exhausted. That in the same breath, the Petitioner had failed to exhaust the established statutory mechanisms to resolve this dispute.
 48. On the second issue for determination it was the 6th Respondent's submission that apart from the orders sought, the Petitioner had not associated the 6th Respondent with any impropriety and or infringement of the articles of the *Constitution* and any other act of the parliament.
 49. That in civil matters, under Section 107 of the *Evidence Act*, the Petitioner was required on a balance of probability to prove the wild allegations against the 6th Respondent which he had failed spectacularly.
 50. The 6th Respondent further alluded to the holding in *James Njoroge Mwanjt vs Inspector General of Police & Another [2021] eKLR* wherein it had been held that the Petitioner having made very serious allegations against the police and unknown people, needed to prove his allegations on a balance of probability as was required under Section 107 of the *Evidence Act*. Consequently the Petition had been dismissed.
 51. The 6th Respondent thus urged the court to similarly dismiss the Claim against them there having been no evidence adduced and/or there having been no mention of them in the supporting affidavit as a company that had participated in any fraud, contravening Articles of the *Constitution* or any impropriety.
 52. On the last issue for determination as to whether the Petitioner had established that the 6th Respondent had infringed and/or Contravened any Fundamental Rights and Freedoms under Article 3, 19(2), 20(5), 21, 22, 23, 26, 27, 28, 29, 40 and 42 of the *Constitution*, the 6th Respondent submitted that what was before court was a tussle between entities which was foreign to them. That the structure had been completed. The Petitioner had not bothered to join other parties that had constructed the main construction. The Petitioner's Petition was to the effect that due process was not followed in awarding the contract where no evidence had been adduced to that effect or how the process became flawed. That the Petition was not only biased and discriminatory, but the same was frivolous, premature and ought to be dismissed with costs.

Determination.

53. I have carefully considered the contents of the Petitioner's Petition as well as his Supporting and Supplementary Affidavits. I have also considered the 4th, 5th and 6th Respondents' Grounds of Opposition and Replying affidavits respectively as well as the written submissions by all Counsel and the relevant provisions of the law and authorities herein cited.



54. To begin with this court reminds parties that this is a noble profession where etiquette and professionalism should not be lost. Counsel are therefore reminded to be mindful while attacking the work of their colleagues or opposing side so that the same is done respectfully and in a language, phrase and/or words that are acceptable as the court takes offence to the use of derogatory innuendo and foul language in written submissions.
55. That said and done, the Petitioner's claim stems from an allegation that public land identified as Bomet Town Development Plan 2000 dated January 7, 2000, Ref No R336/2000 being parcels Nos 307 and 308 was awarded to Moi University by the 4th Respondent herein who went ahead and issued titles to it without following the due process and no public participation was conducted. That the 1st Respondent then went ahead to construct a multimillion sports complex being Bomet International Association of Athletics Federations (IAAF) Stadium using public funds without following the due process of the law.
56. That the said land having been awarded to Moi University, the 1st Respondent had continued to commit moneys to develop the same parcel of land where a contract was even entered into where over Kshs 257, 498,105/= was to be paid to the 6th Respondent. That by failing to follow the procedures laid out for purposes of disposing, procurement, demolition of public properties development, the 1st, 2nd, 3rd, 4th and 5th Respondents had abdicated their Constitutional role and acted contrary to the intention and the spirit of Article 10 of the Constitution.
57. The 1st, 3rd, 4th and 6th Respondents have vehemently opposed the reasons brought forth by the petitioner in his petition stating and rightly so that these allegations needed to be proved on a balance of probability as was required under Section 107 of the Evidence Act and through the established statutory mechanisms. That the Constitutional jurisdiction of the court need not be invoked where there existed statutory mechanisms which had not been exhausted. That the Petitioner had failed to exhaust the said established statutory mechanisms to resolve his dispute if any.
58. Of interest to note is that the court has been referred to a decided case in Bomet *Petition No 3 of 2016 County Government of Bomet vs Moi University* (unreported) but to which reference is made by the Court of Appeal in an application for injunction pending the hearing and determination of an intended appeal from the judgment and order of the High Court of Kenya at Bomet (Muya, J), dated June 8, 2016 in *The County Government Of Bomet v Moi University & 2 others [2016] eKLR* where the Court of Appeal sitting in Nakuru held that:
- ' We have said enough to show that this application is for granting. We grant it in terms of prayer 3 thereof which for the avoidance of doubt, refers to parcels Number 307 and 308 in Bomet Town on which the stadium under construction stands.'
59. For avoidance of doubt 'prayer 3' herein above captioned was as herein under;
- ' 3) That pending the hearing and determination of the intended Appeal, there be an order of injunction restraining the 1st Defendant/1st Respondent either by itself, its agents, servants or otherwise howsoever from occupying, interfering, trespassing, demolishing, dealing or in any way alienating or disposing of the land identified in the Bomet Town Part Development Plan 2000 dated January 7, 2000, Ref No R336/2000 being parcels Nos 418 and 419 and the Public Stadium therein.'
60. The extract from the ruling delivered by the Court of Appeal does not create any doubt in my mind that the issue before this court was litigated and determined before another court of competent jurisdiction where the parties therein had been the 1st, 2nd and 4th Respondents herein.



61. Having summarized the matter before me as above, I find the issues arising herein for determination as being:-
- i. Whether the instant Petition is res judicata
 - ii. Whether the Petitioner's rights under Articles 1, 2, 3, 13, 19(2), 20(5), 21, 22, 23, 26, 27, 28, 29, 40, 42 and 47 of the Constitution were violated by the Respondents and what remedies if any are available to the Petitioner.
62. In Bernard Mugo Ndegwa -vs- James Nderitu Gitbae and 2 Others (2010) eKLR, the court held that for a matter to be seen as being res judicata the following factors should be considered:
- i. The matter in issue is identical in both suits;
 - ii. The parties in the suit are the same;
 - iii. Sameness of the title/claim;
 - iv. Concurrence of jurisdiction; and
 - v. Finality of the previous decision.
63. Looking at the circumstance of the present suit and pursuant to the determination in Bomet Petition No 3 of 2016 County Government of Bomet vs Moi University & 2 Others (unreported) where judgment had been rendered, I find that this Petition is res judicata the said proceedings and the addition of the Petitioner, the 2nd and 6th Respondents herein to the Petition estoppes them from litigating under the provisions on Section 7 of the Civil Procedure Act.
64. Indeed it was held in ET vs Attorney General & Another (2012) eKLR that:
- ' The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, in the case of Njangu vs Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.'
65. The upshot of the foregoing is that the Petition herein having been conclusively in Bomet Petition No 3 of 2016 County Government of Bomet vs Moi University & 2 Others the Petitioner's Petition herein is res judicata to that effect and is therefore an abuse of the court process. Litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and procedure to be adhered to. The same is herein dismissed with costs.
66. In case I am wrong then I must hasten to point out that it is for the Petitioner to prove on a balance of probabilities that his fundamental freedoms and rights as protected by or under the Constitution have been violated. A Petitioner must establish this by not only clearly identifying the relevant and specific Articles of the Constitution but availing evidence, through affidavit or otherwise of such violation as



per the required standard set out in respect of the Constitutional Petitions as set out in the case of *Anarita Katimi Njeru vs The Republic* [1979] eKLR where it had been held, in the words of the Justices Trevelyan and Hancox that;

' We would, however, again stress that 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.'

67. The Petition referred to infringement of Articles 1, 2, 3, 13, 19(2), 20(5), 21, 22, 23, 26, 27, 28, 29, 40, 42 and 47 of the *Constitution* in its title, however, the Petition provided little or no particulars as to the allegations and the manner of the alleged infringements thereto.

68. The Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR held 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.'

69. Indeed what came out clearly in the present Petition was not an infringement of the Petitioner's right but rather, as I understood was that the Petitioner was challenging allocation and title to ownership of land parcel identified as Bomet Town Development Plan 2000 dated January 7, 2000, Ref No R336/2000 being parcels Nos 307 and 308, to the 3rd Respondent.

70. I further understood that the Petitioner was also challenging the tender and procurement process used by the 1st Respondent to award the tender to the 6th Respondent in Bomet Tender No. CGB/ADM/001/2017/18, to complete the works on the Stadium, wherein he (Petitioner) sought that the said Tender be revoked.

71. I find that the determination that the Petitioner seeks herein are orders whose resolution requires a full trial hearing and the interpretation of a statute rather than through a Constitutional Petition because a constitutional question is an issue whose resolution requires the interpretation of a Constitution rather than that of a statute. The particular question to be decided herein so as to put this matter into the ambit of a Petition was whether the state was liable for acts committed by its agents while on duty. In this case, I find the answer in the negative as constitutional rights protect individuals from governmental injury and regulate the discretion of the government to inflict injury. No such evidence had been adduced herein.

72. In the case of *Godfrey Paul Okutoyi & Others vs Habil Olaka & Another* (2018) eKLR Chacha, J held that:-

' It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being



a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional Petition. A party should only file a constitutional Petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.'

73. In the case of *Bernard Murage -vs- Fine Serve Africa Ltd & others (2015) eKLR* the Court held that:-

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

74. Indeed the Court of Appeal in the case of *Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited [2013] eKLR* made the following observation:-

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

75. The issues raised by the petition herein, in my opinion and in accordance to the case law herein above cited would best be dealt with in the appropriate forum in the manner allowed by the applicable statutory law and procedure like the Penal Code, The Land Act, The Land Registration Act, The Public Procurement and Asset Disposal Act amongst others, but not through a Constitutional Petition.

76. From the facts before me, and the fact that that courts must at all times guard against improper transmission of normal disputes or ordinary issues of litigation being clothed as Constitutional Petitions, I find that this Petition does not raise constitutional issues. The Petitioner ought to have approached the appropriate court by way of an ordinary suit. For the above captioned reasons, this Petition is still stands dismissed with costs.

77. The interim orders issued on October 14, 2021 are herein vacated.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 19TH DAY OF JANUARY 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

