



Kyule & 640 others v County Government of Kajiado & 5 others (Constitutional Petition 25 of 2020) [2023] KEELC 16997 (KLR) (21 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16997 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 25 OF 2020**

**LL NAIKUNI, J
MARCH 21, 2023**

BETWEEN

**JACKSON KASYOKA KYULE 1ST PETITIONER
JOSEPH KING'ELE 2ND PETITIONER
JOSEPHINE MUTHOKA & 638 OTHERS 3RD PETITIONER**

AND

**COUNTY GOVERNMENT OF KAJIADO 1ST RESPONDENT
COUNTY GOVERNMENT OF TAITA TAVETA 2ND RESPONDENT
ROMBO GROUP RANCH 3RD RESPONDENT
THE NATIONAL LAND COMMISSION 4TH RESPONDENT
THE NATIONAL POLICE SERVICE 5TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 6TH RESPONDENT**

JUDGMENT

I. Preamble

1. This Judgement pertains to the Petition dated 2nd September 2020 instituted by the Petitioners herein against the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents herein. The Petitioners approached this Honourable Court for its determination acting on their own and on behalf of the other members of places know as “Kijiji - A1”, “Kijiji - A2”, “Kijiji – C”, “Uthiani”, “Langata – A” and “Langata - B” villages of Rombo - Njukini area which ideally are areas within the County of Kajiado and Taita Taveta.
2. The Petition was contemporaneously filed with a Notice of Motion application under Certificate of Urgency. Upon service, the 1st Respondent appeared through the Law firm of Messrs. Sankale &



Company advocates while the 2nd Respondent appeared through the Law firm of Messrs. John Bwire & Associates Advocates. The 3rd Respondent was represented through the Law firm of Messrs. Taliti Collins Advocates. The 5th and 6th Respondents through Deputy State Counsel of the offices of the Attorney general, Mombasa. On 21st September, 2020, the 2nd Respondents filed their replies and a Notice of Preliminary objection dated on 26th October, 2020 which I shall deal with later on.

3. On 28th October 2020, the Court (C. Yano J) directed the Respondents who had not filed their reply to the Petition and the notice of motion application dated 2nd September to file and serve their responses within the next 14 days. The 1st and 2nd Respondents only participated at the initial stage of the Petition and did not put in responses to the Petition while the 4th Respondent did not enter appearance.

II. The Petitioners case.

4. The filed Petition by the Petitioners herein was premised on the grounds, testimonial facts and averments made out in the 30 Paragraphed affidavit sworn by Mr. Jackson Kasyoka Kyule dated the 2nd September, 2020 together with eleven (11) annexures marked as “JKK – 1 to 11 annexed thereof. He posited being an official of the Steering Committee of the members drawn from the Kijiji – A, 1; Kijiji – A, 2; Kijiji – C, Uthini, Langata A and Langata B villages of Rombo – Njukini area abutting the boundary between the Counties of Taita Taveta and Kajiado. He was the Secretary to the Steering Committee while the 2nd & 3rd Petitioners were the Chairman and Treasurer respectively. He had the authority to pled on behalf of all the Petitioners accordingly.
5. He further deposed that they came to know that there existed Plot LR. No. 141 by then held under a long lease by Rombo Group Ranch which bordered with the Republic of Tanzania on one side and the County of Taita Taveta. On the side of the County of Taita Taveta, the said Rombo Group Ranch occupied under a long lease Plot L. R No. 12355 and 12356 which some of the Petitioners resided on Plot No. 1414 while the others resided in LR No. 12355 and 12356 and had been residing, using and in possession of since the years 1970s and early 1980s. According to them, currently there were six (6) villages on it namely Kijiji – A, 1; Kijiji – A, 2; Kijiji – C, Uthini, Langata A and Langata B villages of Rombo – Njukini. After settling in the current area, they prepared farms and built homesteads where they were living to date and they had had a peaceful relationship with the neighbours so far.
6. On 4th July 2020 a meeting was held at Elerai Town in the County of Kajiado where the Deponent personally attended. Further, during this meeting, then two Governors from the two Counties of Kajiado and Taita Taveta respectively signed a purported boundary dispute resolution agreement that intended to resolve the long standing boundary dispute at Rombo Group Ranch by demarcating the boundary between the two counties. He deposed that he came to learn that this meeting had been organised as a ceremony to sign an agreement resolving a boundaries dispute between the Counties of Kajiado and Taita Taveta. Additionally, he recalled in this meeting it was only the politicians who spoke briefly before the actual signing of the agreement took place. Thereafter, it was publicly declared that an agreement determined the boundary between the two Counties had been signed though he never saw a copy of the said agreement. All efforts to have obtained a copy of the said agreement from both the offices of the Governors of the two Counties was in vain. Luckily, they managed to get a copy of the Survey Plan that was prepared by the technical team. From the said report it confirmed the fears they had always had over the boundaries dispute.
7. He deposed that prior to the signing of the agreement on 4th July, 2020 none of the Petitioners had been consulted or even given an opportunity to say something. The first time they came to know about this process of fixing the common boundary between the two Counties was on 4th July, 2020. They held that this was an unconstitutional decision.



8. He stated that soon after purported decision made on the 4th July, 2020, political leaders of the 1st Respondents were captured by the print media as saying that the Petitioners should be evicted within the ninety (90) days and the Residents of the 1st Respondents were to be given the land currently occupied by the Petitioners. That notice expired on or around the 3rd September, 2020. He felt that there would have been it was mandatory to have involved communities living along the boundary line.
9. Petitioners stated that part of the suit property was claimed by the 3rd Respondent was Plot No. 141 being on the administrative side of the 1st Respondent and Plot L. R No. 12355 and 12356 being on the administrative side of the 2nd Respondent which meant that the 3rd Respondent owns Plot no. LR No. 141 as a long lease issued by the 1st Respondent and LR No. 12355 and 12356 as a long lease as issued by the 2nd Respondent.
10. It was pleaded that after the decision of the 4th July 2020 some of the Petitioners were deemed to be in the 1st Respondent's County while other group of the Petitioners were deemed to be residents of the 2nd Respondent which both counties had started exercising administrative activities on each side of their land and blames the decision made on 4th July 2020 which allegedly fixed the boundary line between the two counties as a catalyst. The Petitioners stated that they had all along believed and held themselves as residents of the County of Taita Taveta and had had their national identity cards issued in Taita Taveta, exercised their civic duty, received services and their children attend schools in the County of Taita Taveta. The Petitioners stated that they were Bantus and small scale peasant farmers who planted seasonal food and kept few domesticated animals. They were unlike the inhabitants from the County of Kajiado who were Nilotes and majorly pastoralists keeping large stock of livestock. This led to perennial land use conflicts between farmers and the herders. Their children attended schools located in the County of Taita Taveta. There was a total mix up.
11. He averred that before the signing of this agreement on 4th July, 2020 there had been uncertainty about the actual location of the official boundaries separating the 1st and 2nd Respondents within the Plot No. 141 on the one hand and Plot Numbers 12355 and 12356 on the other hand. The membership consisted of the Rombo Group Ranch who hailed from the County of Kajiado while others were from the County of Taita Taveta especially those who occupied a small portion of LR No. 12355 and 12356. The main purpose for the Rombo Group Ranch was to provide its members with grazing land for the members majority whom were pure pastoralists. Some of the members had started receiving threats of eviction from the 3rd Respondent. Historically, the Bantus were the majority while the Nilotes were mainly the members of Rombo Group Ranch.
12. The Petitioners stated that the Petition dealt with issues of historical injustices, breaches of *the Constitution* by not providing the Petitioners with a forum for public participation. He held that there was now an organ created by *the Constitution* to deal with issues touching on land in the National Land Commission under the provision of Article 67 of *the Constitution* of Kenya, 2010. Further, the Petitioners were aware that pursuant to the provision of Article 188 (1) of *the Constitution*, any alteration of the boundaries of counties vested in independent commissions formed by Parliament. In this regard a bill had been pending before the Senate since the year 2015 known as the County Boundaries Bill marked as "JKK – 8". To the Petitioners by allegedly forming a technical committee for the purpose of surveying and demarcating the boundary between the Counties of Taita Taveta and Kajiado, the 1st and 2nd Respondent acted outside their legal mandate and in doing so usurped the powers of the independent commission.
13. The Petitioners stated that after 4th July 2020, the administration of the 1st Respondent started constructing a road to mark a new boundary separating the two counties. The road has split the area



occupied by the Petitioners on Plot no. 141 into two-one in the County of Kajiado and the other in the County of Taita Taveta in some places the new road is passing through homes owned by some of the Petitioners, homes which are threatened with demolitions , in some places the road has cut into two farms occupied by the Petitioners. The 1st Respondents had started releasing their cattle to the farms and destroying crop belonging to the Petitioners. There had been arrests and charging of some people being accused of trespass and threat of torching down their houses despite having occupied the land for over 45 years.

14. They filed this Petition for determination by Court issues surrounding historical injustices, breaches of *the Constitution* by not providing the Petitioners with a forum for public participation before the issues of positioning of the boundary between the 1st and 2nd Respondents counties. The Petitioners also complained of the consequential breaches of their Constitutional rights to own, use and occupy land which they had used consistently since the year 1970s and the denial to make a choice of the County of their residence between the 1st and 2nd Respondents.
15. The Petitioners stated that the provisions of Articles 10 (2) (b), 27, 36 (2), 39 (3) 40, 43, 63 (4) and 73 (2) (b) have been infringed . The Petitioners further cited the provision of Articles 181 (1), 188 (a) , 27, 189 (2) of *Constitution of Kenya, 2010* and prayed the Court to make a finding that the joint agreement signed on 4th July 2020 was unconstitutional for violating the Constitutional rights of the Petitioners.
16. These were the documents relied on by the Petitioners in support of their case.
 - a. Consent to file the Petition.
 - b. Authority to plead.
 - c. Although the Petitioner had indicated having producing a copy of survey map for Land Reference numbers No. 141 marked as annexure “JKK – 3” but in fact there was no such annexure
 - d. Photographs.
 - e. Newspaper cuttings.
 - f. The first page of county boundaries bill.
 - g. Copies of the national identification cards.
17. From the filed Petition, the Petitioners sought for the following orders:-
 - a. That pending the hearing and determination of a complaint dated 21st August 2020 pending before the National Land Commission under the provision of Article 67 (2) (e) of *the constitution*, the implementation of the decision by the County Government of Taita Taveta and the County Government of Kajiado on 4th July 2020 relating to the common border be stayed.
 - b. That a judicial review order in the form of orders of Certiorari quashing the joint agreement dated 4th July 2020 that purported to demarcate the Counties of Taita Taveta and Kajiado.
 - c. That an order of injunction restricting the members of Rombo Group Ranch from grazing their animals on the farms of the Petitioners in Plot LR. NO 141, 12355 and 12356 or in any other manner interfering with peaceful occupation and lives of the Petitioners.



- d. That a declaration that the act of forming a technical team and committee to survey and demarcate the County of Taita Taveta and Kajiado county boundary violated article 188 of *the Constitution*.
- e. That a declaration that in the absence of an independent entity contemplated under Article 188 (1) of *the constitution*, the national land commission is the only constitutional organ with jurisdiction to determine conclusively inter county boundary disputes.
- f. That a declaration that as a result of the long uninterrupted and continuous occupation of the portion of LR. NO 141, 12355 AND 12356 the Petitioners have acquired title under the doctrine of adverse possession and have acquired rights to own and occupy land which is protected under Article 40 of *the Constitution*.
- g. That an order of Judicial review in the form of mandamus do issue compelling the National Land Commission to survey and hive the portion of Rombo Group Ranch under Article 63 (4) of *the Constitution*, subdivide the hived portion and issue title deeds to the Petitioners.
- h. That a declaration that the Respondents failed to facilitate public participation and involvement in the process of demarcating the boundary the boundary between the County of Taita Taveta and Kajiado contrary to Article 10 (2) of *the Constitution*.
- i. That a declaration that the act of forceful takeover of the petitioners land breaches the right to own property as guaranteed in Article 40 of *the Constitution*.
- j. Damages for loss of property and farm produce.
- k. Any other reliefs this honourable court would be pleased to issue.
- l. Cost of the Petition.

III. The Responses by the 1st Respondent.

18. On 27th October, 2020, the 1st Respondent filed a 16 Paragraphed Replying Affidavit sworn by LNKU SEKI and dated 23rd October, 2020. He deponed as follows:-
 - a. He was the County Secretary of the County Government of Kajiado and hence duly authorised and competent to swear this affidavit on its behalf.
 - b. The Honourable Court had no jurisdiction to entertain this matter on grounds that:-
 - i. The Cause of action principally related to relief respecting to or on compensation for the wrong to immovable property whose portion of the subject matter was situated within the County of Kajiado where the Court within the local limits as prescribed by the provision of Section 12 and 13 of the *Civil procedure Act*, Cap 21 was the Environment and land Court at Kajiado.
 - ii. The Petitioners have pleaded having lodged a complaint before the National land Commission and whereby the Commission has the powers under the provision of Section 15 (9) (k) of the National Commission Act, to recommend remedies including



declaration, preservation orders and injunctions as well as revocation and reallocation of land.

- iii. The Applicants were guilty of forum shopping.
- c. Based on legal advice by his Counsels, the instant application and the Petition were fatally defective in form and substance as the petitioners/Applicants in Paragraphs (c), (d), and (f) of the Motion and (b) and (g) of the petition sought for prerogative writs of prohibition and Mandamus in contravention to express provision of Order 53 (1) of the Civil Procedure Rules, 2010.
- d. From the issues raised in the Petition by the Petitioners/Applicants were on ownership, use and title of the suit property – Land reference Numbers 141 situated in the County of Kajiado and Land Reference Numbers 12355 and 12356 situated within the County of Taita Tavetta, membership of the group ranches which do not constitute constitutional issues to be dealt with under a Petition but an ordinary suit.
- e. Further, the Petitioners/Applicants are also seeking reliefs and to be granted title deed by way of Land Adverse Possession under the provisions of Order 37 of the Civil procedure Rules, 2010.
- f. The Petition was laden with numerous false allegations, assumptions, misconceived and misrepresentation of facts and all intended to mislead the Court.
- g. The Petition has failed to produce the evidential proof of the joint agreement dated 4th July, 2020 purporting to demarcate and/or alter the boundaries between the Counties of Taita Tavetta and Kajiado. It was a clear indication that Court was being moved into quashing or making a determination on an agreement or decision that does not exist.
- h. There has never been a long standing boundary dispute between the Counties of Taita Tavetta and Kajiado. Furthermore, in addition to their other functions under Articles 186 (1), Fourth Schedule of *the Constitution* of Kenya, 2010, the County Government had legal mandates under the provisions of Sections 15 and 6 of the County Government Act (No. 17 of 2012) to undertake surveying, mapping, boundaries and fencing and its based on these power that the 1st and 2nd Respondents engaged a Joint boundary alignment and marking exercise on 24th and 25th June, 2020.
- i. This survey exercise never in any way alter the boundaries of the two Counties as alleged. It was solely for the marking and pegging the clear boundary of the two Counties as set out in the Registry Index Map (RIM) for both Chulia Njukini adjudication section situated in the County of Taita Tavetta and Rombo Group Ranch topographical maps all with fixed boundaries.
- j. The 1st and 2nd Respondents never intended to alter any boundaries nor proceed contrary to the provisions of Article 188 of *the Constitution* of Kenya, 2010 nor displace, threaten anybody with displacements and/or of their socio – economic activities.
- k. The Petitioners were not entitled to any of the orders sought and the suit should be dismissed with costs.



IV. The Responses by the 2nd Respondent.

19. As indicated above, on 26th October, 2020, the 2nd Respondent filed a Preliminary Objection raising the following grounds. These were:-
- a. The Petition was a claim for ownership to all that parcel of Land Known as land Reference Numbers 12355 and 12356 disguised as a Constitutional Petition. The Petition was therefore defective for violating the mandatory procedure provided for under Order 37 Rule 7 of the Civil Procedure Rules, 2010 and Section 13 of the Limitations Act, Cap. 22.
 - b. This Honourable Court lacked the Jurisdiction to hear and determine the Petition.
 - c. The Application and Petition were defective and bad in law.

Further to this, I note that most of the contents of the Replying Affidavit relates to the law and legal principles on what the deponent has been advised by the advocate on record which I need not to reproduce. Thus, the Honourable Court decided to deal with all these issues simultaneous.

V. The Responses by the 3rd Respondent.

20. On 13th November, 2020 the 3rd Respondent filed a 20 Paragraphed Replying Affidavit sworn by JOHN SITELU NKIPAPAI and dated 8th October, 2020 together with two (2) annexures marked as “JSK – 1 and 2” annexed thereto. He averred as follows:-
- a. He was the duly appointed Chairman of the 3rd Respondent (Also referred to as “the Group Ranch”) in accordance with the provisions of the Land (Group Representatives) Act, Cap. 287 and as indicated from the Certificate of Incorporation marked as “JSK – 1” (hereinafter referred as “The Act”).
 - b. He deponed that the Group Ranch was incorporated in the year 1968 pursuant to the Act had 3, 665 registered members.
 - c. The authority to plead and the pleadings sworn by the 1st Petitioners allegedly on behalf of the 460 Petitioners was invalid and illegal as the Petitioners failed to bear an official stamp of a Commissioners for Oaths and were undated.
 - d. The quoted parcels of land in dispute were in the County of Kajiado and thus from the earliest time possible the Court should down its tools as it had no jurisdiction to entertain the matter and taking that there was an ELC Court at Kajiado.
 - e. The above notwithstanding, the Petition raised two fundamental issues. Firstly, the Petitioners were invoking the doctrine of Land Adverse possession with a view of claiming legal rights over the parcels of land owned by the 3rd Respondent herein. The 3rd Respondent vehemently rebutted this claim as follows:-
 - i. The Claim of land Adverse possession failed as the suit avoided to prove each and every ingredient of Adverse possession and cleverly engaged in a fishing expedition and hiding behind a Constitutional Petition.
 - ii. The Petitioners failed to prove their claim individually.
 - iii. They failed to demonstrate that indeed they were in actual, open, uninterrupted, notorious, exclusive and continuous possession of the suit land for over 12 years. These



facts must be proved through tangible evidence and not through a Petition. It could not be addressed in a generalised manner.

- iv. They had admitted that the members of the 3rd Respondents were grazing their livestock on the suit properties and hence the Petitioners' alleged occupation had always been interrupted thus negating the claim of land adverse possession.
 - v. The encroachment and illegal occupation by the Petitioners would not amount to a claim of land through land Adverse possession.
 - vi. The Petition confirmed that there existed long leases for the suit parcels defeating the legal logic of them claiming the titles through Land Adverse possession.
- f. Secondly, the other issue in the filed Petition, was the Petitioners were challenging a Survey exercise that was spearheaded by the County Government of Kajiado and Taita Tavetta – the 1st and 2nd Respondents respectively with a view of identifying and determining the proper boundary between them. He deposed that this exercise was above board and legal in that:-
- i. There was public participation involving all the relevant parties from both the 1st and 2nd Respondents.
 - ii. The Petitioners who were not registered owners of the land were not agreeable to the land Survey exercise and its outcome.
 - ii. There was no provision in *the Constitution* nor statutes for people to choose which County they wanted to live or belonged.
 - ii. The Petitioners never conducted an independent survey challenging the accuracy and/or credibility of the two subject survey exercise and hence they lack the Locus standi in the matter.
 - ii. The two leaders of the County were informed by the spirit of an amicable solution towards settling down a long term land dispute as stipulated in the provision of *the Constitution* of Kenya.
21. The Provision of Article 188 of *the Constitution* of Kenya dealt with the alteration of the County boundaries. He deposed what happened on the ground was not alteration of the boundaries but identification and determination of the status and area of the boundaries the extent of the already existing boundaries. Therefore, the Petitioners were completely misguided to have invoked this provision of the law out of misinterpretation and misunderstanding of the said Article. The boundary was never altered but was made clear as stated from the Land Survey Report.
22. From the pleadings there was no clear particulars of historical injustices brought out and proved by the Petitioners; which provisions of *the Constitution* have been breached and grants them the right to choose which County to live in and their failure to address issues of land Adverse possession in a Constitution Petition instead of filing an ordinary suit through an Originating Summons under Order 37 of the Civil Procedure Rules, 2010.
23. The Court should not interfere with the legal mandate of another Constitutional legal entity such as the national land Commission through a judicial review. It cannot deal with the merits of any complaints filed at the 4th Respondents and make any orders that may interfere with the independence of that body.



24. The 3rd Respondent never forced the Petitioners to be members of the Group ranch and hence such allegations were false and illogical.
25. In the long run, the 3rd Respondent prayed that the Court to dismiss the Petition.

VI. The Responses by the 5th and 6th Respondents.

26. The 5th and 6th Respondents through Deputy Chief State Counsel Janet Langat filed grounds of opposition dated 25th May 2022 terming the Petition as abuse of Court process and waste of courts time, that the petition does not meet the tests set in the famous case of “Anarita Karimi” and failed to comply with the provision of Section 109 of the *Evidence Act*, cap. 80.; the Petitioners have failed to discharge burden of proof in failing to supply proof of any reports made at the police station, occurrence book entries and copies of charge sheet, the petitioners have not disclosed any cause of action against the 5th and 6th Respondents; the delimitation of boundaries is a function vested in an independent commission to be formed by Parliament under the provision of Article 188 of *the Constitution* of Kenya, 2010; that the National Land Commissions lacked the legal mandate to alter an or determine inter county disputes; under the provision of Article 67 of *the Constitution* of Kenya, 2010, the NLC may initiate investigations on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress;
27. The recommendation by the NLC could only serve to guide the commission vested with authority under the provision of Article 188 of *the Constitution* of Kenya, 2010; that Parliament ought to move Parliament to set up an independent commission as envisaged under provision of Article 188 (1) (a) of *the Constitution*; that grant of prayer sought in Paragraph 42 (e) of the Petition would amount to an illegal amendment of *the constitution*. The 5th and 6th Respondents pray that the Petition be dismissed with costs.

VII. Submissions

28. On 24th March, 2022 while all parties were present in Court it was directed that the main Constitution Petition be canvassed by way of written Submissions. Pursuant to that all the parties complied and the Court reserved to deliver the Judgement on notice accordingly.

A. The Written Submissions by the Petitioners

29. On 26th August, 2022 the Learned Counsel for the Petitioners, the Law firm of Messrs. Munthythia, Mutugi, Umara & Muzna Company Advocates filed their written submissions dated 24th August 2022. Mr. Munthythia Advocate provided the Court with a detailed background of this matter. The Learned Counsel based his submission on three (3) broad issues. These were a). the historical injustice b). A claim of title under the Land Adverse possession and c). The issue of boundary dispute between the 1st and 2nd Respondents.
30. Firstly, on the issue of historical injustice and land Adverse Possession, the Learned Counsel submitted that at Paragraphs 36 and 37 of the Petition the Petitioners had been in continuous occupation of the suit property for more than 45 years since the years of 1970s and had only recently faced attempted eviction by the 3rd Respondent on the Claim of trespass. They had established that they were a community of peasant farmers having farms and homestead on the suit properties. The Counsel argued that the Petitioners submitted that despite their occupation and understanding that the portion of the suit property they occupy was a community land under the provision of Article 63 of *the Constitution* of Kenya, 2010; several of the Petitioners had been charged with trespass. The Petitioners considered this to be a violation of their constitutional right to own property under Article 40 and they have



made historical injustice complaint under Article 67 (20) (e) that the 4th Respondent was to consider. The Petitioners placed reliance in the case of “Chief Land Registrar & 4 others – Versus - Nathan Tirop Koech & 4 others 2018 eKLR where the Court of Appeal established that notwithstanding the provisions of article 67 under the National Land Commission Act, the Environment and Land Court could consider a Petition grounded on historical injustices. The Petitioners submitted that they have acquired ownership of the suit property by dint of land adverse possession and placed reliance in the Court of Appeal decision in the case of “Matana Lewa - Versus - Kahindi Ngala Mwangani 2015 eKLR.

31. Secondly, on the issue of boundaries, the Petitioners relied on the provision of Article 188 of the Constitution of Kenya, 2010 and submitted that contrary to these provisions, the 1st and 2nd Respondents unilaterally signed the agreement dated 4th July 2020 that essentially displaced the Petitioners granting the 1st Respondents residents the land and alleging a 90 day eviction notice. The Petitioners stated that there was no public participation on the side of the County of Taita Taveta.
32. The Petitioners submitted that the 1st and 2nd Respondents action were illegal as the provision of Article 67 of the Constitution of Kenya, 2010 mandates the 4th Respondent solely to deal with the issue of land. Further in accordance with the provision of Article 189 (3) that the process of county boundary demarcation was still pending legislation in the County Boundaries Bill and termed the 1st and 2nd Respondents actions ultra vires and ungrounded in law. The Petitioners submitted that being citizens of Kenya and of the County of Taita Taveta had legitimate expectations that their properties would be surveyed and titles issued to them by the state but have had these expectations dashed in issuance of title by the 3rd Respondent despite 45 year occupation and use of the suit properties.
33. They held that the process was in complete contravention of Article 10 (2) (9) on public participation and consultation. To buttress on this point they relied on the decision of “Nairobi Metropolitan PSV Sacco Union Limited & 25 Others – Versus – County of Nairobi Government & 3 Others (2014) eKLR” on the short duration given to the Petitioners on the matter. In conclusion, the Petitioners prayed that the Petition be allowed with costs.

B. The Written Submissions by the 3rd Respondent

34. On 21st September, 2022, the Learned Counsel for the 3rd Respondent, the Law firm of Messrs. Taliti Collins & Company Advocates filed its written submissions dated 20th September 2022. Mr, Taliti Advocate provided a some brief background of this matter as stated out from the pleadings. The learned Counsel submitted based on two broad framed issues for consideration. These were:-
 - a). Whether the 3rd Respondent could pursue a claim of title for Land Adverse possession with a view of claiming legal rights over parcels of land owned by the 3rd Respondent in a Constitutional Petition; and
 - b). Whether the Petitioners challenge of the survey exercise that was spearheaded by the County Governments of Kajiado and Taita Taveta being the 1st and 2nd Respondents respectively with a view of identifying and determining proper boundary between them can succeed. The submissions are the replication of the contents of the Replying Affidavit.
35. With regard to the issue of Land Adverse possession, the Learned Counsel for the 3rd Respondent submitted that claim was one that constituted a possession which was hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous for the statutory requisite period of twelve (12) years. According to the Learned Counsel, for a party making this claim must prove all the essential ingredients which the Petitioners had failed to do so. He averred that, illegal occupation and or encroachment of the 3rd Respondent’s parcels could not be considered as proper and legal



ingredients to be granted title under the Land Adverse possession. Further, adverse claims could not be addressed in a generalized manner as presented by the Petition. According to him each Petitioner ought to have indicated individually whether they had satisfied or not the legal requirements for the claim of Land Adverse possession. Furthermore, the Learned Counsel argued that the Petitioners already claimed to be having long term Leases over all the suit parcels and therefore found it to be illegal and improper to be making a claim for Adverse possession at the same time.

36. With regard to the second issue on the challenge of the Land Surveying exercise conducted by the 1st and 2nd Respondents, the Learned Counsel argued that as confirmed in the Petitioners affidavit in support of the Petition confirmed, there was public participation involving relevant parties from both the Counties of Kajiado and Taita Taveta. It was clear that the Petitioners who were not registered land owners and were therefore strangers did not find the popular decision favourable to them.
37. The Learned Counsel contended that no constitutional or statutory provisions granted citizens the right to choose which county they wish to live in. Boundaries were determined scientifically through survey whose results could not be challenged by individuals whims but concrete evidence through separate independent survey that yields different results. He submitted that they failed to commission their own independent survey to challenge the accuracy or credibility of the already conducted survey by the 1st and 2nd Respondents. He was of the view that the decision taken by the 1st and 2nd Respondent was purely in tandem with the provision of *the Constitution* on exploring an out of Court amicable solution to disputes.
38. The Counsel averred that what happened was not altering but identifying and determining the extend of the already of the already existing boundary status as per ground and areas belonging to each county clearly visible. All these were undertaken in conformity with the provisions of Articles 188 and 189 (3) of *the Constitution*. He vouched them for relying on the County Boundaries Bill, 2017 which was not yet an Act of Parliament, therefore it was irrelevant in the given circumstances.
39. In conclusion, the Learned Counsel held that the Petitioners rather than filing a Constitution Petition seeking the reliefs they sought on land ownership under Land Adverse possession and the prerogative writs under Judicial review, they ought to have instituted a normal suit. They used a wrong forum as had already pointed out by this Court under Paragraph 20 delivered on 14th September, 2021. It was the view of the learned Counsel and based on the doctrine of exhaustion, that the Honourable Court being an appellate organ, could not interfere with the legal mandate of another established Constitution entity such as the NLC unless it was a an appeal. Thus, he urged the Petition to be dismissed with Costs.

C. The Written Submissions by the 5th and 6th Respondents

40. On 10th May, 2022, the Learned State Counsels under the offices of the Honourable Attorney General, appearing for the 5th and 6th Respondents filed their written Submissions dated even date. M/s. Langat Advocate provided Court with an indepth background of this matter as per the filed pleadings thereon. The Learned Counsel stated that her submission was fully informed and thus relied entirely on the preliminary objections they had raised at the earliest time of these proceedings to wit that:-
 - a. This Court lacked the jurisdiction to hear and determine this matter.
 - b. The matter offended the provisions of Article 6, 159 (2) (c) and 189 (3) & (4) of *the Constitution* as it was better of being referred for alternative dispute resolution.
 - c. The application and Petition were fatally defective.
 - d. The matter was one on intergovernmental dispute whose resolution was founded elsewhere.



- e. The 1st and 2nd Respondents being County Governments had a mutual cooperative and consultative relationship to resolve dispute as founded under *the Constitution* and Sections 30 to 35 of the Inter Governmental Relations Act No. 2.
41. In a nutshell, the Learned Counsel was of the view that devolved and national government disputes and disputes amongst County Governments were best settled via alternative methods. This never meant to oust the authority of the Courts but to first result should be alternative modes of disputes settlement and not litigation. It was after this failed then the dispute would be referred to Court. The Counsel informed Court that the principles behind this idea was to sustain continuous Government relationship through mutual cooperation and consultation. It this philosophy that led to the establishment of such governance and leadership organs as the Council of Governors and Inter governmental Committee. To buttress her point she relied on the decisions of “Owners of the Motor Vessel “Lillian S” – Versus Caltex Oil (Kenya) Limited, 1989 eKLR; and Maggie Mwaniki Mtaleki – Versus – Housing Finance Company of Kenya Limited (2015) eKLR’
42. Additionally, The Learned Counsel submitted on the issues of public participation. She held that the Petitioners contended that they were not consulted in the demarcation process that led to the settlement of the boundary dispute between the County of Kajiado and Taita Tavetta and hence it violated their right of involvement under the provisions of Article 73 (2) (b) of *the Constitution* of Kenya, 2010. She argued that they misconstrued the meaning of public participation to mean each of their views being factored in and prevailing as envisaged in law and the case of “Nairobi Metropolitan PSV Sacco Union Limited (Supra)”. The Learned Counsel argued their representatives were consulted and their views were taken into account. To the Counsel public participation never meant factoring in the views of each and every person as that would make the process of decision making very tedious and impossible. She argued that it was unreasonable of them to have expected that every single person was to be consulted and their views captured in the exercise leading to the settlement of the boundary dispute between the 1st and 2nd Respondents.
43. Additionally, the Learned Counsel argued on whether the Petitioners had justifiable cause of action against the 5th Respondent. Citing the provision of Sections 107 and 109 of the *Evidence Act*, Cap. 80 the 5th and 6th Respondents contended that he who alleges must prove. Faulting the Petitioners for accusing the 5th Respondent for dereliction of duty for failure to act on the alleged trespass to their property and destruction of crops the Learned Counsel for the 5th and 6th Respondents argued that Petitioners failed to produce any evidence to show that they lodged any complaint with or at any police station. No details relating to the occurrence book entries in the aforementioned police stations, the copies of charge sheets, the dates of alleged arrests or records of criminal proceedings had been adduced before this court. The Counsel averred that the Petitioners had not discharged their legal and evidentiary burden on the allegations against the 5th Respondent. To the 5th Respondent, the Petitioners had not set out with reasonable precision the rights that were violated and did not disclose any cause of action against the 5th and the 6th Respondents. To buttress her point of view, the Counsel cited the following cases of: “Evans Otieno Nyakwana – Versus - Cleophas Bwana Ongaro (2015) eKLR, Mbuthia Macharia – Versus - Annah Mutua & Another 2017 eKLR and Anarita Karimi Njeru - Versus - Republic.
44. In conclusion, the Learned Counsel urged the Honourable Court to find that the Petitioners claim against the 5th Respondent as unsubstantiated and uncorroborated and as such does not disclose any justifiable cause of action against the 5th Respondent and prayed that the petition be dismissed with costs.



VIII. Issues for Determination.

45. I have carefully assessed and considered all the filed pleadings - the Petition with supporting documents, the responses with the annexed and supporting documents and all the written submissions in light of the entire record, the myriad cited authorities, relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes.
46. For the Honourable Court to arrive at an informed, reasonable, fair and equitable decision in the filed suit, it has distilled the subject matter into the following four (4) salient issues for its determination. These are:-
- a. Whether filed Constitution Petition filed by the Petitioners is meritorious and meets the threshold of a Petition.
 - b. Whether the Petitioners are entitled to a claim of Land Adverse possession and if so, can it be issued in a Constitutional Petition?
 - c. Whether this was the proper forum to institute this suit and if so, the parties herein are entitled to the reliefs sought from the filed pleadings.
 - d. Who will bear the Costs for the Petition.

IX. Analysis and determination.

ISSUE No. a). Whether filed Constitution Petition filed by the Petitioners is meritorious and meets the threshold of a Petition.

47. Before the Honorable Court arrives proceeds further, fundamentally, it seeks to be guided by the recognition of the fact that the constitutional provisions which are at the core of the Petition must be thoroughly reviewed and fully appreciated within the constitutional jurisprudence and Constitutionalism and its value as a whole. The said provisions cited by the Petitioners are mainly under Articles 2 (1), (4) 40 (1), (2) & (3), 3 (1), 10 (2) (b), 27, 36 (2) , 39 (3) , 40 (1), 43, 47, 60 (1), 63 (4), 67, 69, 70, 73, 173, 188 (a) & 189 (3) of *the Constitution* of Kenya. For clarity sake, I wish to expound on them thus:-Article 2 (1) provides that *the Constitution* is the supreme law of the Republic and binds all persons and all State organs at all levels of government. Article 2 (4) provides that any law that is inconstant with it is void to the extent of the inconsistency and is invalid. Article 3 (1) provides that every person has an obligation to respect, uphold and defend *the Constitution*. Article 10 (2) (b) sets out all the national values and principles of Government that binds all the State offices, State organs, public offices and all persons whereas they apply or interpret *the Constitution*. These include public participation, inclusivity non – discrimination & protection of the marginalised, social justice, equity and the rule of law; Article 27 provides for equality and freedom from discrimination. Article 36 (2) and 39 (3) provides for freedom of association and not compelling any person to join an association of any kind. That every citizen has a right to enter, reside and remain anywhere in the Republic of Kenya. This would be contrary to being forced to become members of a Group Ranch yet along they had been residents of the County of Taita Tavetta; Article 40 (1) provides the right for every person to acquire and own property at any part of the Republic; the 1st and 2nd Respondent desiring to determine where the Petitioners should belong and own their property. This will crash their hopes of ever obtaining title deeds permanently. Article 43 provides for social and economic rights. Hence by annexing their land and declaring it to be part of Rombo Group ranch, the Petitioners would be left with no land to reside on or utilize unless they comply with the terms and conditions of the Group Ranch. Thus, they would be staring at hunger as their farms have already been invaded by



livestock of the pastoralist communities. Article 60 (1) enshrines the principles of security of land rights while. Article 63 (4) provides that community land shall not be disposed off or otherwise used except in terms of the legislation specifying the nature and extent of the rights of members of each community individually and collectively. The Petitioners hold having been in occupation and used the suit land for over 45 years thus they deserve to be issued with Title Deeds for the parcels they occupy. For this reason, Rombo Group Ranch being community land should be hived off the portion occupied by the Petitioners. Article 67 on the investigation of the historical and present injustices to be investigated and redressed from the recommendations made thereof. Article 73 (2) (b) provides for the objectivity and impartiality in decision making and ensuring that the decision making is not marred with nepotism, favouritism, other improper motives or corrupt practices. There had been lack of public participation in the fixing of the boundaries and hence the Petitioners were likely to be adversely affected by the decision made on their behalf by the 1st and 2nd Respondents. Article 176 (1) is for the establishment of the County Governments of Kajiado and Taita Tavetta and their legal Mandate. Article 188 (a) provides for boundaries of Counties through recommendation made by an independent Commission set up for that purpose by Parliament. Article 189 (2) provides for cooperation between national and County Governments at each level and different governments at the County level, shall Co - operate in the performance of functions and exercise of powers and for that purpose set up joint committees and joint authorities.

50. The Honorable Court has also taken deep cognizance to the importance and sensitivities apportioned to land in this country. Indeed, land is a source of livelihood and very emotive. It is not a matter to treat so lightly but with great care and circumspect lest one is misunderstood and it leads to grotesque conflict which may even cause blood shed as it has happened before and quite often. Therefore, no citizen is to be deprived off his land by the State Or any public authority against his wish unless expressly authorized by law and public interest.

As a matter of course, *the Constitution* of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

This Constitution shall be interpreted in a manner that:-

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

This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided.

Further, it is important to fathom that *the Constitution* is “a living instrument having a soul and consciousness of its own” . It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

37. Based on the principles set out in the edit of The Court of appeal case of the Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another (2013)eKLR provided the standards of proof in the Constitutional Petitions as founded in the case of Anarita Karimi Njeru –Versus - Republic



[1980]KLR 154 where the court is satisfied that the Petitioner's claim were well pleaded and articulated with absolute particularity. It held:-

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

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

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

38. In application of these set out Constitutional principles for filing a Constitution Petition to this case, the Honorable Court is fully satisfied that the Petitioners herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents herein and pleading for the prayers sought.

ISSUE No. b). Whether the Petitioners are entitled to a claim of Land Adverse possession and if so, can it be issued in a Constitutional Petition?

39. Under this Sub – heading, the Honourable Court has noted that the Petitioners at prayer No (f) has primarily prayed for a declaration that as a result of the long uninterrupted and continuous occupation of the portion of Land Reference numbers 141, 12355 and 12356 for over forty five (45) years, therefore they have acquired title under the doctrine of adverse possession and have acquired rights to own and occupy land which according to them it is protected under the provision of Article 40 of *the Constitution* of Kenya, 2010. To buttress their case, the Petitioners have stated that they have been in continuous occupation of their farms from the time of their ancestors and in any case prior to year 1974 and for that reason they have acquired title by reason of long uninterrupted occupation for more than 45 years .
40. For this reason, this Court feels it imperative to deliberate in depth on the concept of the Land Adverse Possession. The doctrine of Adverse Possession is one of the ways of acquiring land in Kenya. The statutory provisions that underpin the doctrine of adverse possession is set out under the provisions of Sections 7, 13 and 38 of Limitations of Actions Act Cap 22 and Order 37 (1) of the Civil Procedure Rules, 2010.
41. Section 7 provides that:-

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

Section 13 on the other hand provides:

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



- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.

42. Finally Section 38 states:-

38.

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

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

From the above provisions of the law of the [Limitation of Actions Act](#), Chapter 22 of the Laws of Kenya, the rights of registered owner of a property under article 40 of the constitutions become extinguished in favor of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.

- 39. The procedure for filing a claim for adverse possession in Kenya is provided for under Order 37 of the Civil Procedure Rules, 2010 wherein a person is required to file an Application under Section 38 of the [Limitation of Actions Act](#) by way of an Originating Summons supported by an Affidavit to which a certified extract of the title to the land in question has been annexed. Under the provision of Article 162 (2) of [the Constitution](#) of Kenya 2010, Section 13 of the [Environment and Land Court Act](#) and Section 38 of the [Limitation of actions Act](#) confer jurisdiction on the Environment and Land Court as to handle claims premised on adverse possession.
- 40. It should be noted that this doctrine is one that cannot be borne out of right. The Provisions of Order 37 Rules 1 and 7 of the Civil Procedure Rules 2010 provides for the mandatory procedure for applying to court which is through an Originating Summons where the court determines the questions arising on adverse possession. The provision of Order 37 Rule 7 is to the effect that adverse possession is only applicable where the land is registered and there is a title. Where the land is yet to be registered, it cannot be subject to adverse possession. It has to await the ascertainment of rights through the process of adjudication. For a claim of adverse possession to be entertained by court the applicant must specifically identify the exact title of land that is the subject of the claim.
- 44. One must have to comply with certain strictures set out by the law before he can realize such a right. Such strictures are to ensure that the doctrine of adverse which is a limitation to the right to property complies with the test for limitations of certain constitutional right set out under Article 24. The



principles were well set out in the case of “Kahindi Ngala Mwangandi - Versus - Mtana Lewa [2021] eKLR” where the Court of Appeal sitting in Malindi held: -

“Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, *nec vi, nec clam, nec precario*, that, one’s possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met the possessor, without more becomes the new owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 as follows:-

“7(1) an application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons.

- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The Court shall direct on whom and in what manner the summons shall be served.”

In the case of “Teresa Wachuka Gachira – Versus - Joseph Mwangi Gachira”, Civil Appeal No.325 of 2003, the Court emphasised the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See the case of:- “Kyeyu - Versus - Omuto, Civil Appeal No. 8 of 1990”. See also the present position in case “Johnson Kinyua – Versus - Simon Gitura Civil Appeal No.265 of 2005,” where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.

45. Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a Judge under the provision of Order 37 Rules 13 and 16 of the Civil Procedure Rules, 2010 and thereafter fixed for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim.

In case of: “Kimani Ruchine – Versus - Swift Rutherford & Co.Ltd (1980) KLR it was stated on this point that:-

“The Plaintiffs have to prove that they have used this land which they claim, as of right: *nec vi, nec clam, nec precario* So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; See the case of:- “Wanyoike Gathire – Versus - Berverly (1965) EA 514, 518, 519 per Miles, J.”



In *Teresa Wachuka Gachira (Supra)*, a dispute between a stepmother and a stepson the latter sought to evict the former from a parcel of land he claimed to be his. The former for her part invoked prescriptive rights by virtue of having been married on the suit land many years before the action was instituted. This Court, on appeal found that the appellant did not discharge the onus placed on her in establishing a case for entitlement to the disputed land through adverse possession. The Court held;

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor”

45. Further, R.C.N. Kuloba, J (Retired) in the case of “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR elaborately enlisted 7 key elements that a person claiming adverse possession must establish. Summarily, the elements were:-
- a. The intruder claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. Adverse possession rests on de facto use and occupation by an entrant.
 - b. The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. That is to say, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression “color of title” in law means, that which is title in appearance but not in reality. He/she must have with him/her own apparent right which affords him some semblance of title under which he claims to found his/her occupation of the land independently of anyone else’s power.
 - c. The occupation of the land by the intruder who pleads adverse possession must be non - permissive use, ie without permission from the true owner of the land occupied. Acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. The ingredient of unpermitted occupation is usually expressed as “hostile” possession.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.
 - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner’s enjoyment of the soil for the purposes for which he intended to use it. It is incumbent on the person alleging a right by adverse possession to show, not only that his possession has lasted twelve or more years, but also that it has all the time been in open conflict with the title on which the owner relies.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of



dominion over the land. The purpose of this element is to afford the owner an opportunity for notice.

- g. The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. There are circumstances under which adverse possession which has begun to grow may be interrupted. Possession may be interrupted;
- i. by the physical entry upon the land by any person claiming the land in opposition to the person in actual possession, with the intention of causing interruption; or
 - ii. by the institution of legal proceedings by the rightful owner to assert his right to the land; or
 - iii. by any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.
45. The rightful owner must know that he is ousted, he must be aware he had been dispossessed. The owner who had not intended to part with possession or is unconsciously dispossessed cannot be said to have been evicted. The land or portion of land being adversely possessed must be a definite, with clear boundaries. Order 37 Rule 7 is mandatory that title to the land must be attached to the OS. The squatters claiming adverse possession must be individually identified, they ought to produce their ID cards when filing suits and not a mere stating Mwanaisha Juma and 300 others.
46. The burden of proving the above elements is on the person seeking title by Land adverse possession, he/she proves it in the usual standard of proof in civil cases i.e. balance of probability. The facts that must be asserted, pleaded and proved are; the date of occupation, the nature of possession, whether the occupation is known to the owner, how long the occupation has been going on, whether possession has been open and undisturbed. All these are questions of facts and unless they are asserted and proved adequately through a trial.
47. Recently, the Supreme Court had an opportunity to further address the issue of the Land Adverse Possession but only in jest in the matter of “Supreme Court Applications No. 16 (E026) of 2021 – Thomas Muka Maulo & Walter Washington Barasa Nyogensa – Versus – Robert Ouma Oduori”. Briefly, the Applicants had sought the Supreme Court to review the Court of Appeal decision declining to grant Certification of leave against its Judgement of the general importance under the provision of Article 163 (4) (b) of *the Constitution* of Kenya. The subject matter was that the Court of Appeal in its Judgement had ignored critical evidence and facts on record thereby arriving at a decision that would amount to conflicting principles on a claim of Land Adverse possession. In its ruling, on 19th may, 2021 while dismissing the application the Court held:

“that the jurisdiction of the Supreme Court under Article 163 (4) (b) of *the Constitution* went beyond resolving factual contestations between parties. In any event, the principles of Land Adverse Possession were settled and the Applicants had not demonstrated any inconsistency of findings by the Court of Appeal on the Doctrine. The Supreme was not convinced that there was any miscarriage of Justice or violation of any Constitutional provision as alleged by the Appellant or at all. The Appellant were merely in disagreement with the ultimate Court determination & that did not suffice to invoke the Supreme Court’s jurisdiction or amount to miscarriage of Justice”.



45. From these decisions of Court, for one to qualify for a title by virtue of a claim of Land Adverse possession, one has to have fulfilled the following ingredients. These are:-
- a. There has to be a registered proprietor of the land being claimed;
 - b. The Claimant ought to have occupied the suit land without any interruption and continuously.
 - c. The Claimant ought to have used and taken possession of the suit land for over twelve (12) years.
 - d. The Claimant should not have been granted any permission to use or occupy the suit land by the registered owner, the principle of non permissiveness.

Were adequately deliberated on from the cases of Daniel Ruchire & Others versus swift Ruther Fords & Co. Limited & Another 1977 eKLR, Sarah Nyambura Njoroge Mairu (2005) eKLR Nairobi Court of Appeal Sisto Wambugu –Versus- Kamau Njuguna (1983) eKLR.

45. Section 7 (i) of the Land Act recognizes that title to land may be acquired through any manner prescribed by statute. Section 28(h) of the Land Registration Act on overriding interests provides:-
rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

45. Order 37 rule 7 of the Civil Procedure rules on adverse possession provides:-

- (1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The court shall direct on whom and in what manner the summons shall be served.

45. The main issue is whether a party may seek remedy of Land Adverse possession as well from a Constitution Petition as the Petitioners have done here. In the process of instituting this Petition, the Petitioners have not explained to Court or anywhere from their filed pleadings why they did not deem it fit to file a Civil or ordinary suit in this Case an Originating Summons under Order 37 of the Civil Procedure Rules, 2010 in a Court of competent jurisdiction to claim the same remedies they have sought in this Petition. Eventually, pursuant to the directions under Order 37 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010, the Originating Summons gets converted at a later stage of the proceedings into a Plaint. There are a myriad of authorities to support this legal position.

46. In the case of “ELC (Mombasa) Petition No. 15 of 2017 – Bandari Investment Company Limited – Versus – National Police Service & Others” eKLR (2021), Justice Sila Munyao had this to say:

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



are in adverse possession, that is a question that can only be determined through a hearing in an ordinary Civil suit”.

ISSUE No. c). Whether this was the proper method or mode to institute this suit and if so, the parties herein are entitled to the reliefs sought from the filed pleadings.

45. Under this sub heading, the Honorable Court extrapolate further on an issue strongly brought out by all the Respondents while attacking the Petition. The said issue is whether this was *the Constitution* Petition was the proper method to have sought for the said reliefs. From the very onset, the Honorable Court has comprehensively deliberated on this issue herein and thus the answer is already stated. In simple terms, from the relief sought by the Petitioners, the suit ought to have been by way of filing an ordinary suit and not a Constitution Petition. In saying so, on 14th September, 2021 this Court (Justice Yano) held and rightly so:-

Paragraph 20 “The Respondents argue that the Petition is incompetent for pursuing a claim for adverse possession in a Constitutional Petition. I do agree with this argument that there is laid down procedure on how to pursue a claim for adverse possession. A claim for adverse possession is pursued vide an Originating Summons under the Limitations of Actions Act and Order 37 of the Civil Procedure Rules. In my view, a Constitutional Petition cannot sustain a claim of adverse possession”.

By arriving at this decision, the Court considers the fact that it would lead to or germinate to what is now termed as “Doctrine or principle of Constitutional Avoidance” . It is a preference of deciding a case on any other basis other than one which involves Constitutional issue being resolved. This is where it is possible to decide a case without reaching a Constitutional issue, it should be done. It is argued that where infringement of rights alleged can be founded on the substantive law, the proper course is to bring the claim under the law and not the under *the Constitution* through a Petition. It encompasses three main principles which are standing, ripeness and mootness. Comparatively, this doctrine is just like in the case of the Doctrine of Exhaustion or Res Judicata or doctrine of Justiciability (the limitations on the Constitutional arguments that the Court will entertain). , the doctrine of avoidance precludes a Court from entertaining a case which is conferred by a statute. The doctrine of avoidance is primarily viewed by Courts from the position that although a Court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In other words the Court will not determine a Constitutional issue when a matter may properly be decided on another basis. This legal position was upheld in several decisions including the cases of: “Sports & Recreation Commission – Versus – Sagittarius Wrestling Club & Another“ (2001) (2) ZLR 501 (S) and John Harun Mwau - Versus - Peter Gastrow & 3 Others [2014] eKLR and the Supreme Court case of “Communication of Kenya & 5 Others – Versus – Royal Media Services Limited & 5 Others (2014) eKLR page 259” the Court held that *the Constitution* only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

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



45. Similarly, in the case of “Uhuru Muigai Kenyatta - Versus - Nairobi Star Publications Limited [2013] eKLR, Lenaola, J (as he then was) held that:

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

45. The Learned Judge, Justice Sila Munyao in “Parkire Stephen Munkasio & 14 others versus Kedong Ranch Limited & 8 others [2015] eKLR rendered himself thus:-

26. I think this is a good point to also address the argument that this Petition is incompetent for seeking to pursue a claim for adverse possession as a Constitutional Petition. I agree with this argument. Claims for adverse possession are adequately addressed by the *Limitation of Actions Act*, CAP 22, Laws of Kenya, and the Civil Procedure Rules, specifically Order 37 thereof. Claims of adverse possession are private law claims which need to be addressed through the private law legal channels provided. I do not see how the Petitioners can assert a claim for adverse possession, a purely private law claim, through a constitutional petition. Indeed I doubt if there is a constitutional violation which one will point at, when pursuing a suit for adverse possession. It follows that even if I am wrong on the point that the issue of adverse possession on behalf of the same parties herein has previously been litigated, the aspect of this Petition, that relates to pursuance of a right over land by dint of adverse possession is incompetent, for there are laid down procedures on how to pursue an adverse possession suit, which ought to be followed.
27. I agree with Mr. Musangi for the 3rd respondent that not every violation of proprietary rights ought to provoke a constitutional petition. I agree, that where there are private rights being agitated, the proper recourse is to file an ordinary suit, for determination and not to file a Constitutional Petition. Mr. Musangi’s view was that the entire Petition pursues private rights. On my part, I hesitate to make a final conclusion of this argument at this preliminary stage, for on the face of it, the petitioners cite various constitutional violations, which appear to go beyond the agitation of private proprietary rights. I would rather hear the petitioners first, before concluding that the Petition agitates purely private rights.
45. In direct application of the above cited provisions, certainly I conversely state that a Constitutional Petition is not an appropriate mechanism to ventilate claims based on title for Land adverse possession. For avoidance of doubt this issue is better dealt with through laid down procedure
46. Painstakingly, I note that the Petitioners herein were already guided by this Court on the rightful laid down procedure to pursue for a claim for adverse possession which is an originating summons and not a constitutional Petition but despite of this this vital lesson from the Court the Petitioner chose not to take an appropriate action including amending the Petition. For these reasons,



I hold that the Constitution Petition is the wrongful mode to have instituted this suit and therefore it fails on arrival.

ISSUE No. c). Whether the parties herein are entitled to the reliefs sought from the filed pleadings.

45. With regard to this issue under this Sub – heading, and based on the analysis conducted herein, I would have downed my tools at this point but the Petitioners have raised other issues in the Petition which calls for determination. The Petitioners relies on the provisions under Article 188 of the Constitution of Kenya, 2010 and submits that contrary to these provisions, the 1st and 2nd Respondents unilaterally signed the agreement dated 4th July 2020 that according to them essentially displaced the Petitioners granting the 1st Respondents residents the land and alleging a 90 day eviction notice. The Petitioners feel aggrieved by the actions of the 1st and 2nd Respondents signing the mentioned agreement.
46. The Petitioners state that there was no public participation on the side of Taita Taveta . The Petitioners stated that the 1st and 2nd Respondents action are illegal as the provision of Article 67 of the Constitution mandates the 4th Respondent solely to deal with the issue of land. Further as per the provision of Article 189 (3) that the process of county boundary demarcation is pending legislation in the County Boundaries Bill and termed the 1st and 2nd Respondents actions ultra vires and ungrounded in law. The Petitioners state that being citizens of Kenya and of Taita Taveta county have legitimate expectations that their properties would be surveyed and titles issued to them by the state but have had these expectations dashed in issuance of title by the 3rd Respondent despite 45 year occupation and use of the suit properties. The Petitioners prayed that the Petition be allowed with costs.
47. The 3rd Respondent states that it is clear that the Petitioners who are not registered land owners and are therefore strangers did not find the popular decision favourable to them. The 3rd Respondent state that no constitutional or statutory provisions grants citizens the right to choose which county they wish to live in. Boundaries are determined scientifically through survey whose results cannot be challenged by individuals whims but concrete evidence through separate independent survey that yields different results. The 3rd Respondent submits that what happened was not altering but identifying and determining the extend of the already of the already existing boundary status as per ground and areas belonging to each county clearly visible.
48. For purposes of clarity I have reproduced the entire Article 188 of the Constitution of Kenya, 2010 which states that;

PART 4 – The Boundaries of Counties

188. Boundaries of counties

- (1) The boundaries of a county may be altered only by a resolution—
- (a) recommended by an independent commission set up for that purpose by Parliament; and (b) passed by—
 - (i) the National Assembly, with the support of at least two-thirds of all of the members of the Assembly; and
 - (ii) the Senate, with the support of at least two-thirds of all of the county delegations.
- (2) The boundaries of a county may be altered to take into account—
- (a) population density and demographic trends;
 - (b) physical and human infrastructure;



- (c) historical and cultural ties;
- (d) the cost of administration;
- (e) the views of the communities affected;
- (f) the objects of devolution of government; and (g) geographical features

45. In the case of: “Okiya Omtata Okoiti – Versus - Parliament of Kenya & 2 others; County Government of Taita Taveta & 3 others (Interested Parties) [2022] eKLR, this Court rendered itself that:-

89. Therefore, to my mind, purposive interpretation of *the constitution* is to the effect that territorial county boundaries are fixed and can only be altered through the clear step provided by *the Constitution* in strict adherence to the provisions of article 188 of *the Constitution*. My discernment from *the Constitution* is that the National Executive has no role in altering or demarcating county boundaries while Independent Electoral and Boundaries Commission can only delimit constituencies and wards and has no role or authority to alter or demarcate county boundaries. With promulgation of *the Constitution*, 2010 all the actions in this country are done as per *the Constitution* and *the Constitution* alone.

45. The Court has been to understand that the Petitioners to be occupying portions of the suit property which stretches to the two counties. The Petitioners are not members of the 3rd Respondent. Further the mentioned parcels does not to the Petitioners, it is only that the Petitioners are claiming the portions they are occupying by virtue of adverse possession which was already stated above has a different procedure. The Petitioners feel that the two Counties in the agreement dated 4th July 2020 The Petitioners relies on the provision of Article 188 and submits that contrary to these provisions, the 1st and 2nd Respondents unilaterally signed the agreement dated 4th July 2020 that essentially displaced the Petitioners.

46. I have carefully examined a survey report on record titled Rombo Ranch Boundary Determination Survey Report relating to Njukini Area – Border of Taita Taveta & Kajiado. The survey is intended to precisely determine the boundary of Rombo Ranches which one belongs to Kajiado and registered as a group Ranch and the other in Taita Taveta which bears L.R No. 12356 as well as pegging the stretch for clear boundary visibility. It is this report that is the substratum of the instant petition. I disagree with the petitioners that the technical team formed by the 1st and 2nd Respondents for purpose of surveying and demarcating the boundary between the two counties acted outside their legal mandate and in doing so usurped the powers of the independent commission. The Petitioners keep using the words alter and demarcate as though the two words have a similar meaning. Article 188 of *the Constitution* pertains to altering of county boundaries and in effect change the boundaries of the existing counties. What happened in the survey is to demarcate the county boundaries by clearly identifying boundaries of the existing counties. I am quick to point out that the 5th and 6th Respondent are wrong to state that National Land Commissions lacks the mandate to alter an or determine inter county disputes.

47. The Petitioners state that they are being forced to become members of the Rombo Group Ranch contrary to article 16 (2) of *the Constitution*. For context, the provision of Article 36 (2) of freedom of association states that a person shall not be compelled to join an association of any kind. The Petitioners are not members of the Rombo Group Ranch, there is no register of members which has been tendered before this Court to demonstrate that the Petitioners names have been included in the register. I find this assertions lacking any merit.



48. The Petitioners contend that they are majorly Bantus have all along held themselves as residents of Taita Taveta County where they have exercised their civic duty, received administrative services and their children attend school. On the other hand the 3rd Respondents states that there is no constitutional or statutory provisions which grants citizens the right to choose which county they wish to live in. Certainly, the 3rd Respondent is wrong. Article 39(3) on freedom of movement and residence stipulates that Every citizen has the right to enter, remain in and reside anywhere in Kenya. The limitation which may arise is that a citizen's land can be found to be in a particular county so long as due process is considered. The suit property stretches into two counties, the Petitioners admit that the 3rd Respondent owns Plot LR No, 141 as a long lease issued by the 1st Respondent and LR, No. 12355 and 12356 as a long lease issued by the 2nd Respondent. It would be absurd and a recipe for chaos for a particular portion of land to be found to be in county A and then a person decides that portion of land should not be in County A but County B. I summation this issue fails in its entirety.
49. The gist of the Petitioners claims is that by declaring the area occupied by the Petitioners through the process of fixing of the Boundary of the 1st and 2nd Respondents, the Petitioners hope of being issued with title deeds have been crushed permanently. I will reproduce the entire Article;

40. Protection of right to property

- (1) 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.
- (2) Parliament shall not enact a law that permits the State or any person—
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) 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 in Article 27(4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold Title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.



- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
45. To my mind, the thrust of Article 40 is to protect proprietary rights under the law. Such rights are governed by various statutes in place, It is not in contention that the Petitioners are not the registered owners of the suit property. The Petitioners have no absolute and indefeasible title of the suit property that it is capable of being protected under Article 40. This right is only available once a title is issued under the Act, the holder thereof acquires an indefeasible title which cannot be taken away except in accordance with *the Constitution* and the law. For that reason, the argument advanced by the Petitioners herein is not only untenable, unstainable but unfounded. It must fail.

ISSUE NO. c). Whether the parties herein are entitled to the reliefs sought from the filed pleadings.

45. Under this Sub heading, this Honorable Court cannot pen off without examining the Petitioners assertions that they reported destruction of their crops at Njukini and Chumvini police stations but their actions were not acted on but instead referred to Elerai Police station. the petitioners state Elerai Police station they were told to search and arrest the trespassers themselves and present them to the police station; a mandate purely reserved for the National Police service. In response the 5th and 6th Respondents state that the petitioners have not produced any documents relating to any reports made at any police station stating that the Petitioners have not discharged both legal and evidentiary burden of proof.
46. In the case of “Muslims for Human Rights (MUHURI) & Another - Versus - Inspector-General of Police & 5 Others [2015] eKLR, Emukule J expressed himself as hereunder:
- “The principles of constitutionalism and the rule of law lie at the root of our system of government. It is a fundamental postulate of our constitutional architecture. The expression the rule of law conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law vouchsafes to the citizens and residents of Kenya, a stable, predictable and ordered society in which to conduct its affairs. Like our National Anthem says it is our shield and defender for individuals from arbitrary state action.”
45. The majority decision of the Supreme Court while addressing itself to the necessity of adhering to the rule of law in the case of “Raila Amolo Odinga & Another – Versus - Independent Electoral and Boundaries Commission & Others Petition No. 1 of 2017 at paragraph 394 expressed itself as hereunder that:-
- “It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to *the Constitution* and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by *the Constitution*.”
45. It is impossible to expect the petitioners to tender copies of entries made on occurrence book yet their reports were not recorded but instead told to report to Elerai police station, at Elerai police station the petitioners are asked to arrest the trespassers themselves. Taking cue from the above cited decisions I render myself that the aspirations of the people of Kenya are captured in *the constitution* whose heart pumps the rule of law which broader aspect in this context entails all the person (s), organs,



commissions and bodies discharging their constitutional and statutory mandate with full effect as required. The architecture of our Constitution at its basic minimum expects that each one of the bodies in place lives true to its principles as enshrined in the law. My request is each one of us to deliver on their mandate as per oath of office.

ISSUE No. d .Who will bear the Costs of the Petition

45. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

It is not well established that and from Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Cost.

In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms.

45. The Proviso of the Provisions of Section 27(1) of the *Civil Procedure Act* Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the Supreme Court Case of Jasbir Rai Singh Rai – Versus- Tarhochan Singh (2014) eKLR and Mary Wambui Munene –Versus- Ihururu Dairy Cooperative Societies eKLR (2014)

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

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....” (aso see from the Court of Appeal cases of “Rosemary Wambui Munene – Versus – Ihururu Dairy Cooperatives Societies Limited (2014), eKLR & Cecilia Wambui Ngayo -Versus -Barclays Bank of Kenya Limited (2016) eKLR)

Additionally, the Supreme Court fortified this position in the case of “Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others [2014] eKLR thus:

“so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

45. In the instant case, while the Petitioners have failed in prosecuting their Petition and the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents herein have succeeded in presenting their defences, hence are entitled to costs. However, taking that this is a matter of great public interest piting between the ordinary members of the public and well established Constitutionally established entities and the great need to encourage access to justice for all parties, it is just fair and reasonable that each party bears its own costs.



X. Conclusion & Disposition

45. Consequently, having conducted a comprehensive and expansive expositions on the framed issues, this Honourable Court is satisfied that the Petitioners herein have failed to establish their case. Specifically, the Honourable Court holds:-

- a. THAT Judgement be and is hereby entered against the Petitioners herein and in favour of the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents herein.
- b. THAT *the Constitution* Petition dated 2nd September 2020 filed by the Petitioners be and is hereby found to be unmeritorious. Hence, it fails in entirety and is dismissed.
- c. THAT unless otherwise stated, there be an order of Status Quo to be maintained on the suit land meaning the situation to remain as it is prior to the filing of *the Constitution* Petition. There be high spirit of peace and tranquillity and state of Co – existence to be sustained among the inhabitants and ordinarily residents of the suit lands known as land Reference Numbers 141, 12355 and 12356 of the Counties of Kajiado and Taita Tavetta respectively.
- d. THAT each party to bear its own costs.

46 It Is So Ordered Accordingly.

JUDGEMENT DELIVERED THROUGH MICROSOFT VIRTUAL TEAMS SIGNED AND DATED AT MOMBASA THIS21STDAY OFMARCH..... 2023

HON JUSTICE MR L.L NAIKUNI JUDGE

THE ENVIRONMENT AND LAND COURT AT MOMBASA.

In the presence of:

- a. M/s. Yumnah, Court Assistant.
- b. M/s. Umara Advocate holding brief for Mr. Munyithya for the Petitioners.
- c. Mr. Sankale Advocate for 1st Respondent.
- d. No appearance for the 2nd Respondent.
- e. Mr. Taliti Advocate for the 3rd Respondent.
- f. No appearance for the 4th Respondent.
- g. Mr. Penda holding brief for M/s. Langat Advocate for the 5th & 6th Respondents.

